REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 1 OF 2018

DENNIS NDEGWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrates Court at Malindi Criminal Case No. 67 of 2015 by Hon. S.R Wewa (PM) dated 15th March 2017)

JUDGMENT

The Case at Trial

The appellant **Dennis Ndegwa** was charged together with a co accused of the offence of assault causing grievous bodily harm contrary to **Section 234 of the Penal Code** in **Criminal Case No 67 of 2015**. It was alleged that on the 1st January 2015 within Malindi Township, he together with his co accused did grievous harm to one Jacob Njoroge Kinyanjui by hitting him using pieces of wood several times on his hands. At trial the prosecution called upon five witnesses to prove their case.

PW1 Jacob Njoroge Kinyanjui was the complainant. His testimony at the trial court was that on the 1st January 2015 he left for work at his shop whereupon an altercation ensued and he was assaulted by the accused persons using pieces of timber that they each carried. After the altercation, he went to the nearest chemist for first aid and thereafter to Malindi Hospital for treatment. He produced his treatment notes as Exhibit 1.

PW2 Ibrahim Abdulahim was the clinical officer that examined the complainant at Malindi sub County Hospital. His testimony was that he examined the complainant on the 16th January 2015 and found that he had broken his 2nd, 4th and 5th fingers but there were no injuries on the rest of the body. That he gave him pain killers and treated him. That the P3 form, which he produced in court as Exhibit 2, was filled 15 days after the occurrence of the alleged incident and that a blunt object was used to cause the injuries sustained.

PW3 Mercy Muthoni Njoroge the wife of the complainant and **PW4 Lawrence Njoroge** were present on the day and at the time the alleged assault was committed. Their testimonies corroborated the testimony of PW1, confirming that the complainant was hit using pieces of timber held by the accuse persons and identifying the accused persons as the perpetrators of the alleged assault. PW3 further testified that when the accused persons attacked her husband she screamed and the neighbours came.

PW5 Police Constable Edwin Mkoneru of Malindi Police Station was the investigating officer in the matter. His testimony was that on the 15th January 2015 while in the office, the complainant came in to report an assault on him by the accuse persons whereupon he referred him to the hospital where a P£ form was issued and returned. He recorded the statement of the witnesses and the complainant. He testified that both the accused and the complainant were businessmen at the market stage at Soko Mpya. That on 1st January 2015 the complainant was opening his business and got into an exchange with the accused persons which resulted in him being beaten up with logs. That the complainant was rescued by the members of the public. That he was injured in his left hand.

At the close of the prosecution's case, the trial court found that a prima facie case had been established and placed the accused persons on their defence. **DW1 Dennis Ndegwa** the Appellant herein elected to give an unsworn testimony. He testified to having gone to work on the morning of the alleged incident and admitted to working at his parent's shop next to the complainant's own shop. He averred that on the material date he was with his brother and another unmentioned person. That the complainant was with a worker repairing his own kiosk and had dug holes that encroached on his own kiosk area. That he asked why PW3 screamed. That three weeks later three people came to the shop among them the complainant and a police officer. He was taken to the police station and locked and finally charged and brought before court. That the complainants injury was not shown to him and neither was the timber he was alleged to have used to commit the offence.

On analysis of the evidence adduced, the learned trial magistrate found that the prosecution had proven its case beyond reasonable doubt and sentenced the accused to 5 years imprisonment.

The Appeal

Felling aggrieved by the decision at the trial court, the appellant filed a petition for appeal stating four (4) grounds. That the learned trial magistrate erred in law and facts by failing to consider the charge sheet was defective; failing to consider the sharp contradictions in evidence; failing to consider that the age of the injuries did not connect to the date of offence; and failing to consider the appellant defence as the same was reliable.

Prosecution's Submissions

Citing **BND vs. Republic (2017) eKLR**, it was submitted that in this case the charge sheet could not be said to be defective as the appellant had understood the charge facing him. On the alleged contradictions on evidence it was submitted that the same had not been specifically pointed out. In this regard, it was submitted that per **Twehangane Alfred Vs Uganda, Crim. App. No 139 of 2001,[2003] UGCA, 6** it was not every contradiction that warranted rejection of evidence. That the date of injuries fell squarely within the date of the incident. Further, that there was no contention that appellant had assaulted the complainant, as at no particular point did the appellant object to this fact during the trial and in his defence. It was submitted that the accused defence and mitigation was considered by the trial Court, and the defence did not call any witnesses hence the prosecution witnesses' evidence was not contradictory at all and the prosecution did prove its case beyond reasonable doubt. It was therefore submitted that the conviction was safe taking into account the circumstances and that the prosecution had proven its case beyond reasonable doubt hence the court ought to find as such and affirm the findings of the trial court.

Analysis and Determinations

As this is the first appellate court, I have a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusions as was laid out in the case of **Okeno v R (1972) EA 32.** (See **Njoroge –vs- Republic [1987] K.L.R. 19**)

In the present case, the complainant narrated the manner in which the Appellant had assaulted him by hitting him severally with pieces of timber. This evidence was corroborated by PW3 and PW4. The medical evidence in the P3 form adduced by PW2 indicated the wounds that the complainant suffered and a conclusion reached that the complainant had suffered grievous harm.

The Appellant has raised four issues on appeal which can really be crystallised into one pertinent issue, whether the prosecution managed to prove its case beyond reasonable doubt at the trial court.

On examination of the evidence on record and the sentence meted out by the learned trial magistrate, it is my finding that the evidence adduced by the prosecution proved that there was an assault which was caused by the Appellant and that the complainant suffered injury as a result. Hence, by all accounts, the charge against the Appellant was proven beyond reasonable doubt. Additionally, the learned trial magistrate took into account everything that was argued before the court and included the reasoning in the judgement and it was this reasoning that informed the sentence.

Having stated the above, I note that it is trite that sentencing is at the discretion of the trial court and an appellate court shall only interfere with the sentence under specific circumstances. This principle was clearly articulated by the Court of Appeal in **Benard Kimani Gacheru vs Republic [2002] eKLR** thus:-

> ***"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."***

In the upshot, I find that the conviction at the trial court was safe as the prosecution had proven its case beyond reasonable doubt and therefore decline to rescind it. The Sentence meted out by the learned trial magistrate was similarly commensurate given the circumstances of the offence and is hereby affirmed. The Appeal is dismissed.

It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT MALINDI THIS 15TH DAY OF JULY 2019

……

R NYAKUNDI

JUDGE