REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 01 OF 2019

ABUDI BWANALOO MOHAMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Appellant in person

Mr. Mwangi for the state

JUDGMENT

The appellant initially charged, tried, convicted and sentenced with two counts of offences against the person has preferred an appeal on both conviction and sentence.

The first count was that of grievous harm contrary to Section 234 of the Penal Code in which he was sentenced to serve 5 years imprisonment whereas on Count II on assault causing actual bodily harm contrary to Section 251 of the Penal Code upon conviction, he was sentenced to a fine of Kshs.50,000/= in default 6 months imprisonment.

> ***(1). The appellant claims that the Learned trial Magistrate erred in Law and fact by finding the conviction without satisfying himself that the prosecution had failed to proof the case beyond reasonable doubt.***
>
> ***(2). That the Learned trial Magistrate erred in Law and fact by not considering the case at hand was poorly investigated leading to miscarriage of justice.***

The appeal was canvassed leading to a miscarriage of justice. The appeal was canvassed by way of submissions from both the appellant and prosecution counsel. In challenging the trial Court Judgment, the appellant submitted that the case for the prosecution was riddled with inconsistencies and contradictions to raise sufficient suspicion to the charge on identification. The appellant submitted that the prevailing circumstances were not favourable for a positive identification to take place. That the appellant in all circumstances argued and submitted that the so called dock identification should not be allowed to stand.

Mr. Mwangi for the respondent opposed the appeal on the basis of the strength of the evidence adduced before the trial Court.

Determination

On consideration of this appeal, I am guided by the principles in **Okeno v R {1972} EA 32:**

> ***"That the duty of the Court is to analyze and re-evaluate the evidence adduced before the trial Court independency and drew conclusions, taking into account the vantage position of the Learned trial Magistrate who heard, saw and factored in the demeaning witnesses. That opportunity is never availed an appeals Court."***

The appeal mainly raises the issue of Identification Act. This has been explained time and time again the importance of positive identification or recognition evidence in cases where the crime is alleged to have occurred at night the prosecution case was that the assault had occurred on 22.12.2017 at night but she complaint nevertheless was able to recognize the assailant. That assailant came to be the appellant.

The evidence in question has to be analysed and evaluated within the context of the well settled principles explained in **Roria v R {1949} 16**

EACA 135, Wamunga v R {1989} KLR, Nzaro v R {1991} KAR 212, Kiarie v R {1984} KLR 739.

In order for the prosecution to succeed and sustain a conviction against an accused person, it must show the weight of evidence which satisfied the considered questions in **R v Turnbull & Others {1976} 3 ALL ER 549** these factors are of a nature as prescribed in the context of this case as follows:

> ***"the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the Jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

In assessing the contending positions before this Court it is noted that the issue of identification purely came from **(PW1) Joseph Muya Noinyi**. According to **(PW1)** the incident occurred at night when the appellant went to his house seeking to purchase fish. In the circumstances thereto, (PW1) told the trial Court he was not able to provide the fish since the stock was all sold out. When the complainant failed to satisfy the appellant and in defiance and suddenly found himself being hit with a club resulting in loss of the seven teeth.

As the record stands from the evidence of **(PW1),** he reported the matter to the police station who issued him with a P3. He drew the Court's attention on this aspect of the medical evidence flowing from the x-ray, treatment notes and the P3 Form all from Mokowe Hospital. The other source of evidence upon which this case dependent upon came from **(PW2) – John Mwangi Gicheru.** The nature of less evidence was in material particulars similar with that of **(PW1).** To recapitulate **(PW2)** evidence he was at home when the appellant came knocking demanding to buy fish.

However as **(PW2)** had already sold out the stock, appellate was angered and moved to use his club to inflict bodily harm. **(PW2)** told the Court that he managed to identify the appellant as the man armed with a club who positioned himself to cause personal injuries. What followed was a report made to Mokowe Police Post where he was issued with a P3 Form. The question of importance on this aspect of the case, is whether, the evidence led of **(PW1)** and **(PW2)** was such as to justify a conclusion that the appellant was the perpetrator of the crime. I think from fresh scrutiny the evidence by **(PW1)** and **(PW2)** reached the degree of certainty required to proof identification beyond reasonable doubt. The two witnesses were quite emphatic that it was not the first time they came into contact with the appellant.

I give consideration to the fact of the appellant visiting **(PW1)** and **(PW2)** who are fishmongers with an intention to buy some fish. Its only when **(PW1)** and **(PW2)** turned down the request on the basis of depleted stock that appellant used his club to attack each one of them.

The appellant who filled the description on voice given by **(PW1)** and **(PW2)** was not able to controvert that evidence. Taking into account all these pieces of evidence they lead me to only plausible conclusion that the appellant was positively identified as the assailant on 22.12.2017.

I therefore find that there was no error of Law or fact committed by the Learned trial Magistrate in his findings that the appellant was properly identified. Apart from the evidence on identification from **(PW1)** and **(PW2)** there was sufficient evidence to proof the ingredients of the offences on grievous and assault inflicting bodily harm. The medical examination carried out by **Ahmed Hassan (PW3)** of Lamu confirmed that **(PW1)** suffered grievous harm while **(PW2)** degree of injury was harm.

The appellant statement of defence consistently failed to rebut the primafacie evidence by **(PW1)** and **(PW2)** which placed him at the scene of the crime. I also cannot agree with the appellant on the part that the prosecution witnesses evidence comprised of inconsistencies and contradictions fatal to the case.

Having therefore considered such matters on the evidence as a whole, I am satisfied that the trial Court came to a just conclusion. That the appellant was guilty in committing the offence of grievous harm contrary to Section 234 and assault contrary 251 of the Penal Code beyond reasonable doubt. He was also lawfully punished and appropriately so as reflected in the sentences imposed by the Court.

Therefore, the appeal on conviction and sentence are found to be unmeritonous and as a consequence dismissed. That is the order of the Court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF DECEMBER 2020

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Alenga for the state

2. Appellant in person