



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 275 OF 2012

WYCLIFFE BAHATI BANYAKO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(from the original conviction and sentence of P.A Achieng,SRM, in Kakamega CMC Criminal Case No. 822 of 2011 dated 31/7/2012).

J U D G M E N T

1.The appellant was convicted of the offence of causing a person grievous harm contrary to section 234 of the Penal Code and sentenced to a fine of Kshs. 15,000/= in default to serve 8 months imprisonment. The appellant was grieved and filed this appeal challenging both the conviction and the sentence.

2. The grounds of appeal are contained in a memorandum of appeal dated the 7th November 2012 and in a supplementary grounds of appeal dated 3rd November, 2014. The grounds of appeal in the memorandum of appeal are also captured in the supplementary grounds of appeal. The supplementary grounds of appeal are that:

1. The learned trial magistrate erred in law and in fact in convicting the appellant when the prosecution had failed to prove its case against him beyond reasonable doubt.
2. The learned trial magistrate erred in law and in fact in convicting the appellant against the weight of the evidence on record.
3. The learned trial magistrate erred in law and in fact in convicting the appellant in the face of serious contradictions and doubts of the alleged offence.
4. The learned trial magistrate erred in law and in fact in convicting the appellant in face of serious doubts as to the probable type of weapon that was used in inflicting the alleged injuries on PW1.
5. The learned trial magistrate erred in law and in fact in dismissing the appellant's defence when the said defence was watertight.

3. The particulars of the charge against the appellant were that on the 3rd April 2011 at Ifweterere village, Ifweterere sub- location Shianda location in Kakamega North District within Western Province he unlawfully caused grievous harm to Brian Ashiundu (herein referred to as the complainant).

Prosecution case

4. The case for the prosecution was that the complainant (PW1), Jackline Aoko PW2, Vitalis PW3 the and appellant are co- villagers. That Jackline PW2 wanted to lease a parcel of land from the appellant's brother called Nobert. That on the material day Jackline invited the complainant and Vitalis to take her to the shamba of Nobert. The complainant was to see the land so that he could deliver cane seedlings for Jackline at the said parcel of land after the lease agreement had been entered into. Vitalis was to witness the agreement.

5. That the three of them proceeded to the Shamba of Nobert. They did not find him at home. His father called Samuel was at his home. Jackline called Nobert over phone who told her that he was in church. They waited for him. While they were there his brother the appellant appeared. He talked angrily to the complainant. He then produced a panga and aimed a blow at him. The complainant blocked it with his right hand. The complainant was severely cut by the panga on the right hand. He fell to the ground. He was injured on the chest by the fall. Jackline held the appellant and snatched the panga from him. The appellant's father snatched the panga from Jackline. Jackline and Vitalis took the complainant to Kakamega Police Station where they made a report. Pc Gatimu PW5 issued a P3 form to him. He was taken to Kakamega Provincial General Hospital. He was attended to by a clinical officer PW4 who found him with swellings on the chest and cut wound on the right forearm with a fracture of the two bones of the said forearm. The complainant was admitted for 3 days. A plaster of paris

was applied on the hand. X-rays were taken which showed fracture of the ulna bone. On the 16/4/11, the Clinical Officer PW4 completed the P3 form. He classified the degree of injury as grievous harm. PC Gatimu investigated the case. He visited the scene. After investigations the appellant was arrested and charged with the offence. He denied the charge. During the hearing the Clinical officer PW4 produced the treatment notes from Kakamega provincial Hospital, the discharge summary and the P3 form as exhibits, Pexh 1, 2, and 4 respectively.

Defence Case

6. When placed to his defence the appellant gave sworn evidence and called 3 witnesses. His witnesses were his brothers, Victor DW2 and Nobert DW4 and his father DW3. The appellant stated in his defence that on the material day he was planting maize with his younger brother Victor. The land he was planting the maize belongs to his father. While working he saw 3 people at the home of his brother called Shisoha. They continued to work. One of the people, the complainant, approached them. He called at him and told him that he wanted to lease the shamba. He answered him that they did not want him to lease the shamba as he had not been paying promptly for the period he had leased it. The complainant then held him and threw him to the ground. He the appellant, started to scream. His mother and Victor started to scream and said that the complainant was removing a panga. He held the complainant and got hold of the panga. They struggled for the panga. People gathered and started screaming. They assisted him to snatch the panga from the complainant. They were separated. While struggling for the panga, it had cut him on the right side of the head and had sustained injuries on the waist. He, his father and his brother Nobert took the apanga to the Assistant Chief. The chief wrote him a letter referring him for treatment at Malava Hospital. He took the panga to Kabras Police Station and reported. He was issued with a P3 form. He was treated at Kabras District Hospital. He later learnt that the complainant had reported at Kakamega Police Station yet they are under the jurisdiction of Kabras police station. He produced the letter from the assistant chief and the P3 form as exhibits, Dex 1 and 2 respectively. He denied that he is the one who had the panga. He denied that he cut the complainant with a panga.

7. The appellant's brother Victor DW2 was a minor who at the time he testified was aged around 14 years. His evidence was that on that day at 10 am he and the appellant were planting maize on their father's land. While they were working they saw 3 people at the home of their brother Nobert. One of the people, the complainant went to where they were. He clicked and asked his brother why he wanted to lease out the land and he wanted to lease it. The appellant told him that they had stopped him from leasing the land as he was not paying the money. The complainant then attacked the appellant and slapped him. He, DW2, screamed. He saw the complainant removing a panga. The appellant held the handle of the panga and they started struggling for it. The panga cut the appellant on the head and on the waist. His father and the appellant went to report to the chief. The complainant went away while saying that if people had not gone there he would have killed someone. In cross-examination he said that the complainant was cut on the palm of the right hand.

8. The appellant's father DW3 testified that on that day at 10 am he was at home. The complainant went to his home with two other people. The appellant was at the time at his home which is about 100 m from his home. The complainant then left the other people and went to the home of the appellant. After a short while he heard some screams. He went there and found the complainant and the appellant struggling for a panga. It is the complainant who had the panga. His son Nobert assisted him to snatch the panga from the complainant. The complainant then went away running while saying that he wanted to kill someone. He and the appellant reported to the assistant chief who wrote them a letter referring them to Kabras police station. He and the appellant took the panga to the police. The appellant had been injured. He went to hospital for treatment at Malaba. He was issued with a P3 form. In cross-examination he said that the complainant suffered an injury on the head.

9. Nobert DW4 stated that on that day he was in church when a person called Oreno called him over phone and told him to go home. That he set for home. On the way he received a phone call from the complainant who asked him why he wanted to lease the land yet he had leased it. He went home and found the appellant injured. He was told that he had been injured by the complainant who at that time was not there. They reported to the assistant chief and later at Malava Police Station. They left the panga at Malava Police Station. They went to hospital and the appellant was treated.

Findings of the trial court

10. The trial court found that the appellant attacked the complainant with a panga when they were waiting for the accused's brother DW4 and injured him severely. That the complainant would not have suffered injuries of such a magnitude if he and the appellant were only struggling for a panga. He dismissed the appellant's defence that he sustained injuries. He held that the appellant did not produce any treatment notes to back up his P3 form that he was treated at Malava Hospital. He was of the view that the appellant's report to the police was meant to cover up the truth.

Submissions

11. The advocates for the appellant, **Shitsama & Co. Advocates**, submitted that the prosecution did not prove the charge against the appellant beyond reasonable doubt. That the evidence by the prosecution witnesses was not reliable. That Vitalis PW3 did not witness the incident as Jackline PW2 said that he was a distance away from them. That the Clinical officer PW4 stated that the fractures allegedly sustained by the complainant were not captured in the treatment notes neither were there x-ray films supporting the injuries. That the investing officer PW5 admitted to having seen the appellant's P3 form. Further that the trial magistrate did not give any reasons why he rejected the appellant's defence. That the appellant's defence was reasonable.

12. The prosecution counsel did not make any submissions though he opposed the appeal.

Analysis and Determination

13. This is a first appeal. It is the duty of a first appellate court to look at the evidence presented before the trial court afresh, re-evaluate and re-examine the same and reach its own conclusion. The court must bear in mind that it did not have the opportunity to see the witnesses as they testified. The court should also look at the grounds of appeal put forward by the appellant- see **Kinyanjui Vs Republic (2004) 2KLR 364**.

14. The complainant denied in cross – examination that he was armed with a panga. He denied that he provoked a fight between him and the appellant by abusing him and then assaulted him.
15. The appellant, his brother victor DW2 and his father DW3 stated that it is the appellant who went to where the appellant and Victor were planting maize. The appellant and Victor stated that the complainant asked the appellant why he was leasing the land to another person when he wanted to lease it. The appellant stated that the complainant had leased the land before but that they no longer wanted to lease the land to him as he was poor in making payments. Nobert Dw2 stated that the appellant called him over phone and told him that he wanted to lease the land.
16. The complainant on the other hand stated that he had only gone to the shamba to ascertain the shamba as he was to deliver sugar cane seedlings for Jackline at the said shamba after Jackline leased the shamba. The complainant stated that the appellant came to where they were while armed with a panga and demanded to know what they were doing at his father’s place. That Jackline told him that his father knew what they had come to do there. That the appellant then attacked him with the panga.
17. Jackline on her part stated that the appellant came to where they were while talking in Lugha language which she does not understand. That the appellant asked the complainant in Kiswahili language what he wanted there. The complainant told him that he was with her. She told the appellant that she is the one who had brought the complainant there. That the appellant then attacked the complainant with a panga. She stated that she is the one who had gone to lease the land from Nobert and that the complainant was to deliver sugarcane seedlings upon her leasing the land.
18. Vitalis PW3 stated that he had accompanied Jackline to lease a plot from Nobert. That on getting to the shamba they were shown the plot by the appellant’s father. That the appellant then came there. He, PW3, was slightly a head of the other two. The appellant passed him and headed to where the other two were. He then talked angrily in Lughya language which he Pw3 did not understand. He then abruptly produced a panga and attacked the complainant. The witness said that the complainant had come with them so that he could know where he would deliver sugar cane seedlings for Jackline upon Jackline leasing the land.
19. The defence witnesses stated that the complainant is the one who wanted to lease the land. The prosecution witnesses on the other hand stated that it is Jackline who wanted to lease the land from Nobert. None of the prosecution witnesses was cross- examined to the effect that the complainant said that he wanted to lease the land. All of the prosecution witnesses said that it is Jackline who wanted to lease the land. The appellant only raised the issue that it is the complainant who wanted to lease the land in his defence. That the issue was not raised when the defence cross – examined the prosecution witnesses can only mean that the issue was an afterthought and a fabrication. It is clear that the complainant and PW3 had escorted Jackline there for Jackline to lease the land from Nobert. It is not the complainant who wanted to do so. The cause of the incident was thereby not after an altercation between the complainant and the appellant over lease of land.
20. The defence alleged that it is the complainant who went to where the appellant and Victor (DW2) were. The prosecution witnesses on the other hand stated that it is the appellant who went to where they were. Similarly the defence did not cross- examine the three witnesses to that end. Again it can only mean that the issue was an afterthought and a fabrication by the defence witnesses all of whom are members of the same family.
21. The appellant alleged that after the altercation over land, the complainant held him and dropped him down. However Victor (DW2) stated that the complainant slapped the appellant after the altercation. Victor never stated that the complainant held the appellant and dropped him to the ground. That the two defence witnesses could not agree on how the incident started was a clear manifestation that the defence evidence was a fabrication.
22. The defence witnesses alleged that it is the complainant who had the panga. Victor (DW2) stated in cross- examination that the complainant was cut by the panga because he was holding the sharp part of the panga. If the complainant is the one who had produced the panga, how then could he have been holding the sharp end of the panga when they were struggling for it? The logical thing if he had produced it is that he would have been holding the handle. The fact that it is the appellant who was holding the handle meant that he is the one who had produced it.
23. The three prosecution witnesses- the complainant, Jackline and Vitalis- stated that Nobert was not there when the appellant attacked the complainant. The appellant and Victor also stated that Nobert was not there at the time. Nobert also stated that he was not there. However, the appellant’s father DW3 stated in his evidence that Nobert was there and that he is the one who assisted him to snatch the panga from the complainant. Jackline said that it is her who snatched the panga from the appellant and that the appellant’s father snatched it from her. Once again the contradiction in the defence evidence shows that the defence was a fabrication. Jackline must be the one telling the truth that she is the one who snatched the panga from the appellant.
24. The appellant stated that he was injured and that he reported the incident at Kabras Police Station. He was issued with a P3 form that was completed at Malava Hospital. The appellant produced his P3 form in court as exhibit. However the appellant did not call the police officer from Kabras Police Station who issued him with the P3 form so as to identify it as having been issued from that Police Station. The P3 form that the appellant produced was a photocopy and not the original. More so, the appellant did not call the medical officer who completed the P3 form at Malava Hospital to produce it as exhibit. P3 forms are usually produced in court by the doctor or clinical officer who completed it. It is the original documents that are usually produced unless there is an explanation why the original cannot be produced. In this case the trial magistrate unprocedurally admitted a photocopy of the P3 form. The evidence about the appellant’s P3 form should therefore have been dismissed. There was no medical evidence that the appellant was injured during the incident.
25. Though the appellant stated that their area fell under the jurisdiction of Kabras Police Station, no evidence was laid before the court that this was indeed the case. Pc. Gatimu was not questioned on the issue. No adverse inference can therefore be made against the complainant for reporting the incident at Kakamega Police Station instead of Kabras Police Station.
26. There was credible evidence from the prosecution witnesses, P1, PW2 and PW3 that the appellant was not injured during the incident. It

was clear that it is the appellant who cut the complainant with a panga. The appellant's act of reporting to the Police and trying to procure an unidentified P3 form were attempts to cover up the offence.

26. The complainant received very severe injuries. Such injuries cannot have been occasioned by a mere struggle over a panga. The severity of the injuries meant that a great force was exerted to inflict the injuries. This supports the evidence of the prosecution witnesses that the cut was occasioned by a panga blow. The trial magistrate did not err in dismissing the defence evidence.

27. Hospital documents, including x-ray films were produced to prove that the complainant suffered fractures of the ulna bone. The Clinical officer classified the degree of injury as grievous harm.

28. Upon keenly evaluating the evidence adduced before the lower court, I find that the appellant was convicted on watertight evidence. The defence by the appellant was a fabrication. The case against the appellant was proved beyond all reasonable doubt. The conviction is thereby upheld. The appellant was lucky to escape with a fine after occasioning the complainant very severe injuries. The appeal is bereft of merit and is accordingly dismissed.

Delivered, dated and signed in open court at Kakamega this 9th day of October, 2018.

J.NJAGI

JUDGE

In the presence of :

Miss Ashitsa.....for appellant

Ngetichfor state

GeorgeCourt Assistant

Appellantpresent

14 days Right of Appeal.