



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 151 OF 2019

JAPHET KUBAI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal arising from the original conviction and sentence by Sogomo G P.M in Tigania CR. 318 OF 2017 ON 20/8/2019)

J U D G M E N T

1. **JAPHETH KUBAI N'ITIMBILI (“the appellant”)**, was charged with assault causing actual bodily harm contrary to **section 251 of the Penal Code**. It was alleged that on 9/10/2016 at about 7.00 am at Kamaruki Village, Kimachia Location in Tigania West Sub County within Meru County, jointly with others not before court, the appellant unlawfully assaulted **Caxton Kaunyangi Ayub** occasioning him actual bodily harm.

2. He faced a second count of malicious damage to property contrary to **section 339 (1) of the Penal Code**. The particulars were that, on the aforementioned date, time and place jointly with others not before court he willfully and unlawfully damaged a barbed wire fence and post valued at Kshs.200,000/- being property of **Caxton Kaunyangi**.

3. He denied the charges, was tried convicted and sentenced to pay a fine of Kshs.20,000/- in default serve 6 months imprisonment for count 1 and on count 2 to pay a fine of Kshs. 100,000/- in default serve 3 years imprisonment. The sentences were to run concurrently.

4. Dissatisfied with the conviction and sentence, the appellant lodged this appeal setting out 7 grounds of appeal which can be collapsed into 3 as follows: -

a. that the trial Court erred in convicting the appellant on an unproved prosecution case which was based on contradictory and inconsistent evidence.

b. the trial Court erred in sentencing the appellant to an excessive and punitive sentence;

c. the trial Court erred in failing to consider the appellant’s mitigation.

5. This being a first appeal, this Court is enjoined to re-appraise, review and re-evaluate the facts afresh with a view of drawing its own independent conclusions and findings. See **Okeno v. Republic [1972] EA 32**. However, in doing so, the Court must warn itself that it did not have the advantage of seeing the witnesses testify in order to gauge their demeanor.

6. The prosecution case was that on the material day, **Pw1 Caxton Kaunyangi Ayub** was at home when he was alerted at about 7;00 am that there were people cutting his fence. He rushed to the gate where he found the appellant with others waiting for him. One **Mitui** was armed with a bow and arrow while the appellant had a stick with which he hit him on the chest. He fell down but escaped using a motorcycle. He returned shortly thereafter with police officers and found about 10 people including the appellant gathering fencing poles in readiness to burn them.

7. On the same day at about 6.30 am, **Pw2 Liston Mutuma Kionga** was returning home from the local centre when he saw 20 to 30 people invade **Pw1’s** land. Among the invaders was the appellant. He saw the appellant hit **Pw1** with a long stick. **Pw3 Mbaya Akwalu Joseph**, a neighbor to **Pw1** heard screams from his home and rushed to the scene. He saw people invade **Pw1’s** land, cut the wire fence and proceed to uproot the fencing posts. He saw the appellant armed with a stick with which he hit **Pw1** on the chest.

8. When the complainant visited **Miathene Sub-County Hospital**, he found **Pw4 Geoffrey Muthomi Murithi** a clinician who examined

him and produced the P3 form in Court. He found that the complainant had a swollen tender chest arterially and that the injuries were days old having been inflicted by a blunt object.

9. Pw5 Richard Kimoi, a surveyor in Tigania West produced a letter from the Adjudication Office showing that plot No. 2347 Uringu II Adjudication Section was registered in the name of the Complainant.

10. Pw1. PC Ongoya Enos Pw6, investigated the complaint. The report was made on the 9/12/2016. He visited the scene on the same day and established that Land Parcel 2347 belonged to the complainant. He established that the suspects were armed while damaging the fence and photographs of the damaged fence were taken at the scene.

11. In his defence, the appellant told the Court that the complainant was known to him as he was his neighbor. That on the material day, his mother sent him to her land parcel No. 2347 Uringu where arrived at about 7.30 am and together with his brother prepared to work on the land. It is then that they saw the complainant's children rushing in while screaming and the neighbors were also drawn by the screams. He did not see the complainant on that day and it is not true that he assaulted him or destroyed property on his land. There is however, a court case over the land between his parents and the complainant over the land.

12. Dw2 Patrick Gitonga testified that the appellant was his neighbor. That on the morning of the material day, he heard screams and when he went to the scene, he found the complainant's wife and children screaming. The appellant was in the farm preparing the same for planting. He denied seeing the complainant nor the appellant destroy any fence. That the subject land was under the cultivation of the appellant's mother.

13. The appellant filed his submissions on 23/1/2020 together with the authority of **Kenneth Mwangera Marimba v. Republic [2012] Eklr** both of which the Court has considered. The respondent filed none.

14. The first ground was that the trial Court erred in convicting the appellant on an unproved prosecution case which was based on contradictory and inconsistent evidence. It was submitted that the testimony of **Pw1** that he was hit with a stick from about 3 meters away contradicted that of **Pw3** who put the distance at 10 meters. That while **Pw1** alleged that the incident occurred at 7 am, **Pw2** alleged it to have been at 6.30 am. That **Pw6** alleged that there were 58 machetes only later to say there was only 1 machete.

15. On the testimony of **Pw6**, he told the Court that he had been informed that there were amongst others, 56 machetes at the time the fence was being destroyed. However, when he visited the scene, he only saw one machete. That in my view was not a contradiction of his evidence.

16. As regards the evidence of **Pw1, Pw2 and Pw3** on the distance within which **Pw1** was hit by the stick and the time of the incident, the Court observes that these were people from Kenya Rural set up. They may not be scientifically knowledgeable on the exact distances as well as time.

17. To my mind, 3 meters and 10 meters to a rural Kenyan or any other person for that matter is not so drastic a difference as to affect the evidence tendered. Likewise, a difference of 30 minutes between the times given by **Pw1 and Pw2** is not so big as to affect the evidence the witnesses gave. The contradiction was not so material as to affect their testimonies.

18. As to whether the case was proved, this was an offences of assault causing actual bodily harm under *section 252 of the Penal Code* and malicious damage to property under *section 339(1) of the Penal Code*.

19. Section 251 of the Penal Code Cap 63 provides: -

“Any person who commits an assault occasioning actual bodily harm is guilty of misdemeanor and is liable to imprisonment for five years.”

20. While *Section 339(1) of the Penal Code Cap 63* provides that:

“Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which unless otherwise stated is a misdemeanor and is liable to imprisonment for five years.”

21. The evidence on record shows that on the material day at about 7 am, the complainant was informed that there were people who had invaded his land. When he went to the gate to ascertain what was happening, he was accosted by a group of people who included the appellant. It is then that the appellant hit him in the chest with a stick which he had. **Pw2 and Pw3** witnessed the incident. Their testimony remained firm and unshaken.

22. Pw4 who examined the complainant at **Miathene Sub-County Hospital** confirmed that the complainant's chest had been injured by a blunt object. The land where the incident occurred was confirmed by **Pw5** to belong to the complainant. Notwithstanding the rejection of the photographs that showed the destruction of the fencing posts, the testimony of **Pw1, Pw2, Pw3 and Pw6** on the destruction of the fence and the posts was cogent and irreplaceable.

23. The entire evidence placed the appellant at the scene. He himself admitted being at the scene. To my mind, the evidence was so consistent and firm as not to hold that the case had been proved beyond any reasonable doubt. The appellant's defence that he did not see the

complainant could not hold in face of the compelling evidence by the prosecution witness.

24. The next two grounds were that the trial Court erred in sentencing the appellant to an excessive and punitive sentence and that it failed to consider the appellant's mitigation. In his submissions, Learned Counsel for the appellant submitted that under **section 250 of the Penal Code**, the sentence set out therein is one year imprisonment.

25. In **Wanjema v Republic [1971] EA 493 at page 494**, the Court stated: -

“An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

26. In the present case, the appellant was convicted on both counts. Both counts carry a sentence of up to five years' imprisonment.

27. The appellant was only sentenced to 3 years which is less than 5 years provided for under the law the appellant was convicted on. The case of **Kenneth Mwongera Marimba v. Republic [2012] Eklr** does not apply in this case. In this regard, The sentence of 3 years meted to the appellant was within the law and constitutional.

28. Consequently, I find that the appeal lacks merit and is dismissed.

DATED and DELIVERED electronically at Meru this 5th day of May, 2020.

A. MABEYA

JUDGE