



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. NO. 30 OF 2019

ATANASIO MBAE FUNDI.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of Hon. Lesootia, Senior Resident Magistrate

in Mombasa Chief Magistrate's Court Criminal Case No. 1585 of 2014

delivered on 30th January, 2019)

JUDGMENT

1. The appellant herein, Atanasio Mbae was on the 2nd September, 2014 charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of the charge were that on the 16th day of August, 2014 at Mikindani in Changamwe area within Mombasa County, he unlawfully assaulted Aniceta Gicuku Kaverenge thereby occasioning her actual bodily harm. He denied the charge. The case went to full trial. The appellant was found guilty as charged and sentenced to 1 year imprisonment.

2. He was dissatisfied with the said decision and filed a petition of appeal on 27th February, 2019 raising the following grounds of appeal:-

- i. That the Learned Trial Magistrate erred in law and fact in proceeding with the matter to conviction on a charge that was defective;
- ii. That the Learned Trial Magistrate erred in law and fact in finding that the offence as charged had been proved;
- iii. That the Learned Trial Magistrate erred in law and fact in coming to a conclusion that the testimony of the complainant could form the basis of a finding of guilt;
- iv. That the Learned Trial Magistrate erred in law and fact in failing to consider the inconsistency and the gaps in the prosecution's case which would have entitled the accused to the benefit of doubt.
- v. That the Learned Trial Magistrate erred in law and in fact in denying the appellant the benefit of doubt and right assessment of his defence;
- vi. That the Learned Trial Magistrate erred in law and fact in failing to arrive at a conclusion; and
- vii. That the sentence was manifestly excessive.

3. Mr. Magolo, Learned Counsel for the appellant filed his written submissions on 25th April, 2019. The Director of Public Prosecutions through Ms Marindah, Prosecution Counsel, filed her written submissions on 30th April, 2019 to oppose the appeal.

4. In highlighting his submissions, Mr. Magolo submitted that the Hon. Magistrate did not believe the appellant's defence as the appellant did not seem to have injuries and had no P3 form. It was stated that although the Trial Magistrate found that it was the appellant who requested the persons who were in the room with PW1 to leave so that he could talk to her, the complainant on the other hand testified that the appellant went to where she was and he asked to speak with her. She further testified that she asked her workers to leave.

5. Counsel for the appellant submitted that the appellant did not produce his P3 form and that the Hon. Magistrate had issued summons for the OCS of Changamwe Police Station to produce the said form. This court was informed that the said summons were not served as Mr. Gikandi did not collect them from the Executive Officer. Mr. Magolo stated that the Hon. Magistrate declined to give another adjournment. In his view, failure to produce the P3 form was not of the appellant's making. He argued that the OCS was not allowed to come to court to adduce evidence of the P3 form and circumstances surrounding it, which were that the appellant had made a report of having been attacked by the complainant during a fight. He took the position that the appellant and PW1 should have been charged with affray.

6. It was submitted for the appellant that the two witnesses contradicted what PW1 said, as their evidence was that it was the appellant who told them to leave him and PW1 alone. The appellant's Counsel indicated that there was a dispute about a house between PW1 and the appellant. He was of the view that the criminal court should be reluctant to punish persons in order to settle scores. He argued that the appellant is entitled to the benefit of the doubt.

7. On the issue of sentence, Mr. Magolo submitted that the offence of assault under Section 251 of the Penal Code is a misdemeanor and that Section 26(3) of the Penal Code gives courts wide discretion to impose the sentence of a fine, imprisonment or a discharge. He indicated that where no option of a fine is given, there should be a justification. It was stated that the appellant is a 64 year old man who had retired from the military and the sentence herein was harsh. He indicated that the appellant was convicted in January 2019 and had been in custody for 4 months. Mr Magolo prayed for the appeal to be allowed.

8. Ms Marindah, Prosecution Counsel was of the view that the charge was proved beyond reasonable doubt and that the P3 form for the appellant was not produced. She said that the contradiction referred to by Mr. Magolo on who between PW1 and the appellant requested the witnesses who testified for the prosecution to leave alone the two to talk, was a minor one.

9. The Prosecution Counsel submitted that the appellant's mitigation was taken into account. She stated that the maximum sentence provided for an offence of assault is 5 years. She left the issue of sentencing to the court.

10. In response to Ms Marindah's submissions, Mr. Magolo submitted that the issue of who between the appellant and PW1 asked PW2 and PW3 to leave the room they were in, is not a minor issue, for it was taken into account by the Hon. Magistrate in convicting the appellant.

ANALYSIS AND DETERMINATION

11. The duty of a first appellate court is to consider the evidence adduced in the lower court, analyze it and re-evaluate it before coming to an independent decision. An appellate court must however bear in mind that it has neither seen nor heard the witnesses testify first hand and give an allowance for that. In the case of **David Njuguna Wairimu vs Republic [2010]** eKLR the Court of Appeal reiterated this duty as follows:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

12. With regard to the lower court proceedings, the evidence tendered by PW1, Anicera Gicuku Kaverenge, was that she was assaulted by the appellant who cut her on the head with a panga. He also injured her on the shoulder and on her back with a wooden bar which had pieces of cement on it. Her evidence reveals that the appellant had gone to her house at Mikindani and sought an opportunity to talk with her. PW1 asked two of her workers, PW3, Paul Juma Odera and PW4, Meshak Abutsi Maya, to leave. She stated that on being left with the appellant he told her **“leo ni leo mmoja atakufa”**. She screamed and the appellant ran away and jumped over a fence. She was treated at Bomu Hospital where she received 11 to 12 stitches. Her P3 form was filled. PW1 further testified that she was the estranged wife of the appellant.

13. Their son, Dominic Karimi Mwea, who testified as PW2 was on the material day outside PW1's house when one Juma (PW3) called him. As he entered the house, the appellant rushed out. He found his mother, PW1, bleeding from the head.

14. The evidence of PW3 and PW4 who had gone to do some work at PW1's house was that the appellant went to the said house. According to PW3, the appellant ordered them out. While outside, PW3 heard PW1 shouting **“Karani”!**. PW3 stated that they called Karani who was PW2. PW3 gave evidence that he saw the appellant walk out of the house armed with a panga. He saw PW1 bleeding from the head.

15. PW4's evidence was that when the appellant went to PW1's house, he ordered them (PW3 and PW4) to give him time alone with PW1. PW4 further testified that PW1 ordered them to go out. While outside, he heard PW1 screaming and they (PW3 and PW4) informed PW2 about the screams. PW4's evidence was that as they entered the house, the appellant pushed them on his way out. PW4 saw that the appellant had a panga and that PW1 had been injured.

16. PW5, a Medical Doctor produced the P3 form for PW1 and her treatment notes. He testified that PW1 sustained a cut wound on the left region of the head, bruises on the shoulder, lacerations of the right arm and lacerations of the buttocks. She also sustained bruises on the left elbow and left arm. The degree of injury was assessed as harm. PW5 stated that the probable type of weapons used were blunt and sharp objects.

17. PW6, No. 69422 Corporal Augustine Cheruiyot was the Investigating Officer. He testified that on 18th August, 2014 he was assigned this case by the OCS, Changamwe Police Station. PW6 gave evidence that he interrogated PW1 who had visible injuries on the head, shoulders and arms. He visited PW1's house where he saw a lot of blood stains. He collected a piece of wood which he suspected was used in the assault, which he produced as P. exhibit 1. He also produced as P. exhibit 2 which was a blood stained blouse which PW1 handed over to

him. He issued PW1 with a P3 form. He stated that after consulting the OCPD, they preferred charges of affray against PW1 and the appellant. They then sought the advice of the Director of Public Prosecutions who directed that the appellant be charged with assault. PW6 further testified that when he saw the appellant, he did not have any physical injuries and he did not complain of having been assaulted by PW1 on 17th August, 2014. He indicated that the Officer Commanding Police Division wanted PW1 and the appellant to reconcile.

18. The appellant in his defence claimed that PW1 rented out his house without his authority. He indicated that on the material day, he had argued with PW1, they fought and that PW1 hit him with a board. He reported the matter Changamwe Police Station where he was issued with a P3 form. He further stated that he and PW1 were charged with affray, but he was later charged alone with the present charge. He stated that PW1 was enjoying rent from the house that she was occupying but he had not filed a civil case to recover his house.

19. The issues for determination are:-

- i. If there were material contradictions or inconsistencies in the prosecution's case;**
- ii. If the appellant was denied the right to a fair hearing by the non-production of his P3 form;**
- iii. If the prosecution proved its case beyond reasonable doubt; and**
- iv. If the sentence was harsh or excessive.**

If there were material contradictions or inconsistencies in the prosecution's case

23. The inconsistency that was brought out by Mr. Magolo was on the issue of who between PW1 and the appellant ordered PW3 and PW4 out of PW1's house. According to PW3, it was the appellant. PW4 talked of both the appellant and PW1 having asked them to leave the premises. PW1 testified that she is the one who asked the two witnesses to leave.

24. In **Ahamad Abolfathi & Another vs Republic** [2018] eKLR, the Court of Appeal cited the case of **John Nyaga Njuki and 4 others vs Republic**, Criminal Appeal No. 160 of 2000 in which the Court expressed itself as follows with regard to the issue of discrepancies in the evidence of witnesses:-

“In certain criminal cases particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, minor in nature considering the facts and circumstances of the case.”

25. In this case, what is of critical importance is whether the appellant assaulted PW1 or not. The inconsistency in the evidence of PW1, PW3 and PW4 as to who between PW1 and the appellant told them to leave PW1's house is minor in nature and does not affect the veracity of the prosecution's evidence and in my considered view, it did not prejudice the appellant in any way whatsoever.

If the appellant was denied the right to a fair hearing for the non-production of his P3 form

26. The appellant cannot be heard to complain that he was denied the right to produce his P3 form to establish that what happened between him and PW1 was affray. On 1st of August, 2018, when the appellant gave his sworn defence, Mr. Gikandi Advocate represented him. The appellant sought to produce copies of his P3 form but the Prosecution Counsel objected to the production of copies. Mr. Gikandi applied for an adjournment to enable him to obtain the original P3 form. The defence case proceeded further on 26th September, 2018 with Mr. Gikandi representing the appellant. He prayed for witness summons to issue to the OCS Changamwe Police Station to attend court and produce the P3 form issued by the said station on 16th August, 1994. The said prayer was granted and the matter was scheduled for hearing on 17th October, 2018. On that day, Mr. Kiptum held brief for Mr. Gikandi, he apologized for not having served the summons. He prayed for an adjournment. The court gave the defence the last adjournment. On 14th November, 2018, Mr. Kiptum appeared in court on behalf of Mr. Gikandi and once again said that they had not yet obtained summons from court for service on the OCS Changamwe Police Station. The court declined to grant another adjournment to the defence.

27. The record of the lower court as outlined above speaks for itself. The appellant was given ample opportunity to avail his original P3 form in court but the same was not done. He was therefore not denied the right to a fair trial. The blame falls squarely on his shoulders and that of his defence Counsel.

If the prosecution proved its case beyond reasonable doubt

28. Having analyzed the evidence tendered before the lower court, I am of the considered view that the prosecution proved its case against the appellant beyond reasonable doubt. He is the only one who had the opportunity to assault PW1 after PW3 and PW4 were asked to leave PW1's house in order to give her and the appellant a chance to talk. When PW1 shouted for help, PW2, PW3 and PW4 found her bleeding from the head. PW3 and PW4 met the appellant leaving the premises holding a panga.

29. As to whether the appellant and PW1 were charged with the offence of affray but later the appellant was charged with the offence of assault, the decision on the charges to be leveled against suspects is the sole prerogative of Director of Public Prosecutions. The appellant failed to produce his P3 form to show that he was injured by PW1.

30. The evidence adduced before the lower court unerringly points to the appellant as the perpetrator of the offence. His defence was considered by the Trial Court and the said court found it to be untruthful. I am of a similar view. It is my finding that he was properly convicted. I therefore uphold the conviction against the appellant for the offence of assault contrary to Section 251 of the Penal Code.

Sentence

31. The appellant was sentenced to serve 1 year imprisonment. Although Mr. Magolo argued that the sentence was harsh, that is not the case. The sentence was in my view, very lenient. He gave the age of the appellant as 64 years. The appellant indeed looks like a senior citizen. This court does not condone personal violence being meted out against a person of any gender. The appellant did not have to resort to the use of physical violence against his estranged wife because of a property dispute. He could have filed a suit in court to resolve the issue. Due to the age of the appellant, I set aside the sentence of 1 year imprisonment on condition that he will not commit a similar offence against PW1. I accordingly substitute the sentence of 1 year imprisonment with the period that the appellant has already served in prison. If the appellant contravenes the condition imposed, he shall be arrested and returned to Shimo-la-Tewa Prison to serve the remainder of the sentence of 1 year imprisonment. The appellant shall be set at liberty forthwith unless otherwise lawfully held. His appeal succeeds only to the above extent.

DELIVERED, DATED and SIGNED at MOMBASA on this 12th day of July, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. P. Magolo holding brief for J. Magolo for the appellant

Ms Ogwen, Principal Prosecution Counsel for the DPP

Appellant present

Mr. Oliver Musundi - Court Assistant