



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 34 OF 2018**

**YUSSUF SALAT MOHAMED.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the Judgment of Hon. J. J. Masiga (SRM) in the Chief***

***Magistrate's Court at Garissa Criminal Case No.1477 of 2011, delivered on 15<sup>th</sup> June, 2018)***

**JUDGEMENT**

1. The appellant was charged in **Count I** with offence of grievous harm contrary to section 234 of the Penal Code. Particulars being that on the 31<sup>st</sup> day of July, 2011 at Bula Iqra in Garissa township within Garissa County, the appellant person unlawfully did grievous harm to **Sofia Abdi Ibrahim**.

2. In **Count II** the appellant person was charged with malicious damage to property contrary to section 339 of the Penal Code. Particulars are that on the 31<sup>st</sup> day of July, 2011 at Bula Iqra area in Garissa County within Garissa County, the appellant person jointly with others not before court, willfully and unlawfully damaged 14 concrete fence poles valued at Kshs.48,000/= the property of **Sofia Abdi**.

3. In **Count III** the appellant person was charged with stealing contrary to section 275 of the Penal Code that on the 31<sup>st</sup> day of July 2011 at Bula area in Garissa township within Garissa County, the appellant person jointly with others not before court stole 18 iron bars valued at Kshs.25,000/= the property of **Sofia Abdi**.

4. He pleaded not guilty and thus matter proceeded into full trial. He was found guilty and was convicted and sentenced to serve eight (8) years imprisonment on Count I, one (1) year imprisonment on count II and two (2) years imprisonment on Count III.

5. Being aggrieved by above verdict he lodged instant appeal and set out the following grounds of appeal:-

***(1) That the learned magistrate misdirected himself on the law and fact in convicting and sentencing the appellant whereas the prosecution had not proved their case beyond reasonable doubt.***

***(2) That the learned magistrate erred in law and fact for failure to fully analyze the appellant's defence so as to know what actually happened on the material day.***

***(3) That the learned trial magistrate erred in law and fact by failing to explain to the appellant the substance of the charge facing him once a ruling on a prima facie case had been made.***

***(4) As such, the learned magistrate erred in law and fact by sentencing the appellant to such a callous and capricious sentence under the circumstances.***

6. Parties were directed to canvass appeal via submissions.

**APPELLANT'S SUBMISSIONS:**

7. There is a huge contradiction in term of time, simply because complainant says she was assaulted at 4.00 pm while the PW2 says it was 9.00 am. It is per his claim that the appellant person came and started chasing fundis. Where are these fundis? They are very crucial witnesses if they can be available and come to testify because the claims of chasing fundis are not true. He further claims that the appellant attacked the complainant with a Somali sword of which the owner of the sword is unknown because the said sword was found in the hands of

PW2 when he goes to police station to record his statement. This has been confirmed by himself when he said he is the one who took the sword to the police station. PW1 claims to be a knife while PW2 said it was a sword. There is a difference between a sword and a knife so the question is which knife was used? Or which sword was used to attack.

8. The complainant in cross examination PW2 says, “*me and my brothers were carrying the sword*”, meaning both of us have a sword. So the swords were more than one and the exhibit which was brought before court is only one sword, where are the other sword? He further states that the appellant attempted to beat the complainant meaning the appellant did not beat the complainant but attempted to do so.

9. PW3 a passerby stated that as he was walking toward town, he met people quarreling, the appellant was beating the complainant by the name Sofia, the time was 6.00 pm. Here in terms of time of assault is a huge contradiction whereby PW1 says it was 4.00pm and PW2 says it was 9.00 am. As per this observation, there was no assault committed it is just a framing by prosecution witness with an intention of destroying appellant’s life because nobody gives exactly time of the said offence was committed.

10. PW3 contradicted himself when he said the appellant person was having a Somali sword and he moved on and say that appellant person was beating the complainant with a panga using the blunt side of a panga in company of his two brothers.

11. The difference between a sworn and a panga has not been substantiated by the said witness that’s PW3. The said offence was committed by more than one person according to the PW3’s statement that the appellant, and his brothers. The question is whether there were other people. Why is the appellant person only who was arrested and linked with such kind of the offence?

12. In cross examination, PW3 told the court that he was digging holes with PW2 while in his recorded statement he claimed that he was just passing by when he saw people quarrelling. The question is which one was passing by? Who saw people quarrelling? The question is which one was passing by and this one digging holes with the PW2. Where did he come from? It is very clear that there is a bit lie, as per these claims of PW3, PW4, who was handed over the duty of conducting investigations by his colleague by the name PC Manuba. He never conducted thorough investigations and instead he was hand over a file and the exhibits without visiting the scene of crime. He just perused the file and came up with an idea of substituting the charges from assault to grievous harm. His claims were worthless because he did not visit the scene of crime as per law require of him to do so. Very interesting to note that he is not the one who arrested the appellant. PW1 claimed that it was a slight cut on the right side of the face but not a deep cut as PW3 states.

13. The first clinical officer who was called to testify was thrown out of order due to his claims that he never worked with the officer who treated the complainant. If he was not the one who attended the complainant why was he called to give his testimony? The complainant herself after seeing that the doctor was chased away she decided to move to another hospital seeking treatment. She moved from Garissa General Hospital to Iftin Su-County Hospital. Why did he choose to transfer from one hospital to another hospital for P3 form to be filled? Why did it took too long (20) days for the complainant to be treated?

14. The question which remains in appellant’s mind is, that how can a witness carry an exhibit upto police station? Is he an investigating officer to this case? According to the law it is the duty of the investigating officer to visit the scene of crime and collect the exhibit and not the witnesses. How then can witnesses carry the exhibit to police station. Who is the owner of that exhibit? All in all the appellant have never touched the complainant as his defence at the same time as indicated by all defence witnesses. All what has transpired is a grudge of a person who wants to grab his wife’s land of which they decided to frame the appellant due to his strong stand to defend what complainant wanted to do.

#### RESPONDENT’S SUBMISSIONS:

15. The prosecution called a total of 5 witnesses. In the evidence of the complainant she gave a graphical account on how she received the information that someone had damaged the fence, the precursor to the case. She went to the locus and found the appellant in company of other people. Upon asking why he had damaged the fence, the appellant started attacking her on the right hand, right side of the face, on both knees and her shoulder. The appellant was armed with a sword/panga.

16. The complainant acknowledged that the injuries on the knee were as a result of falling on the stones after being pushed by the appellant.

17. PW2 was a clinical officer who produced the P3 form on behalf of the colleague who was not readily available. The injuries were confirmed as follows:

- *On the face there were deep cut wounds that were actively bleeding.*
- *On the neck, there were finger marks noted, swelling and tenderness.*
- *Thorax and abdomen at the back there were swelling and tenderness.*
- *Upper limbs on the right forearm there were multiple cut wounds that were actively bleeding.*
- *On the left leg on the knee, there was a cut wound that was actively bleeding.*
- *The age of injury was 2 days. She had visited the facility on 2<sup>nd</sup> August 2011.*

18. PW3 and PW4 were eye witnesses. Infact PW3 indicated that he is the one who disarmed the appellant the sword he was using to inflict the complainant with.

19. As per the evidence of the complainant on malicious damage, she went at the locus and found the metal rods of the fence had been uprooted. PW3 stated that the appellant had uprooted the posts which had been erected. PW4 also stated that the appellant came and started

uprooting the poles which had been erected.

20. PW1 stated that she saw the appellant carrying the metal bars while headed to his house. PW3 stated that the appellant left and followed his brothers who took the metal posts. PW4 stated that when the appellant uprooted the posts, they took them to the house.

21. From the record, it is barefaced that the fence was damaged, the posts were carried away (stolen), and the appellant assaulted the complainant.

22. The evidence against the appellant is cogent and urge this honourable court to uphold conviction and affirm the sentence. A first appellate court, this court is obliged to analyse and evaluated afresh all the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno vs. Republic [1972] EA 32* where the Court of Appeal set out the duties of a first appellate court as follows:

**“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424.”**

23. Similarly, in *Kiilu & Another vs. Republic [2005]1 KLR 174*, the Court of Appeal stated thus;

24. An Appellant on a first appeal 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.

25. 2. 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; 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.

#### EVIDENCE ADDUCED:

##### **Prosecution’s Case:**

26. The prosecution called five witnesses in this case. **PW1 Sofia Abdi Ibrahim** testified that in the year 1997, they formed a group by the name Lahole Women’s Group. In the year 2002, Garissa Municipal Council allotted to the group Plot No. GSA/20667. On the 31/7/2011, the group met and agreed to do construction. They called a fundi to give estimates of fencing the plot. They took four bags of cement and 18 iron bars. The said iron bars were erected the same day. Sofia testified that she went back to her shop at 4.30 pm. She took a car and went back to the plot at 6.00 pm. She found the appellant person, his child and another person at the plot. Sofia asked the appellant person why he had damaged the fence. The appellant person did not reply, instead, he attacked Sofia with a sword. The appellant person cut right hand and right side of the face of Sofia. She fell down on the stones and injured her knees, back and shoulders. Sofia testified further that a person by the name Bishar got hold of the appellant person and wrestled the sword from him. She went to Garissa Provincial Hospital but she did not find a doctor. She proceeded to Mkono Hospital where she was treated. She reported the matter to Garissa Police Station. She was issued with P3 form. She testified further that there were stones and iron sheets and iron rod on the plot. The appellant person took the iron police and never returned them. The person who was fencing the plot is Isaak Ahmed. She stated that the appellant person wanted to grab the plot from her, otherwise there had been no bad feelings between them.

27. **PW2 John Wambugu**, the clinical officer in charge of Iftin Sub-County Hospital testified that the complainant visited the hospital facility on the 2/8/2011. Her clothings were torn at the back and blood stained.

28. On examination, there was deep cut wound on the fact which was still bleeding. Finger marks, swelling and tenderness was note on the neck. There was tenderness and swelling on the back. The complainant was unable to walk or support herself. There were multiple cut wounds on the forearm which were still actively bleeding. There was a cut wound on the left knee which was still bleeding. The injuries were two days old. The complainant was stitched and given antibiotics and plain killers. Physiotherapy was recommended for the patient. The degree of injury was assessed to be grievous harm. Wambugu produced the P3 form as exhibit 3.

29. **PW3 Bashir Yussuf** recalled that on the 31/7/2011 at about 6.00pm he was at Bula Sagarey. He had gone to measure his plot. He was alone. While coming to his plot using Fafi road, he found people quarreling. He found the complainant, the appellant person and his two other brothers. Yussuf testified that he knew the appellant person because he often met him in the area. He testified that he knew Sofia because she is a Chairlady of a women’s group which owned the plot. He also found the person who was working on the plot. Yussuf testified that he saw the appellant person cut the complainant with a sword and throw her to the ground. The complainant bled on the face, right hand and knees. The appellant person cut the complainant three times with the sword. Yussuf testified that he rescued the complainant. He wrestled the Somali sword from the appellant. The appellant then followed his brothers who had taken the metal posts. Yussuf took the Somali sworn to the police station.

30. **PW4 Isaack Ahmed Abdullahi**, Assistant Chief Eldoret Sub-Location, recalled that on 31/7/2011, Sofia called him and informed him that she was going to fence a piece of land. Abdullahi proceeded to the said land. When the work was almost done, the appellant person, his brother, son and another man came and started uprooting the poles which had been erected. Abdullahi testified that he called Sofia and told her that things had turned out bad. Sofia came to the plot and when they saw her they turned to her. The appellant person went and assaulted

her. Sofia was cut on the cheek. Bishar intervened and restrained the appellant from attacking her further. Abdullahi testified that he also intervened. When they uprooted the metal poles they took them to their house. Abdullahi testified that Sofia called a taxi and they took her to hospital for treatment.

31. **PW5 No. 88718 PC James Githinji**, the investigating officer in this case testified that he took over the case in the year 2014 from PC Herbert Maloba. He perused the file and noted that the case was reported on 31/7/2011. The complainant alleged that she was attacked by the appellant person at her plot. The complainant had bruises caused by a Somali sword. PC Maloba arrested the appellant person on the 2/8/2011. When PC Githinji took over the matter the investigations were already complete. He took the sword and kept it. He produced the sword as exhibit 2.

#### **Defence Case:**

32. On his part, the appellant person denied attacking the complainant. He swore that he did not touch the complainant.

33. **DW2 Hawa Ahmed** testified that on the 31/7/2011 the complainant went to her house at 8 am with six people. The appellant person was present at that moment. The complainant tried to attack her but she went into the house. The appellant person dismissed it as a ladies affair and went away. Hawa testified that between 5pm and 6pm when the offence was allegedly committed, the appellant person was not at home. Nothing happened to the complainant on that day or any day. She testified further that she did not know if anything happened to the complainant. In her view, the case was brought because of a land dispute.

34. On cross examination, Hawa testified that the appellant person did not leave the home. He only went to the mosque for evening prayers.

35. **DW3 Habibu Ibrahim Hassan**, testified that the appellant person is her neighbour. She testified further that she did not witness the appellant person commit the offences.

36. On cross examination, she testified that on 31/7/2011 she did not see the appellant person nor did she know where he was or what he was doing.

37. **DW4 Ise Ibar Abdi** testified that on the 31/7/2011 he was at the home of the appellant person from 8 am to 7 pm. All the time he was with the appellant person. At about 4.30pm to 6pm, the complainant came to the appellant person's home with other people. The complainant quarreled and went away. He did not see the appellant person and other people attack the complainant.

#### **ISSUES:**

38. After going through the evidence on record and the submissions tendered, I find the issues are; ***Whether prosecution proved its case beyond reasonable doubt? Whether defence was considered? Whether sentence was excessive?***

#### **ANALYSIS AND DETERMINATION:**

39. This being a first appellate court, this court is obliged to analyse and evaluate afresh all the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See ***Okeno vs. Republic [1972] EA 32*** where the Court of Appeal set out the duties of a first appellate court as follows:

***“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424.”***

40. Similarly, in ***Kiilu & Another vs. Republic [2005]1 KLR 174***, the Court of Appeal stated thus;

***“1. An Appellant on a first appeal 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.***

***2. 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; 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.”***

41. I have carefully gone through the evidence by the prosecution and the defence by the appellant person. The appellant person was charged with three counts, to wit, grievous harm contrary to section 234 of the Penal Code, malicious damage to property contrary to section 339 of the Penal Code and stealing contrary to section 275 of the Penal Code.

42. In Count I, that is grievous harm, section 234 of the Penal Code provides as follows:

**“234. Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.”**

43. Therefore the prosecution must prove that the appellant did harm and the harm was grievous.

44. With regards to the first element above, that is whether the appellant person did harm to the complainant; in her testimony the complainant testified that the appellant person attacked her with a sword. He pieced her in two places, that is, on the hand and on the face. She sustained injuries on knees and the back when he held her by the neck and pushed her down on the stones.

45. Her testimony was corroborated by PW3 and PW4 who were present at the scene and who saw the appellant person attack the complainant. Infact, it was PW3 who rescued the complainant and wrestled the sword from the appellant person. It is PW3 who took the sword to the police.

46. The said sword was identified by all the prosecution witnesses and produced in court as exhibit 2. The complainant’s testimony is further corroborated by PW2, the clinical officer who testified that the complainant was injured. He produced a P3 form as exhibit 3.

47. The appellant person denied committing the offence generally. His witness DW2 testified that at the time the offence was allegedly committed, the appellant person was not at home. He had gone to the mosque for evening prayers. However, she never accompanied the appellant person to the mosque, nor, did the appellant person call anybody from the mosque to confirm that he was indeed in the mosque.

48. That leaves DW2’s testimony uncorroborated. It is worth noting that the appellant himself did not mention anything about going to the mosque. Whereas, on cross examination, DW3 testified that she did not see the appellant person on the material date nor did she know where he was or what he was doing.

49. DW4 on the other hand testified that he was with the appellant in the appellant’s house from 8am to 7pm on the material date. However, it is very surprising that neither the appellant person nor DW2, his wife, talked of being with DW4 that day.

50. All in all, I find that the testimonies of the defence witnesses were disjointed, uncorroborated and therefore false. I thus find that the appellant person did harm to the complainant.

51. The Appellant submit that there is a huge contradiction in term of time, simply because complainant says she was assaulted at 4.00 pm while the PW2 says it was 9.00 am. Also appellant argues that, PW3 contradicted himself when he said the appellant person was having a Somali sword and he moved on and say that appellant person was beating the complainant with a panga using the blunt side of a panga in company of his two brothers.

52. Another noted contradiction is that in cross examination, PW3 told the court that he was digging holes with PW2 while in his recorded statement he claimed that he was just passing by when he saw people quarrelling. The question is which one was passing by? Who saw people quarrelling? The question is which one was passing by and this one digging holes with the PW2.

53. The Court had occasion to address this issue in *Phillip Nzaka Watu vs. Republic (2016) eKLR*, where it expressed;

**“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed it has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and couching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.” (Emphasis supplied.)**

54. I don’t find contradictions in testimonies material to warrant appeal succeeding.

55. On the second issue, whether the harm was grievous, section 4 of the Penal Code defines grievous harm as:

**“Any harm which amounts to maim or dangerous harm, or seriously or permanently injures health, or which extends to permanent disfigurement or any permanent or serious injury to any external or internal organ, membrane or sense.”**

56. By all means, the injuries on the complainant by the appellant were very serious. Intact the clinical officer assessed the degree of injury as grievous. The P3 form confirms the same. Therefore, I find the injuries suffered by the complainant were grievous.

57. The upshot of the above is that, I find the prosecution proved the offence of grievous harm against the appellant person beyond reasonable doubt.

58. Turning to the second count of malice damage to property, section 339 of the Penal Code provides as follows:

**“339. (A) Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanor, and is liable, if no other punishment is provided to imprisonment for five years.”**

59. PW4 testified that, when they were about to complete erecting the fence, the appellant person, his brother, son and another person came and uprooted the fence. The appellant person on the other hand did not offer any defence to this particular charge, nor did he raise any

serious doubt to the testimony of PW4. Therefore I find that the appellant willfully and unlawfully damaged the fence.

60. Turning to the third and last count, that is stealing, section 275 of the Penal Code provides as follows:

**“275. Any person who steals anything capable of being stolen is guilty of a felony termed theft and is liable, unless owing to the circumstances of the theft or nature of the thing stolen some other punishment is provided, to imprisonment for three years.”**

61. There was evidence of PW1, PW3 and PW4 that, upon uprooting the iron rods and assaulting the complainant, the appellant person and the other persons picked the iron rods and took them to their home. They never returned them. The appellant person did not give any evidence to the contrary.

62. In my view, that was stealing things that were capable of being stolen within the meaning of section 275 of the Penal Code.

63. On sentence, although the same was within the law, the same was excessive in the circumstances of the case. The appellant was first offender, has young school and college going children who have nobody to take care of PW2 noted injuries were 2 cut wounds on the face. Thus in line with principles of sentencing will interfere with the sentence as follows:-

64. Thus in sum, the court finds that the prosecution proved its case beyond reasonable doubt and conviction was justified and thus;

**(i) Appeal has no merit and it is dismissed accordingly on conviction.**

**(ii) The sentence is adjusted as follows; Count 1 fine of Ksh. 100,000/= in default 3 years imprisonment, Count II fine Ksh. 60,000/= in default 1 one year imprisonment and Count III fine Ksh.60,000/= and in default 1 one year imprisonment.**

**DATED, DELIVERED AND SIGNED AT GARISSA THIS DAY OF 6<sup>TH</sup> NOVEMBER, 2019.**

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**C. KARIUKI**

**JUDGE**