



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.25 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. Olwande – PM delivered on 20th November 2015 in Makadara CM. CR. Case No.241 of 2011)

GEOFFREY NJAKA SHISIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Geoffrey Njaka Shisia with another, was charged with the offence of **causing grievous harm** contrary to **Section 234** of the **Penal Code**. The particulars of the offence were that on 27th December 2010 at Mathare 4A in Nairobi County, the Appellant, jointly with another not before court, unlawfully did grievous harm to Pamela Atieno (hereinafter referred to as the complainant). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged. He was sentenced to serve two (2) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted against the weight of evidence and in circumstances where the prosecution had not adduced sufficient evidence to sustain a conviction. He faulted the trial magistrate for failing to properly evaluate the evidence that was adduced and thereby reached the erroneous conclusion that the prosecution had established all the elements that proved that he had caused grievous harm. The Appellant was aggrieved that he had been sentenced to serve a custodial sentence that was harsh and excessive in the circumstances. He was finally aggrieved that his defence had not been considered before the trial court reached the verdict to convict him. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

Prior to the hearing of the appeal, counsel for the parties to the appeal filed written submission in support of their respective opposing positions. Mr. Mathenge for the Appellant and Ms. Kimiri for the State further made oral submissions in support of their respective cases. Whereas Mr. Mathenge submitted that the prosecution had failed to establish to the required standard of proof that the Appellant was part of the group that attacked the complainant and thereby caused her to sustain injury, Ms. Kimiri for the State submitted that the prosecution had adduced sufficient culpatory evidence to connect the Appellant with the assault of the complainant. She urged the court to dismiss the appeal. Mr. Mathenge submitted that taking the evidence adduced by the prosecution witnesses in totality, it was clear that the Appellant ought to have been acquitted of the charge. He urged the court to allow the appeal.

Before giving reasons for its decision, this court shall set out the facts of the case. The complainant in this case was at the material a resident of Mathare 4A Estate. She testified as PW1. She told the court that the Appellant was her neighbour. She recalled that on 27th December 2010 at about 2.00 p.m., she was at home. She was sweeping rubbish from her compound. She placed the rubbish at the gate. The Appellant's accomplice by the name Lucy Atieno took issue with the fact that the complainant had dumped rubbish at the gate. An argument ensued. Lucy Atieno started beating the complainant. She was joined by the Appellant who was armed with a masai whip and a metal bar. The complainant testified that the Appellant attempted to hit her with the metal bar. She lifted her right hand to shield and protect herself. The Appellant hit her on the right hand as a result of which she sustained a fracture.

PW3 Beatrice Atieno was on the material day having lunch at her home when she heard screams emanating from the complainant's home. She went to investigate. She found the complainant being beaten by the Appellant and two women. The complainant was lying prone on the ground. She saw the Appellant hit the complainant's right hand using a metal bar. She explained that she was sure that it was the Appellant who had assaulted the complainant with the metal bar because the Appellant was a neighbour. The complainant testified that after being injured, she was rescued by neighbours. She was taken to the nearby Mathare Hospital where she was x-rayed before her hand was plastered. She reported the incident at Muthaiga Police Station. She was issued with a P3 form and advised to be examined by PW2 Dr. Zephania Kamau based at the Police Surgery. The complainant was examined on 30th December 2010. PW2 testified that he established that the complainant's right hand had indeed been fractured by a blunt object. He saw the x-ray which confirmed the fracture. He assessed the degree

of injury sustained by the complainant to be grievous harm. He produced the P3 form as an exhibit in the case.

After the complaint was reported to the police, PW4 PC John Mwiti and PW5 PC Boniface Mwangi were on 14th January 2011, while on patrol within Mathare 4A Estate, informed that the Appellant had been seen in the area. They got this information from the complainant who told them that she had been assaulted by the Appellant and two other persons. They arrested the Appellant and took him to Muthaiga Police Station. The Appellant was booked and later charged with the offence for which he was convicted. When he was put on his defence, the Appellant denied committing the offence. He told the court that on the material day of the incident, he heard someone raise alarm. He rushed to the scene while armed with pliers. He thought that there was an electrical emergency that required his intervention. He found one Lucy and the complainant fighting. According to Lucy, she was incensed by the complainant's act of dumping garbage into her gunny bag. The Appellant stated that he offered to give the complainant another gunny bag **"however she resisted and twisted it before leaving. I was informed two days later that Pamela was seeking compensation."** In essence, the Appellant was saying that he was innocent and did not assault the complainant as claimed by the prosecution witnesses.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is aware that it is not being called upon to comment on the demeanour of the witnesses as it did not have an opportunity of seeing or hearing the said witnesses as they testified. (See **David Agwata Achira –vs- Republic Criminal Appeal No.47 of 2003 (Court of Appeal at Kisumu)**). The issue for determination by this court is whether the prosecution proved to the required standard of proof beyond any reasonable doubt the charge of **causing grievous harm** contrary to **Section 234** of the **Penal Code**.

This court has re-evaluated the evidence adduced before the trial magistrate's court. It has also had the benefit of reading the submission, both oral and written made by counsel of the parties to this appeal. According to the Appellant, the prosecution failed to establish that he assaulted the complainant. In particular, the Appellant argued that he was not identified at the scene where the complainant was assaulted. The Appellant further argued that the medical evidence adduced by the prosecution did not establish that the complainant had indeed been assaulted. That being the case, it was the Appellant's appeal that he had been erroneously convicted by the trial court. On its part, it was the prosecution's case that it had adduced sufficient evidence which connected the Appellant with the assault of the complainant that caused her to sustain grievous harm.

The prosecution was required to establish that the Appellant assaulted the complainant and caused her to sustain grievous harm. **"Grievous harm"** is defined under **Section 2** of the **Penal Code** to mean:

"Any harm which amounts to maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense."

In the present appeal, the prosecution adduced evidence which established that indeed the Appellant, with other known persons, attacked the complainant as a result of which she fractured her right hand. Although the Appellant claims that he was not properly identified at the scene, the testimony of the complainant and PW3 proved that the Appellant was previously known to the two as he was a neighbour. Indeed, the Appellant did not dispute that he was at the scene where the complainant was assaulted.

On re-evaluation of the evidence adduced, this court holds that the evidence adduced by the complainant and PW3 in regard to the circumstances that she was assaulted with an iron bar, was credible and consistent. The testimony of the complainant and PW3 corroborated each other in all material respects in regards to what transpired on the material day. The assault took place in broad day light. The likelihood that the Appellant could have been confused with another person is therefore remote. The Appellant's explanation to the effect that he was a peacemaker instead of perpetrator of the crime is incredible and beggars belief. This court therefore holds that the prosecution proved to the required standard of proof beyond any reasonable doubt that the Appellant, with others, assaulted the complainant thereby causing her to sustain the injury.

The second issue for determination is whether the injury that the complainant sustained was grievous harm. According to the complainant, she fractured her right hand as a result of the assault. She produced an x-ray report which established that indeed her hand had been fractured. PW2 Dr. Zephania Kamau saw the complainant three days after the assault and noted that the complainant's right hand was in a cast. The right hand had been plastered for it to heal. This court is of the view that the injury sustained by the complainant was indeed grievous harm. The fracture of the hand resulted in the permanent disfigurement of the hand. Although the fracture may heal, the complainant will permanently bear the scar of the fracture. In the premises therefore, this court finds no merit with the Appellant's appeal that the prosecution had failed to prove that the injury sustained by the complainant did not constitute grievous harm.

In the premises therefore, the conviction against the Appellant against lacks merit and is hereby dismissed. On sentence, the Appellant was sentenced to serve two (2) years imprisonment. Upon filing the appeal, he was released on bail pending appeal. This court is of the considered view that an appropriate sentence would be a fine instead of a custodial sentence. The custodial sentence imposed on the Appellant therefore is set aside and substituted by a sentence of this court. The Appellant is sentenced to pay a fine of Kshs.50,000/- or in default he shall serve one (1) year imprisonment. It is so ordered.

DATED AT NAIROBI THIS 7TH DAY OF JUNE 2018

L. KIMARU

JUDGE