



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 122 OF 2017

CONSOLIDATED WITH

CRIMINAL APPEAL NO.123 OF 2017

LUCY WAMBUI WANJIKU.....1ST APPELLANT

RACHEAL WANJIKU GICHINI.....2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara in Cr. Case No. 1920 of 2011 delivered by Hon. Jalango (SRM) on 30th June 2016).

JUDGEMENT

1. The Appellants, **Lucy Wambui Wanjiku** and **Racheal Wanjiku Gichini**, were charged with the offence of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code**. The particulars of the offence were that on 24th April, 2011 at Maili Saba village, Nairobi within Nairobi Area jointly with another not before court unlawfully assaulted Joseph Maina Mwangi thereby occasioning him actual bodily harm. They pleaded not guilty to the charge. Upon trial they were convicted of the same and each fined Kshs. 30,000/= in default to serve six (6) months imprisonment. Aggrieved by both their conviction and sentence, they preferred separate appeals to this court. The appeals were consolidated and heard together for purposes of this judgment.

2. The Appellants raised sixteen (16) similar grounds of appeal in their respective Petitions of Appeal filed on 19th September 2017. The said grounds can be condensed into three (3) main grounds namely;

i) That the learned trial magistrate erred in law and fact by failing to find that the Prosecution did not establish its case beyond reasonable doubt.

ii) That the learned trial magistrate erred in law and fact by failing to consider the Appellants' defence.

iii) That the learned trial magistrate erred by imposing a sentence that was harsh and excessive in the circumstances of the case.

Evidence

3. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the trial court so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses. (See **Okeno v Republic (1972) EA 32**).

4. The prosecution's case can be summarized as follows: On 24th April 2015, the complainant **Joseph Maina Mwangi (PW1)** was in his house alone. His wife had travelled to his rural home. At about 10.00pm, he went to lock the gate to the plot where he was living as usual and went back to the house. While inside the house, he heard his door being pushed by someone who eventually made his way in. He recognized the person as Mwangi who was well known to him. Mwangi hit and kicked him severally while asking why he had locked the gate. Mwangi did not reside in the same plot. PW1 threw the gate keys at Mwangi out of fear so he could go and open the said gate.

5. Immediately thereafter, someone jumped over the gate into his compound and went where they were. Mwangi dragged PW1 by the neck

towards the gate and opened it. Outside the gate, they found the Appellants who were well known to him since they were neighbours. Mwangi and one Maina pushed him to the ground. The Appellants stepped on him severally while hitting him. They wanted to know why he had locked the gate yet they never used it to access their houses. He sustained injuries on his face and all over his body. He was also bleeding from the mouth and nose.

6. Merichi Ngugi Mwangi (PW4) had also been sent by his father on the same night to find out why PW1 had locked the gate. Upon arrival, he met one Titus Mwangi who had been sent by the 1st Appellant to deal with the issue. The said Mwangi jumped over the fence into PW1's compound. Soon thereafter, PW4 heard a commotion and jumped into the compound as well. He found Mwangi beating PW1 and stopped him. He then asked PW1 to open the gate to enable the 1st Appellant's tenant access her house through the compound. It is after he opened the gate that the Appellants whom he had known for about ten (10) years started beating PW1. He saw the 1st Appellant hit PW1 on the head while the 2nd Appellant used her shoes to hit him. PW1 sustained injuries on the head.

7. On 25th April 2011, **Esther Wanjiku Kariuki** PW1's wife (PW2) received a call from a neighbour informing her that PW1 had been assaulted. She went with her mother in law to their home in Dandora and found PW1 bleeding. He had a cut on one side of his face and the clothes he was wearing were stained with blood. They took him to Maili Saba Medical Clinic where he was treated and discharged later on. They reported the assault at Mowlem Police Station on the same day.

8. Dr. Zephania Kamau (PW3) examined PW1 on 27th April 2011. He had a small stitched wound on the right eyebrow. He also had bilateral red eye and a swelling on the lower part of the right side of his face. He formed the opinion that the injuries were caused by a blunt object. He thus classified the injuries as harm and produced the P3 Form in evidence.

9. Both Appellants gave sworn statements in their defence. The 1st Appellant testified that their plots used to share a common entrance. However, on 24th April 2011, one of her tenants informed her that the gate had been locked with a different padlock. She went to the plot accompanied by her daughter, the 2nd Appellant. On reaching there, she heard a commotion inside the plot. Then, PW4 came out while holding PW1 who was bleeding. She denied assaulting PW1 and said that she did not even touch him on the said date. The 2nd Appellant also denied assaulting PW1 on the said date and merely reiterated the 1st Appellant's testimony.

Analysis and determination

10. The appeal was canvassed by way of written submissions. The Appellants were represented by learned counsel Mr. Waweru whilst learned State Counsel, Ms. Sigei represented the Respondent. The Appellants' submissions are dated 25th October 2018 and those of the Respondent on 20th November 2018. The Respondent opposed the appeal and urged that the same be dismissed and the conviction and sentence by the trial court be upheld. This court has carefully re-evaluated the evidence on record and considered the parties respective submissions and found that there are only two issues for determination. The first issue is whether the prosecution established their case beyond a reasonable doubt that the Appellants assaulted PW1 causing him bodily harm contrary to Section 251 of the Penal Code. The second is whether the trial court failed to consider the Appellants' defence.

Whether the case was proved beyond a reasonable doubt

11. Section 251 of the Penal code provides as follows:-

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

12. The essential ingredients of the offence of assault causing actual bodily harm were set out in the case of **Ndaa vs. Republic [1984] eKLR** as follows;

“i) Assaulting the complainant or victim,

(ii) Occasioning actual bodily harm.”

13. Further, in the case of **Alex Kinyua Murakaru v Republic [2015] eKLR**, Mativo J. cited the case of **Rex v Donovan (1934) 2KB 498** in which the court of Criminal Appeal stated that:-

“For this purpose, we think that “bodily harm” has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the complainant. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling.”

14. A third ingredient which must be established is the positive identification of the accused person as the perpetrator of the assault.

15. As regards the first ingredient of the offence, the Appellants submitted that PW1 was assaulted by a person called Mwangi which they said was vindicated by his testimony and that of PW4. They denied being at the scene of crime and faulted the evidence adduced by the prosecution for placing them at the scene. They submitted that their identification as the assailants was improper because the offence was alleged to have been committed at 10.00pm in the dark. In their view, it was not possible for PW1 to positively identify them as such in the circumstances. Further, the Appellants contended that the fact that the prosecution failed to call crucial witnesses being the arresting & investigating officers led to the presumption that their evidence would have been adverse to the prosecution's case. The Appellants also

raised issues with the failure by the police to arrest and charge the said Mwangi with the offence in question.

16. In response to the Appellants' submissions, the Respondent submitted that the testimonies of PW1 and PW4 who were both eye witnesses were very cogent as to who assaulted PW1. She submitted that the trial court was satisfied on the basis of the evidence adduced that PW1 was assaulted by the Appellants and another resulting into actual bodily harm. Further, she asserted that the issue of improper identification of the Appellants did not arise in this case since they were well known to the victim. As regards the issue of crucial witnesses, the Respondent conceded that the investigating officer did not testify. However, she asserted that the investigating officer was not present during the assault and as such, his evidence would only have been to reiterate what the prosecution witnesses had already stated. Finally, it was the Respondent's submission that the fact that Mwangi who also took part in the assault was not arrested did not negate the fact that they jointly assaulted the victim.

17. PW1 stated that upon being dragged outside the gate by Mwangi, they found the Appellants who attacked him and hit him severally. This evidence is corroborated by PW4 who stated that he saw the 1st Appellant hit him on the head while the 2nd Appellant used her shoes to hit him. He sustained injuries on the head. Secondly, PW1 stated that the Appellants were well known to him since they were neighbours. PW4 also stated that he had known the Appellants for about ten (10) years. In the circumstances, I do find that identification of the Appellants was not in issue contrary to what has been alleged.

18. The Appellants also faulted the prosecution for placing them at the scene of crime. However, the record is clear that the Appellants admitted to being at the scene but denied assaulting PW1. This notwithstanding, the evidence of the prosecution witnesses squarely placed both Appellants at the scene. Their assertion that they were absent is escapist and untenable. In view of all the foregoing, I am satisfied that the prosecution sufficiently established that PW1 was assaulted by the Appellants and the said Mwangi.

19. As regards the second ingredient of occasioning actual bodily harm, PW1 testified that the said Mwangi hit him on the right side of his face. He then dragged him outside the gate where he was pushed to the ground. Thereafter, the Appellants stepped on him severally while hitting him and he sustained injuries on his face and his body as a result thereof. PW4 also testified that he witnessed the Appellants beating PW1. It was his testimony that PW1 sustained injuries on the head as a result of the beating. Further, PW2 stated that when she went back to their house in Dandora, she found PW1 with a cut on one side of his face.

20. The direct evidence is further corroborated by the evidence of PW3 who examined PW1 three days after he had been treated at Maili Saba Clinic. He stated that PW1 had a small stitched wound on the right eyebrow. He also had bilateral red eye and a swelling on the lower part of the right side of his face. He formed the opinion that the injuries were caused by a blunt object. Medical documents were adduced in this regard. It is therefore not in doubt that the assault by the Appellants caused PW1 actual bodily harm.

21. As regards the third ingredient, the same has been determined above and the court need not repeat itself. I am therefore satisfied that the charge against the Appellants was proved beyond a reasonable doubt.

Whether the trial court failed to consider the Appellants' defences?

22. The Appellants further contend that their defences were not given due consideration by the trial court. They pointed out in their submissions that the court failed to consider the 1st Appellant's assertion that there was a land dispute between her and PW1 which may have instigated the charge brought against them. Further, the Appellants argued that the court did not accord any weight to their respective testimonies that PW1 already had a slight injury on his head and was bleeding by the time they met him. The Appellants also faulted the trial court for disregarding the defences despite the fact that they were not cross examined by the prosecution on their sworn testimonies.

23. In rebuttal, the Respondent submitted that the prosecution evidence sufficiently established that the Appellants and another assaulted PW1 thus causing him bodily harm. The Respondent also noted that there was no other evidence to the effect that there existed a grudge between the 1st Appellant and PW1 prior to the incident.

24. The record shows that the trial court categorically stated in its judgment that the Appellants' aforesaid defences did not create any doubt on the prosecution's case. This was in view of the evidence adduced by PW1 which was duly corroborated by PW4, an eye witness who confirmed that he saw the Appellants hitting PW1 and PW1 sustained injuries as a result thereof. Further and in any event, even if there was a land dispute between them as alleged by the 1st Appellant, she ought to have sought an amicable resolution of the same through the relevant authorities and/or channels instead of assaulting PW1. In the premises, I am not convinced by the Appellants' contention that the trial court failed to accord their defence any weight as alleged.

Conclusion

25. From the foregoing, I find that the prosecution proved the case beyond a reasonable doubt. The conviction of the Appellants was therefore safe. I uphold the same.

26. On sentence, the same was legal and lenient. This court has no reason to disturb it in the hope that it will serve as deterrence to the Appellants. I make no order on how the sentence shall be served as the Appellants paid fines.

27. It is so ordered.

DATED and DELIVERED this 6th day of March, 2019

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *No appearance for the Appellants.*
2. *M/s Atina for the Respondent.*