



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 21 OF 2019

AHMED ADAN IBRAHIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgement of Hon. P. N. Areri (PM) in the Principal

Magistrate's Court at Mandera Criminal Case No.576 of 2018 delivered on 7th May, 2019)

JUDGEMENT

1. The appellant was charged with assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars being that on the 6th day of December 2018 at township area in Mandera East Sub-County within Mandera County, willfully and unlawfully assaulted one Omar Mohamed Issack thereby occasioning him actual bodily harm.

2. He was found guilty, convicted and sentenced to serve 4 years imprisonment.

3. He thus filed instant appeal and set out 9 grounds of appeal which can be compressed into –

- ***Whether prosecution proved its case beyond reasonable doubt?***
- ***Whether there were material contradictions of witness testimonies sufficient to warrant allowing appeal?***
- ***Whether sentence was excessive in the circumstances?***

4. Parties agreed to canvas appeal via submissions.

APPELLANT'S SUBMISSIONS:

5. It is submitted that, the prosecution did not prove beyond reasonable doubt the alleged injuries. Every witness had a different account of the alleged injury.

6. That the contradictions and inconsistencies in the evidence given by the prosecution witnesses are of such nature that it leaves doubt to the prosecution's case which should be resolved in favour of the appellant person. The contradictions as to whether the alleged injury was a bleeding cheek or right hand and a cut on the second finger or a swollen right hand palm creates a doubt which should have resolved in favour of the appellant.

7. It is submitted that, the appellant has continuously denied assaulting the complainant (PW1) from the moment he took plea to throughout the trial.

8. That, the PW4 stated in his evidence that the young man said that the car was his and that the chief sold his plot. A senior chief and a local leader, the chief was under obligation to disclose that information to the trial court fact that the chief arbitrated. Judicial immunity does not extend to acts that are criminal and committed outside the official duty of a judicial officer.

9. It is contended that one of the principles which an appellate court can consider in determining whether to interfere with a sentence imposed is the magistrate overlooking some material factors and this is a material factor.

10. It is submitted that there were contradictions by the prosecution witnesses, the complainant (PW1) was not a credible witness and his allegation should have been treated as not credible. The complainant is a senior chief of Barwaqo location and the appellant lives and work in

his location. In cross examination by the appellant, the complainant PW1 stated that he had never seen appellant before.

11. It is argued that, it was not plausible that a chief would not know someone from his location but the truth lies in the evidence given by clinical officer who treated him in Mandera Referral Hospital (PW5) who stated that he gave a history of having been assaulted by a person known to him.

12. The witness gave contradicting accounts on the injury suffered by the complainant (PW1). The complainant (PW1) said he was injured on the right hand.

13. PW3 said PW1 told him he was injured on the right hand even though he was an eye witness and present at the scene of the crime.

14. PW4 a police traffic officer said that he did not know if the person in the car was injured. He was one of the first persons at the scene and who arrested the appellant. He did not see any injury. It would have been difficult not to see if there was any bleeding part of the complainant.

15. PW5 the clinical officer who treated the complainant said the patient had a swollen right hand with a cut on the second finger. PW5 seems to be creating an injury that was not said by the PW1 or any other witness.

16. In cross examination, PW2 said that the appellant wore a maroon T-shirt and a trouser. PW3 said in cross examination that appellant was wearing a trouser and a shirt. In his sworn statement PW4 said appellant was wearing a dirty grey overall.

17. In the judgement on record, the offence is said to have taken place in Township Location when the charge sheet and the complainant said it happened in Kamor Location.

18. Just as are there contradictions in the evidence of the prosecution witnesses on the alleged injury, the learned magistrate seemed to create more injuries where he said in his judgement that the appellant person who was using a piece of metallic pipe hit the complainant several times on the left cheek. He further said that the complainant suffered left cheek bleeding.

19. Nowhere in the evidence given by the prosecution witnesses has any blood or bleeding or several hits on the cheek mentioned. The learned magistrate seemed fishing for more evidence that was not adduced by the prosecution witnesses.

20. It is appellant's submission that the contradictions are overwhelming and the magistrate should have given weight to these contradictions and it should have created a doubt. For these contradictions the case was not proved beyond reasonable doubt. The main prosecution witness was not credible and he was using his office to fix the appellant.

21. In ***James vs Republic [1950]*** it is held that there are principles an appellate court will consider in determining whether to interfere with the sentence imposed by the trial court. They include if the judge acted on wrong principles or overlooked some material factor and if the sentence is manifestly excessive. In this case it is manifestly clear that the sentence is harsh and excessive. The appellant is a first time offender and he should have been given a fine.

22. The appellant is a first time offender and the judge should have been lenient with him.

23. The appellant is a young man and a first time offender, as in the persuasive case **J. Kariuki** said in ***Lawrence Omondi vs Republic Criminal Appeal No. 32 of 2017***, the magistrate ought to have been persuaded to temper justice with mercy, the magistrate should have been reasonable in his sentencing of the appellant.

24. The respondent opposed appeal and argued that conviction and sentence were justified in law. Appellant was jailed 4 years and maximum is 5 years.

25. PW1 narrated how he was assaulted. PW3 corroborated his testimony. PW4 witnessed also the incident. PW5 medical officer confirmed the injuries contradictions are not material to warrant allowing appeal.

EVIDENCE ADDUCED:

26. PW1 the complainant who is the chief of Kamor Location in Mandera told the court that on that day he was attending a security meeting at Township chaired by the Deputy County Commissioner Mandera East Sub-County.

27. The meeting was attended by chiefs from the area including PW2. He said that at around 11.00 am PW2 wanted to leave and asked him to move his vehicle which was parked behind his and as the complainant was reversing he was suddenly attacked by the appellant through the driver's window.

28. The appellant who was using a piece of metallic pipe hit him severally on the left cheek and right hand causing him injuries. PW2 who was standing nearby saw what was happening and went to his rescue. PW3 said he witnessed the incident.

29. PW4 traffic police officer said he was on duty with his colleagues when they saw appellant who was in a dirty grey overall riding a motorcycle while carrying a metal rod.

30. As they watched the appellant jumped off the motorcycle and attacked the complainant in his motor vehicle registration No. KBV 863G

through the driver's window. PW4 and his colleague went and arrested the appellant and escorted him to Mandera Police Station where they handed him to PW6 who investigated the case and issued PW1 with a P3 form. PW1 went to Mandera County Referral Hospital where he was treated and P3 form filled.

31. Clinical officer Kiprotich Bii (PW5) told the court that on 6/12/2018 he treated the complainant who gave a history of having been assaulted by a person known to him and sustained injuries on the left cheek and on the right hand.

32. PW5 said the left cheek was bleeding while the right hand the palm was swollen and numb. He assessed the degree of injury as harm. PW5 produced the treatment notes as exhibit 2 and P3 form as exhibit 3. The investigating officer PW6 produced a meter long metallic pipe which was used in the assault as exhibit 1.

33. In his defence, the appellant stated that they fought .

ISSUES

34. After going through the evidence on record and the submissions , I find the issues are ;

. *Whether prosecution proved its case beyond reasonable doubt?*

. *Whether there were material contradictions of witness testimonies sufficient to warrant allowing appeal?*

. *Whether sentence was excessive in the circumstances?*

ANALYSIS AND DETERMINATION

35. It is the law in Kenya as entrenched in the constitution under **Article 50 (2) (a)** that an accused person is presumed to be innocent until the contrary is proved. The evidence Act Cap 80 of the Laws of Kenya at **section 107 (1)** provides thus: **"whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist."**

36. As to what constitutes the burden of proof beyond reasonable doubt the case of *Miller vs Minister of Pensions [1947] 2 ALL ER 372 – 373* provides as flows in a passage alluded to me considered the greatest jurist of our time Lord Denning:

"That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."

37. In our criminal justice system there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state in a court of law. That burden of proof of an accused guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person.

38. I have evaluated the evidence of the prosecution and the defence offered and I find there is no dispute that the complainant was on 6/12/2018 injured see pw5 testimony. This brings me to the issue of whether he was injured in fight with the appellant person or as a result of being assaulted by the appellant person.

39. From the evidence on record the incident happened at 11.00 am in broad daylight and there was several eye witnesses including pw 2,3 and 4 who said the complainant was inside his vehicle when the appellant attacked him through the window with a metallic pipe.

40. None of the witnesses saw the alleged fight nor talk of fight of the two. The appellant never during cross-examination raise the issue of the fight between him and the complainant .Fight entails confrontation between the contestants. Oxford English Dictionary defines fight to wit *take part in a violent struggle involving the exchange of physical blows or the use of weapons.*

"the men were fighting "Similar: brawl come to blows exchange blows attack/assault each other hit/punch each other box struggle.

41. No body witnessed that nor did the appellant elaborate in his defence how the fighting incident happened and unfolded.

42. One wonders how a fight between two people of whom one is in the car while the other is outside the vehicle proceeded. The appellant did not adduce evidence or call a witness to prove his allegation that they fought with the complainant. His allegation cannot therefore be true and for that reason it was for rejection the same.

43. I agree with trial court that, the appellant person did not challenge the medical evidence presented and neither did he rebut or controvert the same. He did not deny assaulting the complainant but attempted to justify the same saying they fought.

44. As I have said the fighting allegation was false thus properly rejected by the trial court. The upshot of the foregoing is that I find that the

prosecution has proved the case against the appellant person beyond any reasonable doubt.

45. Thus the court finds no merit on conviction and same is upheld. On sentence, the appellant was a first offender but he never mitigated when given chance. The maximum sentence of offence charged was 5 years but was awarded 4 years imprisonment.

46. The appellant submitted via his counsel that, he was a first time offender and the judge should have been lenient with him. And as in the persuasive case **J. Kariuki** said in **Lawrence Omondi vs Republic Criminal Appeal No. 32 of 2017**, the magistrate ought to have been persuaded to temper justice with mercy, the magistrate should have been reasonable in his sentencing of the appellant.

47. I agree in this case in all circumstances to temper justice with mercy thus the court makes the following orders ;

i) The conviction is upheld.

ii) The sentence of 4 years imprisonment is set aside and the appellant is sentenced to a fine of Kshs. 70,000/= and in default to serve 2 years imprisonment.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 19TH DAY OF NOVEMBER, 2019.

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C. KARIUKI

JUDGE