



IN THE HIGH COURT OF KENYA AT KIAMBU

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 36 OF 2019

BETWEEN

BERNARD WALTER KURIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence dated 10th April

2019 in Criminal Case No. 100 of 2017 at Kikuyu Magistrates Court before Hon.G. Onsarigo, RM)

JUDGMENT

1. The appellant, **BENARD WALTER KURIA KIMITA**, was charged and convicted of the offence of assault causing actual bodily harm contrary to **section 251** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The appellant was fined KShs. 20,000/- in default to serve 3 months' imprisonment. The particulars of the charge were that on 25th January 2017 at Kiawanugu village in Kabete Sub-County within Kiambu County, the appellant assaulted **ELIUD GEORGE KARANJA** occasioning him actual bodily harm.

2. Before I consider the grounds of appeal set out in the petition of appeal dated 24th April 2019 and submissions by counsel for the appellant and respondent, it is important to recall the duty of this court as a first appellate court. It is required to review all the evidence and come to its own conclusions bearing in mind that it neither heard or saw the witnesses testify in order to assess their demeanour. In order to proceed with this task, it is necessary to outline the evidence as it was led before the trial court.

3. The complainant, Eliud George Karanja (PW 1), testified that on 27th January 2017, he was coming from hospital when he met the accused who was on a path that he usually used. The accused grabbed his walking stick and pushed him and started kicking him while he was on the ground. He broke the PW 1's spectacles. His sister came by and inquired what happened. PW 1 reported the matter at Kingeero Police Station where he was issued with a P3 form. During cross-examination, he told the court that he was hit on the left jaw as he was defending himself with his hand and that he reported the matter on the following day at about 10.00am. PW 1 acknowledged that the appellant was his uncle and that there was a land dispute concerning the land that belonged to their grandfather.

4. The clinical officer who examined PW 1 on 26th January 2017, Gerald Mutiso, PW 2, testified that PW 1 was walking with a stick. He had been bruised on the gum and suffered pain on the right side of the stomach. He also had a swollen left hand. He classified the injuries as harm. In cross-examination, he stated that PW 1 did not tell him that he had been treated elsewhere.

5. The investigating officer, PC Nicholas Odhiambo (PW 3) recalled that he received PW 1 on 26th January 2017. After taking the complaint he advised him to seek medical attention. He confirmed that PW 1 was a nephew of the accused and that they had a boundary dispute. During cross-examination, he told the court that the lady who rescued PW 1 was not willing to record a statement.

6. The appellant denied the offence in his unsworn statement. He told the court that on 25th January 2017, he was taking fertilizer in his farm. He met PW 1 and asked him why he had damaged his fence. PW 1 shouted at him and told him he will take him to the police. His sister who was nearby told PW 1 to stop the issue. He left the scene only to be arrested on 27th January 2017. He told the court that the case had been brought as a result of land dispute and that the matter was in court.

7. The appellant's sister, Margaret Wanja, DW 2, testified that PW 1 was not assaulted. On the material day she was milking her cows while the appellant was taking manure to his shamba while PW 1 was coming from town. When the appellant asked PW 1 why he was damaging the fence, PW 1 told him he would take him to court. She told the court that the police did not call her to record a statement. She confirmed that the parties had a dispute concerning the estate of their grandfather.

8. The trial magistrate found that the prosecution had proved its case on the basis of the evidence I have outlined. The appellant contests the conviction on several grounds primarily on the grounds that the prosecution did not prove its case beyond reasonable doubt. Counsel for the appellant reiterated the grounds of appeal in his oral submissions. He pointed out that the prosecution case had gaps in the evidence particularly given that the one eye witness who was the appellant's sister was never called as a witness and hence the court was entitled to draw an adverse inference. He added that trial magistrate failed to appreciate the plausible defence given by the appellant in light of the existing land dispute between the family. He contended that on the whole, the case was a family dispute which was not a criminal case and was an abuse of the court process.

9. Counsel for the respondent took the position that the prosecution proved the offence and despite the fact that the parties had a family dispute, the appellant should not be allowed to take the law in to his own hands.

10. It is common ground that the parties were relatives and parties to a succession dispute involving land. In my view, the fact that there is land dispute does not exclude the application of criminal law. Even in such a case, the prosecution is required to prove the elements of the offence. In this case the question is did the appellant assault PW 1?

11. The appellant complained that the only eye witness, DW 2, was not called by the prosecution hence the court was entitled to make an adverse inference. Under **section 143** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, the prosecution is not required to call a multiplicity of witnesses to prove a fact. However, in *Bukenya & Others v Uganda [1972] E.A. 549*, the Court of Appeal for East Africa held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case and that failure to call such a witness would entitle the court to make an adverse inference that the evidence would be favourable to the defence. The prosecution gave a reason for failing to avail DW 2 as a witness. When cross-examined, PW 3 told the court that DW 2, who was present at the scene was not willing to record a statement. That she later gave evidence in favour of the appellant does not weaken the prosecution as she testified and indeed gave testimony in the appellant's favour.

12. The appellant submitted that the trial magistrate was overly influenced by the demeanour of the parties when in fact there was no evidence to support the conclusion made by the trial magistrate that the appellant and his witness were not candid. The trial magistrate stated, "*I observed all the witness(es) testify and the accused and his witness did not impress me a(s) persons who were candid. I examined the complainant with the background that there is a land dispute, I believed he was telling the truth.*" It is true that the trial magistrate did not explain why he thought the appellant and his witness were not candid or why he elected to believe the complainant's case but this is not the end of the matter.

13. Notwithstanding the comments on demeanour, I have looked at the evidence as required by the first appellate court and I find as follows. It is common ground that PW 1, the appellant and DW 2 were at the *locus in quo* on the material day. There was an exchange of words about the fence or boundary. The point of departure is that PW 1 sustained a bruises on his jaw, pain and tenderness on his right abdominal flank and tenderness on his arm. The injuries confirmed by PW 2 were consistent with the injuries sustained as PW 1 had described he was kicked while on the ground. His spectacles were also broken as a result of the assault. All this supports the prosecution case and could not be explained away by a mere land dispute or that the appellant walked away.

14. Since all the elements of the offence were proved, I affirm the conviction. The sentence was in fact lenient and within the law. It is also affirmed.

15. The appeal is dismissed.

DATED AND DELIVERED AT KIAMBU THIS 8TH DAY OF JANUARY 2020.

D.S. MAJANJA

JUDGE

Mr Njagi instructed by J. W. Njagi and Associates Advocates for the appellant.

Mr Kasyoka, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.