



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HIGH COURT CRIMINAL APPEAL NO. 201 OF 2017

RICHARD KYENGO KIMILU.....1ST APPELLANT

MWANGI KIMILU.....2ND APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

JUDGMENT

INTRODUCTION

1. The Appellants were charged with an offence of assault causing actual bodily harm contrary to section 251 Penal Code.
2. Particulars being that on 18/12/2014 at Matiliku Market, Nzaui District in Makueni County jointly willfully and unlawfully assaulted one Bernard Maswili thereby occasioning him actual bodily harm.
3. Count II Malicious damage to property contrary to section 33 9(1) Penal Code.
4. Particulars being that on 18/12/2014 at the same place unlawfully damaged plastic chair valued at Kshs.600/=. The property of Bernard Maswili.
5. The Appellants pleaded not guilty and the matter proceeded to trial.
6. After defence the court delivered judgement convicting the Appellant and sentenced each one of them to Count two years and eight months to run concurrently.
7. Being aggrieved by the aforesaid decision, the appellant lodged appeal setting out the following grounds:-
 - i. That there was error in sentencing the two years without an option of fine.*
 - ii. The court meted them out an illegal sentence.*
 - iii. The court ignored 2nd Appellant P3 produced in defence.*
8. The parties agreed to canvass appeal submissions in which the Appellant filed and served but the prosecution rendered oral submission. In their written submissions the Appellant submit, they ought to have been given an option of fine as required by law.
9. The court also failed to consider that the complainant also assaulted Appellant No.2 vide produced P3 form that failure of the doctor to testify was not justified for court to ignore P3 form of the Appellant 2 thus his defence was ignored. Thus, right to fair trial compromised.
10. The court ignored mitigation tendered in sentencing. On prosecution side it was submitted that the maximum sentence is five years but the Appellants were awarded two years each.
11. The duty of a first appellate Court as aptly put in the case of **Okeno V. Republic (1972) E.A. 32** is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and

hearing the witnesses.

12. Guided by the condensed grounds of appeal, I will proceed to analyze and re-evaluate the evidence. The prosecution called six witnesses.
13. The complainant (PW1) stated that on 18/12/2014 at about 5.00 p.m., he was sitting on a plastic chair outside his Agro-vet business premises at Matiliku town when the 2nd accused came and tried to remove money from the complainant shirt pocket.
14. The complainant held to his shirt pocket to prevent the 2nd accused from snatching the money. The 2nd accused held the complainant at the neck and hit him (Complainant) several times on the mouth, head and all over the body.
15. The complainant fell down and the plastic chair on which he was sitting got broken. The 2nd accused followed the complainant to the ground and continued beating him.
16. The accused came and joined the 2nd accused in assaulting the complainant. He (1st accused) hit the complainant with a stone twice on the head and once on the face near the hair. The complainant bled profusely.
17. The complainant was rescued by PW3 (Samuel Muniyao Kitonga) who accompanied him to Matiliku Administration Police Camp to report and to Matiliku sub-county hospital for treatment.
18. Pains increased and the complainant went to Kilome Nursing Home for further treatment where he was admitted for 4 days. The complainant reported the matter at Emali Police Station. He was issued with a P3 form which was produced as exhibit No. 6.
19. The treatment notes from Matiliku sub-county hospital were produced as Exhibit No. 4 and the discharge summary from Kilome Nursing Home was produced as Exhibit No. 5.
20. The clothes which the complainant was wearing were also produced as exhibits. A blood stained purple shirt which the complainant was wearing at the material time was produced as Exhibit No. 2 and a blood stained white vest was produced as Exhibit No. 3.
21. A broken plastic chair which the complainant was sitting on at the material time was produced as Exhibit No. 1. The accused were later arrested and charged for the two counts.
22. PW2 Jackson Makau Kakumbi was working as a caretaker in a building called Sisi kwa Sisi at Matiliku market. That building was near the complainant's Agro vet business known as Rohoboth Agro-vet.
23. PW2 was going to buy rat poison at the complainant's Agro-vet when he saw the accused beating and assaulting the complainant.
24. PW2 stated that the 2nd accused is the one who started beating the complainant. The 1st accused who is the brother of the 2nd accused joined and hit the complainant three times on the head using stones. The complainant bled profusely. The complainant went to report the matter at Matiliku Administration Police Camp.
25. He went to Matiliku Sub-county hospital for treatment and was later admitted to Kilome Nursing Home Emali for four days for further treatment.
26. PW3 Samuel Muniyao Kitonga was at Matiliku market on 18/12/2014 at about 5.00 p.m. when he heard screams. He went to check at the place where the screams were coming from.
27. PW3 found both accused beating the complainant. The 1st accused was using stones to assault the complainant. PW3 rescued the complainant took him to Matiliku Administration Police Camp where he reported. He also accompanied the complainant to Matiliku Hospital for treatment.
28. PW4 Gladys Mueni Maswili is the wife of the complainant. She stated that on 18/12/2014 at about 5.00 p.m., she had gone to the complainant's Agro-vet Business to get money for buying vegetables. She left their house at Matiliku Market and went to get money from her husband at Rehoboth Agro-vet.
29. The 2nd accused came and put his hands in the pocket of the complainant's shirt. He (2nd accused) beat the complainant with boxes.
30. After a short while, the 1st accused came holding stones and hit the complainant three times on the head. Her husband (complainant) bled profusely.
31. The complainant was treated at Matiliku District Hospital and was later admitted to Kilome Nursing Home for four days undergoing further treatment.
32. PW5 PC Sena Cheruto of Emali Police Station did investigations and charged the accused.
33. She recorded statements from witnesses, issued the complainant with a P3 form and charged the accused after the P3 form was filed. She received a broken plastic chair, a blood stained purple shirt and a blood stained white vest from the complainant. PW4 produced the broken

plastic chair as Exhibit No.1, the blood stained purple shirt (Exhibit 2) and blood stained white vest (Exhibit 3).

34. PW6 doctor Dorcas Kavuli Musyoki produced the complainant's treatment notes (Exh. 4), discharge summary from Kilome Nursing Home (Exh.5) and (Exh.6).

35. The P3 form was filed by Doctor Mibei at Makindu Sub-County hospital on 24/12/2014 but the said doctor was not available at the hearing since he went for further studies in the University of Nairobi. Doctor Musyoki (PW6) had worked with doctor Mibei for 1½ years before he went for further studies and knows his handwriting.

36. The P3 form (Exh. 6) states in page 2 that the complainant sustained a cut wound on the forehead, cut wound on the occipital region of the head and cut wound on the parental region on the head. The complainant also sustained loose upper incisor tooth, swelling on the neck, swelling on the chest and swelling on the left index finger. The wounds were stitched; he was given analgesic, antibiotics and tetanus injection.

37. The complainant was first treated at Matiliku Sub-county hospital where the wounds were stitched, then Kilome Nursing Home and Makindu Sub-county hospital where the P3 form was filed.

38. The injuries were six days old when the complainant was examined at Makindu sub-county hospital and P3 form filled. The degree of injury was assessed as harm

39. The Appellant gave unsworn evidence in defence and did not call any witnesses.

40. The 1st accused stated that he was selling Miraa at Matiliku market when he saw people running towards the place where his brother the 2nd accused was operating a kiosk. He found the 2nd accused being hit on the head by the complainant. Members of the public separated the complainant and the 2nd accused.

41. The 1st accused saw the 2nd accused being hit on the head by the complainant. Members of the public separated the complainant and the 2nd accused.

42. The 1st accused took the 1st accused took the 2nd accused to Matiliku Administration Police post where he recorded a statement and to hospital. He then returned to his place of business where he used to sell miraa. The 1st accused denied ever assaulting the complainant.

43. The 2nd accused also denied ever assaulting the complainant. He stated that he was assaulted by the complainant when he (2nd accused) went to demand payment for money he had shaved the complainant. He found the complainant sitting at the verandah of his business premises.

44. The complainant refused to pay, kicked the 2nd accused and told him to go and report where he wanted. Members of public rescued the 2nd accused from the complainant. His brother (the 1st accused) came and took the 2nd accused to Matiliku Administration Police Camp to report, then to Matiliku Hospital for treatment.

45. The 2nd accused further stated that he went to Emali Police Station to record statement. He was later arrested and charged jointly with 1st accused for assaulting the complainant

ANALYSIS AND DETERMINATION

46. There is ample evidence that the complainant sustained injuries. The oral testimonies of PW1, PW2, and PW3 are that the complainant sustained injuries on the head, teeth, neck, chest, and fingers.

47. The evidence is corroborated by the evidence of PW6 (Doctor Dorcas Musyoki), the P3 form, the treatment card from Matiliku Sub-district hospital and the discharge summary from the Kilome Nursing Home.

48. The 3 cut wounds on the complainant's head were serious and he bled profusely. The shirt and vest which were blood stained. These blood stained clothes further confirm that the complainant sustained injuries. He (complainant) was treated at Matiliku Sub-district Hospital and admitted in Kilome Nursing Home for four days.

49. The trial court found that there was sufficient evidence to prove it is the appellants who inflicted the injuries on the complainant. The offence was committed during broad daylight outside the complainant's Agro-vet business at Matiliku town.

50. PW1, PW2, PW3 and PW4 saw the Appellants assaulting the complainant; the 2nd Appellant grabbed the complainant by the neck and boxed him on the mouth, head and all over the body.

51. The loose incisor tooth, swellings on the neck and swellings on the chest are injuries consistent with being grabbed on the neck and boxed on the mouth.

52. The 1st appellant hit the complainant on the head three times with a stone. He was seen and positively recognized by PW1, PW2, PW3 and PW5 were emphatic that they knew both appellants very well.

53. Both appellants were residents of Matiliku town and their home is near Matiliku town. The 1st appellant was a miraa seller at Matiliku town.
54. The 1st appellant in his unsworn statements corroborated the prosecution's evidence that he used to sell miraa at Matiliku town at the material time. The trial court had no doubt its mind that PW1, PW2, PW3 confirmed both accused as the persons who assaulted the complainant.
55. Those key prosecution witnesses (i.e. PW1, PW2, PW3 and PW4) were not at all shaken by the appellants in cross examination.
56. The trial court did not believe the appellants when they stated in their unsworn defence that they did not assault the complainant.
57. The trial court justifiably posed the question; ***how else did the complainant sustained these serious injuries on the head and other parts of the body?***
58. The appellant were seen by PW2, PW3 and PW4 assaulting the complainant, PW2 and PW3 were independent witnesses and had no reason to lie about the appellants. There was no evidence of any grudge between the appellants and PW2 and PW3.
59. There is no credible evidence that the 2nd appellant was assaulted by the complainant. The 2nd appellant did not produce any medical evidence to prove that he was assaulted by the complainant.
60. The 2nd appellant had no visible injuries when he went to report to PW6 (the investigating officer). PW6 stated that she did not see any visible injuries on the 2nd appellant. The Appellants stated that members of the public saw the complainant assaulting the 2nd appellants and they are the ones who rescued him.
61. However, the appellants did not call any member of the public as a witness. PW6 stated that the 2nd appellant did not bring witnesses to record statement and did not return his P3 form.
62. The trial court was justified in finding that the claim by the 2nd appellant that he was assaulted by the complainant to be an afterthought calculated to hide the fact that it is the appellants who assaulted the complainant thus dismissing the defence by the appellants.
63. The trial court was justified in finding that the assault done to the complainant by the appellants was willful and unlawful. The complainant (PW1) stated that he does not know why the appellants assaulted him when he was resting on a chair outside his business premises on 18/12/2014 at about 5:00 p.m.
64. The 2nd appellant stated that the complainant owed him money for shaving services. However, there is no credible, independent evidence that the complainant owed the 2nd appellant money.
65. The 2nd appellant did not call any of his barber business customers or produce any document to prove that he had shaved the complainant and that the complainant owed him money.
66. Also, a debt was not a good reason for the accused to viciously attack the complainant. I find that the assault done by the accused on the complainant was willful and unlawful.
67. Count was proved beyond reasonable doubt and the conviction of the appellants for the offence of Assault Causing bodily harm contrary to Section 251 of the Penal Code as charged was justified.
68. The complainant stated that when he was beaten by the 2nd Appellant he fell down and the chair on which he was sitting got broken.
69. The 2nd Appellant hit the complainant on the mouth and the chest and the complainant fell off the plastic chair which he was sitting on. The plastic chair broke down. That broken chair was produced as Exhibit No. 1.
70. The 1st appellant followed the complainant to the ground and hit him with a stone three times on the head. PW3 stated that the 2nd appellant was lying on top of the complainant, the 1st accused hit him (i.e. complainant) on the head with a stone.
71. From the evidence of PW1, PW2, PW3 and PW4 it is clear that the appellants had a common intention to attack and assault the complainant.
72. The breaking of the plastic chair was a direct consequence of the unlawful act of the appellants. The plastic chair could not have gotten broken if the appellants did not attack the complainant.
73. Section 251 PC cap 63 states that;

“Any person who commits an assault occasioning actual bodily harm is guilty of misdemeanor and is liable to imprisonment for five years.”

74. Section 339(1) penal code cap 63 states that;

“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 to imprisonment for five years.”

75. The appellants complain that they ought to have been awarded fines in lieu of custodial sentence. In the provisions ***No 23.8 of the Judiciary policy guidelines on sentencing, the element of mitigating circumstances include; (7) being first offender and (10) pleading guilty at the earliest opportunity and cooperation with prosecution and police. Provisions 23.9 (2) states that the effect of mitigating circumstances is to lessen the term of custodial sentence.***

76. The trial court awarded 2 years and 8 months respectively for each appellant and each count and to run concurrently. The maximum sentence for each count was five years imprisonment.

77. The court considered all the mitigations tendered and the circumstances of the case. I find no fault in the findings and the sentence and thus find no merit in the complaint.

78. In sum the entire appeal lacks merit, the same fails and thus court makes the following orders;

i. Appeal is dismissed.

ii. The conviction and sentence are confirmed.

SIGNED, DATED AND DELIVERED THIS 8TH DAY OF OCTOBER 2018, IN OPEN COURT.

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C KARIUKI

JUDGE