



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO.142 OF 2015

PERIS NJOKI KIHKA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant herein was charged in the lower court with the offence of **assault causing actual bodily harm contrary to Section 251 of the Penal Code**. Particulars are that, on the 3rd day of July 2014 at Engashura area within Nakuru County, the appellant unlawfully assaulted **Anthony Gichinga Kihika** thereby occasioning him actual bodily harm. The appellant denied the charge.

2. The case proceeded for hearing with the prosecution calling four witnesses. The appellant was placed on his defence. He opted to adduce sworn statement and did not call a witness. The trial magistrate delivered judgment on 29th May 2015 where she convicted the appellant and sentenced the appellant for 2 years' imprisonment after giving him opportunity to mitigate.

3. Being aggrieved and dissatisfied with the trial court decision, the appellant filed this appeal on the following grounds: -

i. That the learned trial magistrate erred in law and fact by failing to find that the evidence adduced in court by witnesses were contradicting and inconsistency.

ii. That the learned trial magistrate erred in law and fact by overlooking the fact that the evidence relied on was not watertight to justify a conviction.

iii. That the learned trial magistrate erred in law and fact in sentencing the Appellant to serve 2 years which was excessive without even an option of fine.

iv. That the learned trial magistrate erred in law and fact by failing to consider the strong defence and submission by the Appellant

v. That the learned trial magistrate erred in law and fact by shifting the burden of proof to the Appellant.

vi. That the learned trial magistrate erred in law and fact by relying in the insufficient evidence.

4. Parties herein agreed to proceed by way of written submissions. Appellant filed submissions dated 10th October 2018 on 19th October 2017. The state filed submissions through email on 11th May 2020.

APPELLANT'S SUBMISSIONS

5. As to whether the trial magistrate erred in failing to find that evidence adduced was contradictory, the appellant submitted that PW1 said **"the accused started saying open the door but I did not, while PW2 said the accused person then asked PW1 to open the door and PW1 opened the door and they talked."** And he further said **"I was still in the house when she opened the door and they talked from outside for some time."**

6. Appellant submitted that PW1 testified that they were only two when he was assaulted and **Boniface** was the only person present thus contradicting PW2'S evidence. Further that it is evident from evidence adduced that the appellant and PW1 were fighting.

7. As to whether the evidence relied on by the magistrate was watertight, the appellant submitted that one **Boniface** who was said to have

witnessed the alleged assault was not called to testify. Further that PW2 said she did see appellant assault PW1 and that PW1 and appellant talked from outside for some time and later Boniface joined them.

8. Appellant submitted that no evidence was brought to Court to prove that the appellant assaulted PW1 and what was told to PW2 by PW1 was clearly hearsay. The appellant quoted **Section 63 (2) of the Evidence Act** to show the meaning of direct evidence which in summary is what a witness saw, heard and a fact that could be perceived by other sense or any manner.

9. On sentence the appellant submitted that in mitigation she said she is a single mother and also takes care of an old mother and prayed for a non-custodial sentence but that was not considered by the Court. Appellant submitted that there was evidence sufficient to find conviction and on sentence, the trial magistrate should have imposed a non-custodial sentence.

10. In respect to sentence, the appellant cited the case of **Supreme Court of India in state of M.P Vs Bablu Nattstated** where the court held that the principle governing imposition of punishment would depend upon the facts and circumstances of each case.

11. On whether the Court failed to consider the appellant's defence, the appellant submitted that the trial magistrate erred in failing to consider that the appellant proved beyond reasonable doubt that she did not assault the complainant.

12. The appellant submitted that the prosecution failed to avail crucial witness to prove their case and cited the case of **Halkano Mata Bagaja Vs Republic [2015]** where the Court held that the prosecution has discretion to call whoever they wish to call as a witness however they should not fail to call relevant witnesses for ulterior motives, for example if they knew the evidence would be adverse to them.

13. The appellant's counsel submitted that the appellant and complainant have been having ongoing issues between them due to land disputes and other pending cases in Court; that together with her brother, the complainant do not want the appellant to inherit any part of the parcel of land and that's why she is making false allegations.

14. Appellant urged the Court to disregard prosecution evidence and set aside the trial magistrates judgment and acquit him.

RESPONDENT'S SUBMISSIONS

15. The state filed written submissions online through state counsel **Ryta Rotich**. She submitted that the fundamental ingredients of the offence of assault causing bodily harm were analyzed in the case of **Ndaa V Republic [1984] eKLR** where the Court determined the prosecution must prove two critical components in the offence of assault as follows: -

- i. Assaulting the complainant or victim.
- ii. Occasioning actual bodily harm.

16. She submitted that concerning the first ingredient of assault of victim, the complaint (PW1) asserted that the accused who is her stepsister assaulted her by striking her and pushing her to the ground and at the time of the incident, the complainant clearly saw the accused and the accused spoke to her taunting her to call her brothers to rescue her; and screams of help alerted their cousin named **Boniface** who separated the two.

17. She further submitted that PW1 went to her house and was joined by PW2 who is her neighbor and as she let in PW2, she saw the accused outside the door carrying a panga; the accused demanded she open the door but in fear she refused. She reported the attack to the police.

18. On the issue of identification, compound security lights enabled PW1 and PW2 to see the accused carrying the panga. PW2 testified she knew the accused well as she was her neighbor and was also identified in the dock by the above witnesses and PW3.

19. She submitted that the second ingredient of occasioning actual bodily harm was defined by the learned **Judge Justice M. Mativo** in **Alex Kinyua Muarakaru Criminal Appeal 211 of 2011** as follows: -

“Actual bodily harm is any physical injury to a person (which is not permanent) or psychiatric injury that is not merely emotions, fear or panic. To make out the offence, the prosecution must prove that there has been an assault and that the assault has resulted in actual bodily harm. There must be intention to assault (*mens rea*) and assault must have taken place (*actus reus*).”

20. PW4 the Clinical Officer observed that PW1 had injuries to the neck, tendons of back, forehead and face. P3 Form was filled and produced in Court as exhibit. The degree of injury was classified as harm and treatment of analgesics was administered. The evidence of injuries was corroborated by PW3 corroborated this by stating he noticed the complainant's face was swollen when she came to the police station to report the matter.

21. On issue of grudge the accused at the defense hearing alleged there was a long standing family dispute over land but she did not present any proof of the same and thus her defense was not weighty enough to displace the evidence from the prosecution case which produced credible evidence.

22. On sentence, the state counsel submitted that the accused was sentenced to two years which was lenient as the penalty prescribed by the act is five years. The Court's exercised its discretion in regard to the mitigation placed by the accused, the principle of proportionality, deterrence and upon deliberation of the aggravating factors.

23. She cited the case of **Shadrack Kipchoge Kogors V Republic Court of Appeal [2003]** where the court stated as follows: -

“Sentencing is essentially an exercise of the trial court and for this court to interfere it must be shown that in passing the sentence, the court took into account irrelevant factors or that a wrong principle was applied or short of those the sentence was harsh and excessive, that an error in principle must be inferred.”

24. The state urged this court to dismiss this appeal.

ANALYSIS AND DETERMINATION

25. This being the first appellate Court. I am expected to subject the entire evidence adduced before the trial Court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanor. The principles that apply in the first appellate Court are set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows: -

“The first appellate Court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

26. I have considered submissions by parties herein. I have also perused the lower court's proceedings. PW1 who is the complainant testified that she was heading home alone from the shopping centre when she met the accused who challenged her to call her brothers to come and rescue her. She said the accused then pulled her to the ground and assaulted her. She said **Boniface** arrived and asked them why they were fighting. She said accused said she wanted to beat her so that she could respect her. She said she then went to her house and accused left.

27. The complainant said at around 8pm, PW2 knocked her door and while she opened the door for her, she saw the accused; she pulled PW2 in and locked the door. She said accused started telling her to open the door but she did not open.

28. PW4 the doctor confirmed that the complainant sustained injuries. He stated that the complainant was seen 3 days after the injury. He produced P3 form filled for her which confirmed injuries as submitted by state counsel above. This confirms that the complainant was assaulted. However, in view of conflict that existed between parties herein, there was need to prove beyond reasonable doubt that it is the accused who inflicted the alleged injuries on complainant.

29. From evidence adduced the complainant is alleged to have been assaulted while going home from shopping centre at 7 pm. She confirmed that she was alone while going home and when she met accused but One **Boniface** found them together and asked them why they were fighting. Unfortunately, the prosecution failed to avail the said **Boniface** who found the appellant and complainant at the scene but only availed PW2 who said she saw appellant but the alleged assault never occurred at the time. Complainant's testimony was that she had been assaulted earlier. In fact, in her cross examination, PW2 said she did not see the accused assault the complainant.

30. And even if it is true that the accused met complainant on her way home, and assaulted her, from her own evidence, she said Boniface who found them at the scene asked them why they were fighting. The prosecution having failed to avail the said **Boniface**, the Court could not ascertain whether they were fighting or one was assaulting/beating the other. In my view, the charge was not proved beyond reasonable doubt and the trial Court erred in convicting the accused.

31. FINAL ORDERS

1. The appeal is allowed on both conviction and sentence.
2. The conviction against the appellant is hereby quashed and sentence set aside forthwith.

Judgment dated, signed and delivered via zoom at Nakuru This 11th day of June, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Schola - Court Assistant

Mr. Mongeri counsel for Appellant

Rita for State