



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL NO. 19 OF 2018

ALBERT OMENYI OYARO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of Hon. C.R.T. Ateya RM delivered on the 25/10/2017)

JUDGMENT

1. The appellant was charged with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that, on the 16th day of March 2015 at about 9.30am at Botabori sub-location in Gucha South District within Kisii County the appellant unlawfully did grievous harm to Mary Ombati. The appellant was sentenced to 5 years in jail. His appeal is against the conviction and sentence. He seeks to have the conviction quashed and sentence set aside.

2. In his petition filed in court on the 19th March 2018 the appellant raises 9 grounds of appeal which can be summarised as follows that ;

- i. The prosecution failed to prove their case beyond reasonable doubt, there were discrepancies, contradictions and blatant falsehoods in the prosecution evidence
- ii. The trial court failed to consider the merits of his defence
- iii. The trial magistrate failed to explain to him the substance of the charge he was facing once a ruling on prima facie case had been made
- iv. That his mitigation was not considered and thereby the trial court passed a sentence which was manifestly harsh and excessive
- v. That the trial court's decision was guided by grief, emotion and sympathy for the complainant arising from the injuries inflicted upon the complainant and not by fact and merits of the defence tendered.

3. As the first appellate court, I am required to re-evaluate the evidence independently and reach my own conclusion as to whether to uphold the conviction and sentence. I must bear in mind that I neither heard nor saw the witnesses testify (*see Okeno v Republic [1972] EA 32*). In order to proceed with this task, I will set out the facts as they emerged before the trial court.

4. Pw1 testified that on the 16/3/2015 at 9.30am she was in her home at Botabori. Her worker Boi Osoro

removed the cow from the cowshed to take it out to feed. Her worker informed her that the cow was unwell. She went out to check on the cow. She saw the appellant passing near her home. She asked him if he was the one who cut her tree. He told her that she was crazy, then he insulted her calling her the uncircumcised girl and that he would beat her. He had a panga and stick. He used the stick to hit her on the forehead. She lost consciousness. She regained consciousness in hospital. She was treated and later issued with a P3 form after reporting the matter to the police. During cross-examination she testified that the appellant was an uncle brother to her mother, her land borders his and that a tree in her land had been cut. That they have a long land dispute.

5. Pw2 Wycliff Atambo a clinical officer testified that he filed Pw1's P3 form on the 20.3.2015. She had been assaulted on the 16.3.2015 by a person known to her using a blunt wooden piece. She had a cut on the forehead measuring 5x3 cms which was 4 days old. The injury was classified as grievous harm.

6. Pw3 was Lucia Moraa she testified that Pw1 is her son's wife and the accused is her cousin. That on the 16.3.2015 at 9.00am she was going back home when she heard the voices of Mary and Omenyi she was 10 meters away. The appellant was running away. She found Mary bleeding from her head, Mary informed her that she was hit on the head after she inquired about her tree.

7. Pw4 Evan Osoro testified that on the 16/3/2015 he was home looking after the cows. He was present when the appellant assaulted his employer on the eye using a stick. He ran away to call neighbours to assist Mary.

8. Pw5 No. 59928 PC Kipyegon testified that on the 18/11/2016 he took over the case from PC Abdi. It was an assault case which had happened on the 16/3/2015.

9. The appellant in his sworn statement testified that Mary is his neighbour and a niece. That what Mary claims is not true. On the 16th he met Mary she went where he was working and started calling him a witch. He had pruned the tree and they want the timber. She began chasing him and he ran. She was on the upper side and he was on the lower side. He saw her fall down. He went to the station to report that she had cut his trees. He was arrested at the police station and brought to court. He informed the court that they have no disagreement with the complainant at home, that even if they have issues they never argue and that they have not argued about the trees. He produced his statement as an exhibit.

10. At the hearing of this appeal Mr. Nyangacha for the state submitted that this could have been a case of affray as the appellant went to report. That the trial court did not consider the land dispute. That the treatment notes show that Pw1 was treated on the 23/9/2015 yet the assault was on the 16/3/2015, which means she was treated 6 months later. That grievous harm was not proved. That Pw3 testified that she heard voices but did not witness anything. That the conviction is unsafe. That on sentencing the trial court did not consider the appellants mitigation.

11. Mr. Otieno for the state opposed the appeal he submitted that the conviction was proper. That Pw1 testified that the appellant hit her near the eye, the appellant was armed with a stick and panga. Pw4 confirmed the assault. Pw3 heard the commotion and the doctor confirmed the injury and classified it as grievous harm. That the case could have been one of affray has no basis. That the appellant did not state in his defence that he was assaulted. That the numbers referred to as 2319/15 is not a date but the hospital number. That the sentence was proper and there was no prejudice in the sentence of 5 years.

12. I have considered the evidence the submissions too. It is not in dispute that on the 16/3/2017 the appellant and the Pw1 met. The issue is whether the appellant assaulted the complainant. Pw1's evidence that she was assaulted by the appellant was corroborated by the evidence of Pw4 who witnessed the appellant beat Pw1. Pw3 evidence placed the appellant at the locus. She saw him run away. The accused defence is that the complainant fell and that he was arrested when he went to report. His defence weighed against the prosecution evidence cannot stand. There was no contradiction nor discrepancies in the evidence adduced by the prosecution. The submission that this could have been a case of assault too is not plausible as there was no medical evidence that the appellant got injured.

13. The appellant's defence was considered by the trial court the trial court stated as follows, "His evidence that the complainant ran after him and fell is not plausible. He claims that she was the one who attacked him then ran away. He produced his statement taken down on the 19/3/2015 when he went to report and was arrested. He did not produce any treatment notes to show that he was injured or call any witnesses in his defence. He did not explain why it took him 3 days to report if indeed he was the aggrieved party".

14. On failing to explain the charge to him after he was found to have a case to answer. The appellant was informed of the charge he was facing at the time of plea. He understood the charge and proceeded with the case. There is no legal requirement that a trial court has at the stage of informing the accused that he has a case to inform the accused of the charge once again. A trial court will inform the accused on whether he has a case to answer and then proceed to inform him of the provisions of section 211. If an accused is acquitted of an offence then he will be told. In this case there was no error by the trial court.

15. On the land dispute. The trial court did not mention that in the judgment however the prosecution evidence was properly evaluated. The issue that caused the appellant to beat the complainant was because she asked if he had cut her tree. This inquiry even with a pending land dispute was not a reasonable cause for the appellant to act as he did. His acts were unjustified and unlawful. There is also nothing to show that Pw1 was out to fix the appellant. In his defence he stated they have no disagreement with the complainant at home and that even if they have had issues they have never argued nor have they argued about the trees. The complainant was honest enough to admit that they had a land dispute, a fact the appellant seems not to admit in his defence.

16. On the issue that his mitigation was not considered. The court record of 1/11/2017 shows that the court noted his mitigation. At the time of sentence on the 14/11/2017, the trial court stated the following, "I have considered the POR and noted the recommendation therein. The accused states he seeks reconciliation. This is a 2015 matter. If indeed he was remorseful then the matter would not have been in court for this long. The offence accused is charged with provides for maximum sentence of life imprisonment. I hereby sentence the accused to serve 5 years in jail." The trial court observed that the matter had been in court since 2015 though the appellant had sought reconciliation. There was no emotion or sympathy for the complainant. What the court noted was in order. The trial court informed the appellant of the sentence as provided in law and sentenced the appellant to 5 years.

17. On the sentence, the charge was one of grievous harm. Section 234 provides any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life. The trial court noted that grievous harm is defined to mean harm which amounts to maim or dangerous harm or serious permanent injuries health or which is likely to so injure health, or which is likely to so injure health or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ or membrane or sense. The trial court then observed that the complainant sustained a deep cut wound on the forehead that was 5x 3 cm and that she bled profusely as evidenced by P exhibit no.1 and that this meets the criteria of grievous harm being a serious injury. The medical report produced by Pw2 classified the Pw1 injuries as grievous harm. This was an assessment by the clinical officer who filled the P3 form he relied on the treatment notes. She had a cut wound measuring 5 by 3 cms on the forehead. Such an injury cannot be termed to be a minor injury it was a serious injury. The prosecution proved their case beyond reasonable doubt the conviction is affirmed.

18. The appellant was jailed for 5 years. Is the sentence harsh and excessive? The maximum sentence is life imprisonment. Considering his mitigation and the POR this court reduces the sentence to 4 years imprisonment from the date of sentence.

Dated and delivered at Kisii this 17th day of January 2019

R.E. OUGO

JUDGE

In the presence of;

Appellant In person

Mr. Nyangacha For the Appellant

Mr. Otieno For the Respondent/ State

Rael Court clerk