



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 33 OF 2018

JOSEPH KALUI MUIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from original conviction and sentence in Kilungu SRM Criminal Case No. 246 of 2018)

JUDGMENT

1. **Joseph Kaloi Muia** the Appellant was charged with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars were that the Appellant on the 21st day of March 2018 at Kyamuseva village, Kikoko location, Kilungu sub-county within Makueni county, did grievous harm to **January Wambua Muia**.

2. He denied the charge and the matter proceeded to full hearing. The prosecution called seven (7) witnesses while the Appellant gave a sworn defence and called one witness. The learned trial Magistrate found the Appellant guilty, convicted and sentenced him to a fine of Kshs. 150,000/= in default to serve three (3) years imprisonment.

3. He appealed raising the following grounds:

- i. **That**, the learned Magistrate erred in law and in fact in finding that the complainant had identified his assailant when the evidence pointed to the contrary.
- ii. **That**, the learned trial Magistrate erred in law and in fact in failing to find that Pw2 and Pw3 were more likely suspects of the crime than the accused person.
- iii. **That**, the learned trial Magistrate erred in law and in fact in failing to find that the prosecution evidence was full of contradictions and incapable of being relied upon to sustain a conviction.
- iv. **That**, the learned trial Magistrate erred in law and in fact in failing to consider adequately or at all the defence and alibi of the accused person.
- v. **That**, the learned trial Magistrate erred in law and in fact in finding that the prosecution had proved its case beyond reasonable doubt when it had not.
- vi. **That**, the learned trial Magistrate erred in law and in fact in failing to grant the accused person the benefit of doubt.

4. A summary of the prosecution case is that the complainant **January Wambua Muia (Pw1)** and the Appellant are brothers. On 21st November 2018 at 6.00 p.m, Pw1 was at home when he went to bring back his cattle to the homestead. Thereafter he went to the kitchen to check on his supper, when he saw the Appellant behind him. He grabbed him on the neck and after a few exchanges he was hit on the head. He screamed for help and found himself in hospital as he had become unconscious.

5. In cross examination, he said the lights were on in the kitchen. Further that this was not the first time the Appellant was assaulting him. He was with Mwendwa and another when the incident occurred though in cross examination he said the two boys had not worked for him that day.

6. **Pw2 Stephen Musyoka** stated that on the day in issue he went to Pw1's home at 7.00 p.m, and found the kitchen door closed. As he went towards the sitting room of Pw1 he saw the Appellant peeping from the said sitting room, and there were murmurs from the kitchen. He went and called mama Cleophas who came together with neighbours who took Pw1 to hospital. In cross examination he said he went to Pw1's home to look for employment. He was with Pw3 **Cleophas Mwendwa** who gave similar evidence to that of Pw2. In cross

examination both Pw2 and Pw3 denied having assaulted Pw1.

7. **Pw4 Purity Mueni Makau** said she was called by Pw2 and Pw3 who informed her that they had seen someone in Pw1's house. She went to check and screamed for help. They found Pw1 injured and lying in a pool of blood with a cut on the head and eye. His daughter was called and they took him to hospital. In re-examination she said Pw2 and Pw3 informed her it is the accused they had seen.

8. In cross examination she confirmed that Pw1 is her husband's brother while Pw3 is her son. She further said they informed her that something was amiss at Pw1's home, and Pw1 had told them there was somebody in the house. They found no one and he never informed her who had beaten him. She later met the Appellant who told her, her father wanted to cut some trees.

9. **Pw5 Lucy Muthembwa Wambua** is a daughter to Pw1. She testified that she was called by Pw2 on 21st March 2018 at 7.00 p.m. and informed of the assault on Pw1. She organized for his treatment. She knew the assailant later when Pw1 mentioned the Appellant.

10. **Pw6 Eric Kasiamani** the clinical officer testified that upon examination Pw1 was found to have;

- Fracture on the mandibular bone.
- Deep cut wound on forehead involving the orbital bone.
- Injuries on the right eye – permanent loss of sight in right eye.
- Injuries were 19 days old.

He produced the P3 form as EXB2 and treatment notes as EXB1.

11. **Pw7 Inspector Rama Mwashoi** received a report from Pw5 who gave him the name of the Appellant as the assailant. The Appellant was arrested as Pw1 underwent treatment. He visited Pw1 whom he found unconscious. He believed the statements by Pw2 and Pw3 who said they had seen the Appellant in Pw1's house.

12. The Appellant in his sworn defence testified that he was a driver at Thomeandu boys secondary school since 2016. On 21st March 2018 he worked upto 5.00 p.m. when he was informed of a visit to the national museum the following day. He went home to his family. At 9.00 p.m., he heard a knock at his door by persons he identified as police officers plus Boniface a son of Pw1 who wanted the police officers to leave him to them so that they could kill him. He was arrested and charged.

13. He denied the charge and/or threatening Pw4's father. He stated that Pw1 had been beaten by drunkards and even called him as a witness but later called him stupid. He explained that there is a land dispute between him and Pw1 who is occupying his portion of land. He confirmed that Pw1 is his step brother. He produced documents DEXB 1- 3 to confirm where he works.

14. His witness was **Dw2 Phyllis Kaloi** who is his wife. She gave evidence similar to that of the Appellant in respect to the happenings of 21st March 2018. In cross examination she said that the Appellant arrived home at 6.45 p.m. on the day in issue. She said Pw1's house and their house are very close. She denied any knowledge of a dispute between Pw1 and the Appellant.

15. Mrs. Kalinga for Appellant filed written submission which she highlighted during the hearing. On the 1st ground she submitted that the complainant did not identify or mention the assailant when he made the first report. She referred to portions of the proceedings to confirm this. It was her submission that failure to mention her assailant at the earliest opportunity meant he did not know him or her. To support this submission she cited the following cases:

- *Waita Munyoko -Vs- Republic Machakos HC Criminal Appeal No. 242 of 2014.*
- *Maitanyi –Vs- Republic [1986] KLR 198.*
- *Ephantus Gakindu Nyaga Nyeri Criminal Appeal No. 99 of 2014.*

16. She contended that the complainant's failure to mention the Appellant's name to any of the witnesses who came to his rescue and even at the health centre where he was first treated clearly shows he did not know his assailant. That his subsequent mention of the Appellant was an afterthought and unreliable.

17. She argued that Pw1 and Pw2 ought to have been treated as suspects, as they had been found at the scene. She submitted that the Appellant's alibi was dismissed with no reasons to support the dismissal yet the same was a strong one. She referred to the case of **Kimotho Kiarie –Vs- Republic Nairobi Criminal Appeal No. 93 of 1983**, to support this argument.

18. Counsel submitted on inconsistencies in the evidence of the prosecution witnesses, especially Pw1 – Pw4 on what happened and what they saw. She asked the court to allow the appeal.

19. Mrs. Owenga for the Respondent opposed the appeal saying there was sufficient evidence to link the Appellant to the offence. She submitted that it was clear in the proceedings that Pw1 saw the Appellant behind him and that Pw2 and Pw3 identified him. That he was

placed at the scene.

20. It was her further submission that the *alibi* defence was not sound as the Appellant had been seen at the scene by witnesses who reported. There was therefore nothing to make them accomplices. Further that Pw2 and Pw3 explained themselves well on all aspects of the offence.

Analysis and Determination

21. This is the first appellate court and as such it is guided by the principles set out in the case of **Okeno –Vs- Republic [1972] EA 32** which held that;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya –Vs- Republic [1957] EA 336) 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 (Shantilal M Ruwala –Vs- Republic [1957] EA 570). 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 magistrate’s findings should 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, see Peters v Sunday Post [1958] EA 424.”

22. I have carefully considered the evidence on record, the grounds of appeal, the submissions by both parties and the authorities cited. I find the issues falling for consideration to be as follows: -

- i. *Whether the complainant (Pw1) was injured and the degree of injury.*
- ii. *Whether the Appellant was identified as the assailant.*
- iii. *Whether in the final analysis the prosecution proved its case beyond reasonable doubt.*

Issue no. (i) whether the complainant (Pw1) was injured and the degree of injury.

23. Pw1 testified that on the date of attack he was hit on the head with something and he became unconscious. Pw4 saw Pw1 with a cut on the head and eye. Pw2, Pw3 and Pw5 said the complainant was injured but they did not state where the injuries were.

24. Pw6 the clinical officer found Pw1 to have suffered the following injuries;

- *Injuries on head and neck.*
- *Fracture on the mandibular bone.*
- *Deep cut wound on the forehead involving the orbital bone.*

25. From the above analysis, there is no slightest doubt that Pw1 suffered serious injuries which were assessed as grievous harm (EXB2). The answer to issue no. 1 is therefore in the affirmative.

Issue no. (ii) whether the Appellant was identified as the assailant.

26. The incident is said to have occurred in the evening around 6.00 p.m. and 7.00 p.m. Pw1 was alone at his home, in his kitchen and lights were on. In cross examination, he said he was seated in his kitchen where he was held by the neck from behind. He said he was able to see the Appellant who is his brother. He fell down unconscious upon being injured. He confirmed having been alone at his home when this incident occurred.

27. It is true as submitted by Mrs. Kalinda that from the extracts cited by her, Pw1 did not mention the name of his assailant. Pw1 in his evidence mentions that he became unconscious as a result of the injury on the right eye which lost sight. The injury was assessed as grievous harm (EXB2). The investigating officer who visited Pw1 at Kilungu sub-county hospital said he found him unconscious with a cut on the head, neck and with the right eye oozing a yellow substance.

28. This is what Pw2 states at page 6, lines 7-9.

“We heard the complainant calling from the kitchen. We called neighbours who came. We found the complainant injured.”

From this it is clear that Pw1 was alert and that’s why he was able to call from the kitchen. Pw2 makes no mention of Pw1 being unconscious.

29. Pw3 who was with Pw2 states as follows at page 7 lines 10-15;

“We also heard moans from the kitchen. There was electric bulb on at that time. I called my mother who summoned neighbours. We found the complainant down in the kitchen. He was bleeding profusely and injured. He was taken to hospital.”

He was also unconscious at the time. He was unable to speak.”

30. Pw4 who had been called by her son (Pw3) and his neighbour (Pw2) states at page 12 lines 15-18 and page 14 lines 1-12.

“We entered together with them. I called him out while outside. He asked us to go and assist him as there was someone inside the house. I screamed for help and neighbours came to his rescue……. The complainant was in the kitchen. He did not inform me who had beaten him.”

Again from this evidence it is clear that there was communication between Pw1 and Pw4. It cannot therefore be said he was unconscious at the time.

31. Pw5 is Pw1’s daughter who was called and was able to take her father to hospital. At page 9 lines 6-8; lines 10-12;

“I found my father was seriously injured. We took him to Kilungu hospital. I went to report the case…….at the time of treatment he could call the name of the accused. He identified accused as the assailant.”

According to Pw5 the father (Pw1) was conscious while at the hospital and even gave the name of his assailant.

32. Pw6 the examining clinical officer did his physical examination and also used the treatment notes (EXB 1) in the exercise. The information in treatment notes is not shown to have been given by a 3rd party. It was given by Pw1 himself. He clearly explained what happened, to those who took the notes.

33. This is what is recorded in the treatment notes (EXB 1);

“Patient brought in by relative. History of being assaulted in his house by person not known to him. He reports he was in his house suddenly was hit by blunt object on the neck from behind then cut on the temporal left side of right eye. Bled a lot. No idea what was the cause of assault. Happened at Kiboko at around 1930 hours. No history of loss of consciousness ...O/E – talking, mild confusion.”

34. The important facts I have picked from the treatment notes are;

(i) Pw1 did not know who had assaulted him.

(ii) He was hit on the neck from behind by a blunt object then on the right eye.

(iii) He had no idea as to the cause of the assault.

(iv) He had no history of loss of consciousness.

(v) He was talking though he had mild confusion.

35. Pw7 who is the investigating officer stated that upon receipt of the report from Pw5 he went to the hospital (Kilungu sub-county) same night and found the complainant unconscious. Pw1, Pw3 and Pw7 told the court that Pw1 was indeed unconscious and could not talk. On the other hand, witnesses like Pw2, Pw4, Pw5 and Pw6 confirm that indeed Pw1 was conscious. All these are prosecution witnesses. Even the doctor’s EXB 1 shows that Pw1 had no history of being unconscious.

36. Pw5 stated that while on treatment Pw1 had mentioned the Appellant as the assailant. It was however Pw7’s evidence in cross examination that the report was made by Pw1’s daughter called Lucy Wambua (Pw5). That the report was that Pw1 had been assaulted by a person known to him. Pw7 was not given the Appellant’s name as the assailant. Why would that be the case if Pw5 who made the first report and claims to have been given the name of the Appellant by Pw1 while being treated?

37. Another critical issue is why Pw1 who was talking and conscious did not give the name of his assailant to Pw2, Pw3, Pw4 and the medical staff who first attended to him at the hospital as per EXB 1? In fact at the hospital he was categorical that he did not know his assailant. (See treatment notes EXB 1).

38. Pw2 and Pw3 are said to have been the first people at the scene. They said they saw the Appellant in Pw1’s house as he peeped through the window. They then ran to call Pw4 who is the mother to Pw3. Going by this evidence it would be expected that Pw2 and Pw3 would give Pw4 the name of the person they had seen in the house of Pw1. A reading of the evidence of Pw2 and Pw3 shows that none of them gave the name of the Appellant or anybody else to Pw4.

39. At page 8 lines 4-7, Pw4 in her evidence in chief states;

“I do recall on the 21/03/2018 at 7.00 p.m., I was called by Cleophas and Musyoka. They asked me to go and check on their grandfather. They informed me that they had seen someone inside the house.

In re-examination she says;

“I was called by Cleophas and Stephen. They informed me that they saw the accused person hereon.”

40. Was it so difficult for these young people to tell Pw4 that they had seen Joseph Kalui Muia in Pw1’s house if that was the case? That should have come out in Pw4’s evidence in chief as it was very crucial and material evidence. She only mentioned that in re-examination.

41. The issue of identity is very crucial in a case under circumstances as those prevailing in this case. In the case of **Simiyu and Another – Vs- Republic [2005] I KLR 192**, the court of appeal stated thus;

“In every case in which there is a question as to the identity of the accused, the fact of their having been a description given and terms of the description are matters of the highest importance.....the omission on part of the complainants to mention their attackers to the police goes to show that the complainants are not sure of the attacker’s identity.”

42. The complainant (Pw1) is said to have been hit with a blunt object from behind on the head and neck. The injuries he suffered were very serious and I tend to agree with him that he fell down unconscious. The question is whether he ever gave any name of his assailant to Pw5 or gave any history as is contained in EXB 1.

43. There is no dispute that Pw1 was assaulted and suffered serious injuries. My finding however, is that there are a lot of inconsistencies and contradictions in the evidence presented before the court by the prosecution witnesses. It is not possible to know who among them is truthful. In the case of **Kiilu & Anor –Vs- Republic [2005] I KLR 174** the court of appeal had this to say of such witnesses;

“The witness upon whose evidence it is wproposed to rely should not make an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which make it unsafe to accept his evidence.”

44. It is not lost to the mind of this court that Pw1 and the Appellant are brothers. Pw1 told the court that this incident of beating by the Appellant was not the first of its kind. He also in cross examination said he has a grudge with the Appellant. There is therefore the issue of the grudge between the two brothers and the inconsistent and contradictory evidence.

45. Amidst all this the Appellant gave his defence raising an alibi and called his wife as a witness. With the evidence presented by the prosecution and defence, I find that he was not properly placed at the scene and his defence was not therefore displaced.

46. The conclusion is that the Appellant may have or may not have committed this offence. The Appellant should have benefitted from that doubt.

47. I find merit in the appeal which I allow. The conviction is quashed and sentence set aside. Any fine paid to be refunded to the Appellant forthwith.

Orders accordingly.

Delivered, signed & dated this 19th day of November, 2019 in open Court at Makueni.

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Hon. H. I. Ong’udi

Judge