



IN THE HIGH COURT OF KENYA AT KAKAMEGA

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 86 OF 2018

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 87 OF 2018

BETWEEN

STEPHEN AZIVIRA.....1ST APPELLANT

SHEPHERD KAREMERA.....2ND APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. W. K. Cheruiyot, RM, dated 2nd February 2018 in Vihiga Magistrates Court Criminal Case No. 494 of 2017)

JUDGMENT

1. The appellants, **STEPHEN AZIVIRA** and **SHEPHERD KAREMERA**, were charged, convicted and sentenced to 5 years' imprisonment for the offence of causing grievous harm contrary to **section 234** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the offence were as follows;

On the 24th day of January 2017 at Lusuka Village, Mbihi Sub-location in Vihiga County, jointly with others not before the court, they unlawfully did grievous harm to KENNETH OPATI KEGODE.

2. Before I consider the grounds of appeal, I must remind myself of the duty of the first appeal. I am required to analyse the entire evidence and come to my own conclusion bearing in mind that I neither heard nor saw the witnesses testify. The evidence before the trial court was as follows.

3. Kenneth Opati Kegode (PW 1) recalled that on 24th January 2017 at about 10.00am., he was going to cut grass for his cows at the river some distance away from his home. He saw the 1st appellant (A1) who was known to him. He greeted him but A1 did not respond. As he bent down, he was suddenly hit by A1 with the blunt side of the panga. The 2nd appellant (A2), who was also present told A1 to cut PW 1's hands. They took him to the river and A2 held his hands from behind while A1 cut his two fingers, the ring and middle fingers and also his big and fourth toe of his right foot. When A2 told A1 to cut his neck, PW 1 managed to run away as he was bleeding profusely.

4. Annah Amagove (PW 2), PW 1's wife, recalled that she heard her husband screaming and asking for assistance. When he came home he was bleeding profusely, his fingers and legs had been cut and he was bleeding profusely. She called her mother and they took him to hospital. Catherine Kegode (PW 4) recalled that she was informed that her son had been assaulted. She went to his home and found that his hand and toes had been chopped off.

5. Richard Kivugale, PW 3, testified that also heard screaming as he was preparing bricks at about 6.30am. When he went to the river he found A1 and A2 assaulting PW 1. He asked them why they were assaulting him and they told him that PW 1 was a thief. He saw A1 cut the PW 1 on the right hand and right leg toes. PW 1 managed to run away. He confirmed that he knew A1 and A2 as they were neighbours.

6. The investigating officer, PC Evans Rotich (PW 6), told the court that the incident was reported on 24th January, 2017. It had been minuted in the Occurrence Book and it was noted that PW 1 had been taken to hospital. When PW 1 and PW 2 came to the Police Station on 30th January 2017, he noted that the PW 1's two right foot toes and two fingers on his right hand were cut. Because of the injuries, PW 1 did not record a statement. They came back on the 9th February 2017 to record a statement whereupon he issued a P3 medical report. PW 6

testified that A1 was arrested while riding his motorbike on 24th February 2017 while A2 was arrested when he came to visit A1 at the police station.

7. Sammy Chelule, PW 5, the Clinical officer who produced the P3 medical report confirmed that PW 1 had had treated PW 1 on day he was injured. He explained that PW 1 had his 3rd and 4th fingers chopped off and the big toe and the 2nd digit chopped off. PW 5 explained that the injuries could have been caused by a blunt and sharp object and classified them as main.

8. The appellants denied the offence in their respective defences and called witnesses. In his sworn testimony, A1 told the court that on the material day, he left home at about 6.00am and proceeded to take his sister's child to school at about 6.30am. Thereafter he proceeded with his normal duties. He told the court that on the same day one of the elders, Erastus Dasmajor (DW 4) came home and told him that a person had been injured in their farm. He was arrested a month after the incident. He denied that he met the A2 on that day.

9. In his sworn statement, A2 testified that on 24th January 2017 at about 6.30am, he was preparing to go to school when an elder came and asked him whether he had heard about an incident that had taken place near the river. He went with the DW 4 to view the scene where they found a panga and some cut maize. He told the court he was later arrested on 25th February 2017 at Mbale Police Station where he had gone to visit A1.

10. Jackline Nyawira Kegode (DW 2) testified that A1 was his brother and A2 his nephew. She recalled that A1 used to pick her child from school every morning and on that day she picked her at her child at 6.00am who was supposed to be school at 6.30am.

11. DW 4 recalled that on the morning of 24th January 2017 at about 6.15am, he heard a woman screaming. When he rushed there he found PW 1's being washed on his legs by his wife. Before he could ask what happened, the Assistant Chief called him and told him to proceed to the scene where someone had been assaulted. He proceeded and along the way he found A2 and they proceeded to the scene where they found cut maize stalks and a panga. He took the panga to the Assistant Chief. He denied that there was any dispute between the families in the area.

12. The appellants contest the conviction on the grounds set out in the petition of appeal. They contend that the conviction was based on contradictory evidence and that it was based on conjecture. They also contended that the trial magistrate failed to consider their submissions. In short, I find that the main issue in this appeal is whether the prosecution proved its case beyond reasonable doubt.

13. I am satisfied that PW 1 was assaulted and he sustained grievous injuries as explained by himself, PW 2, PW 3 and PW 4. PW 5 confirmed that PW1's fingers and toes were chopped off hence he was subjected to grievous harm.

14. The question then is whether the appellants were the persons who injured PW 1. In their defence, the appellants raised an alibi defence. The law is settled that an accused person who raises the defence of alibi does not assume the burden of proving it. It is sufficient if the alibi raises reasonable doubt as to whether or not the accused was at the scene of the crime (see *Kiarie v Republic* [1984] KLR 739). This means that the burden always remains with the prosecution to prove that the accused committed the crime under trial.

15. Although the prosecution did not call rebuttal evidence, the testimony of PW 1 and PW 3 placed the appellant at the locus in quo. Although the prosecution witnesses gave different time when the offence could have taken place, I do not think this is fatal as the evidence of what happened is consistent in that the incident took place early in the morning and both A1 and A2 state that they heard from DW 4 that someone had been attacked.

16. In disposing of the alibi, I like the magistrate, find the testimony of PW 3 credible as he was an independent witness who found the appellant attacking PW 1. His evidence was consistent with the other evidence and remained unshaken on cross-examination. While the testimony of DW 2 and DW 3 opens the possibility that the appellant could have been somewhere else, it does not foreclose that fact that the appellants were part of a group that assaulted PW 1. I therefore reject the defence and affirm the conviction.

17. The appellant contest the sentence and contend that it was harsh and they ought to have given the option of a fine. On this issue, the court's jurisdiction to review the sentence is circumscribed. It has jurisdiction to interfere with a sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive (see *Wanjema v Republic* [1971] EA 493).

18. In the sentencing notes, the trial magistrate considered that the appellants were first offenders. He noted that the injuries caused permanent disfigurement and in light of the circumstances found that the custodial sentence was reasonable. I do not find any misdirection on the part of the trial magistrate and I am satisfied that a custodial sentence was warranted. Although the appellants were first offenders, their acts were deliberate and unjustified and would have even led to death.

19. This appeal is dismissed.

DATED and DELIVERED at KAKAMEGA this 2nd day of September 2019.

D. S. MAJANJA

JUDGE

Appellant in person.

Ms Ombega, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.