



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 29 OF 2018**

**(From Original Conviction and Sentence in Criminal Case No. 2841 of 2014 by the Chief Magistrate's Court at Kakamega)**

**BONVENTURE LUMWACHI.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGEMENT**

1. The appellant was convicted by Hon. E. Malesi, Senior Resident Magistrate, on 25<sup>th</sup> May 2017, of grievous harm contrary to section 234 of the Penal Code, Cap 63, Laws of Kenya, and was accordingly sentenced to serve four years imprisonment. The particulars of the charge against the appellant were that on 5<sup>th</sup> September 2014 at Nyayo Tea Zone, Kakamega Municipality, Kakamega County, he unlawfully maimed Zachariah Ngaira.
2. He also faced a second charge of illegally transporting alcohol contrary to section 27(1)(a), as read with section 27(4) of the Alcoholic Drinks Act, No. 24 of 2010. The particulars of the second charge were that on the same date and at the same place stated in the first count, he was found illegally transporting forty litres of *chang'aa* using motorcycle registration mark and number KMCZ 173K without a licence.
3. The appellant pleaded not guilty to the charges before the trial court, and a full trial was conducted. The prosecution called six (6) witnesses.
4. The complainant, Zachariah Arambe Ngaira, was the first to take the witness stand, as PW1. He stated that he was the Assistant Chief for Mahiakalo, and testified that on the material day he got information at 5.00 AM that someone was transporting *chang'aa* from Senyende to Kakamega. He tracked him down on a motorcycle, and established that it was the appellant. He stopped him, but the appellant hit him on the left cheek. A crowd formed and came to his rescue. Administration police officers came to the scene and arrested the appellant. He was found ferrying two jerricans of *chang'aa*. He said he knew the appellant before the incident. PW2, Zaddock Shisundi, a watchman at a nearby primary school, was among the persons who witnessed the appellant attacking PW1, and was among those who went to PW1's rescue. Administration police officer Ramadhan Osore Nyakola (PW3) was the one who arrested the appellant. Boaz Shikhalo (PW4) was another member of the public who came to the rescue of PW1 upon finding him being assaulted by the appellant. Patrick Mambiri testified as PW5. He was the clinical officer who attended to PW1. He testified as to the injuries that PW1 sustained and produced the P3 form that he prepared on the said injuries. Police Constable James Kangara (PW6) investigated the matter and produced the exhibits shown to the court by PW1.
5. The appellant was put on his defence. He gave a sworn statement and called a witness. He merely denied the offence. He claimed that he was waylaid on the road as he went about his chores, attacked, injured and thereafter arrested by the police. Lucy Boraje testified as his witness, and largely repeated the version of events given by the appellant.
6. After reviewing the evidence, the trial court convicted him of the main charge, and sentenced him as stated in paragraph 1 of this judgement. He was acquitted of the second charge of transporting *chang'aa* illegally.
7. Being dissatisfied with the sentence the appellant appealed to this court and raised several grounds of appeal. He averred that the trial court did not properly evaluate and appreciate the evidence adduced, that the evidence was wanting and contradictory, that the trial court had neglected the defence evidence, and, specifically, that there was no *mens rea*, and that the sentence imposed was excessive.
8. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic (1972) EA 32*** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

*“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the*

*appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."*

9. The appeal was canvassed on 27<sup>th</sup> June 2019. The case for the appellant was presented by his advocate, Mr. Elung'ata, while Mr. Ng'etich, Senior Prosecution Counsel, stated the case for the state.

10. In his submissions, Mr. Elung'ata submitted that the complainant was the author of his own misfortune for waylaying and attacking the Assistant Chief. He also urged the court to consider the issue of *mens rea*. Mr. Ng'etich submitted that the state had proved its case beyond reasonable doubt, saying that the appellant was arrested at the scene of the crime by members of the public. He stated that the appellant was recognized by the witnesses as he was someone that they had known previously.

11. The first issue the appellant raised is that the trial court did not evaluate the evidence adduced nor appreciate it. I have gone through the record of the trial court. I have noted that the trial court analyzed the evidence adduced in paragraphs 6, 7, 8, 9 and 10 of the judgment. It considered the testimonies of both the prosecution and defence witnesses, and I am not persuaded by the argument that the evidence adduced was not evaluated. Reading through the judgment I am satisfied that the trial court appreciated the evidence as adduced and came to a logical conclusion founded on that evidence.

12. The second issue is that the evidence was wanting and contradictory. I have carefully scrutinized the record of the trial court. I have not found anything suggesting that the evidence was wanting or contradictory. The material on record is clear and consistent. The prosecution witnesses were persons who knew the appellant, and he was apprehended at the scene. The testimonies of all three state witnesses who were at the scene are consistent and credible. I am not persuaded that the same was wanting and contradictory.

13. The other argument is that the defence evidence was not considered. That cannot be true. In paragraph 9 of the judgment, which is quite lengthy, the trial court devoted itself to the defence evidence. It analyzed the sworn statements of the appellant and that of his witness, and arrived at concrete findings or conclusions on the same. It cannot, therefore, be said that the trial court neglected the defence.

14. The issue of *mens rea* was raised. The *mens rea* element for assault generally is the intention to cause harm. The appellant, through his advocate, appeared to concede that the appellant did indeed cause injury to the complainant when he blamed him for what befell him. Intention is inferred from the circumstances. The accusation was that the appellant was ferrying illicit brew, and even though the charge was dismissed, I note that the dismissal was on a technicality. The circumstances were that an officer of the law was out to catch him breaking the law, and it was only natural that he would act intentionally in the face of that to stop whoever was about to arrest him, if he was not minded to submit to the law.

15. The last issue was that the sentence imposed was excessive. The offence charged is defined in section 234. The penalty prescribed is a maximum of life imprisonment. I do not, therefore, find imprisonment for four years to be excessive in the circumstances.

16. In view of everything that I have said above, it is my finding that the appeal herein has no merits. I shall accordingly dismiss it, uphold the conviction and confirm the sentence.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS .....9th.....DAY OF .....October,.....  
2019**

**W MUSYOKA**

**JUDGE**