REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 14 OF 2016

(from original conviction and sentence in Criminal Case No. 756 of 2014 of the Principal Magistrate Court at Gichugu)

ANTHONY MURIUKI GACHOKI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged and convicted of assault causing actual bodily harm contrary to Section 251 of the Penal Code and sentenced to 2 years imprisonment.

The appellant was dissatisfied by both the conviction and the sentence.

He lodged an appeal claiming that the trial court:

1. Did not consider that the case was full of contradictions and inconsistencies.

2. Not considering that the case was not proved beyond reasonable doubt.

3. Not considering that there existed a grudge between the appellant and the complainant.

4. Gave him a harsh sentence.

This being a first appeal this court has duty to analyse the evidence and come up with its own independent finding. In the case of **John Oketch Abongo v Republic [2000] eKLR**

The Court of Appeal at Kisumu in dismissing the appeal stated;

> **The duty of a first appellate court in regard to the evidence and facts is now settled in law. It is required to subject the evidence to fresh and independent analysis and, in appropriate circumstances, even to make its own independent findings and conclusions. In doing so however, the first appellate court must bear in mind that it has only the record and has not enjoyed the advantage of seeing and observing witnesses under testimony…..**
>
> **We must take the evidence on record in its entirety. The evidence of the prosecution witnesses must be taken together with the evidence of the appellant. We are satisfied that, the entire evidence on record left no doubt, as the subordinate court found, that the appellant assaulted the complainant in the manner described by the complainant and supported by other witnesses.**

I have considered the evidence tendered before the trial Magistrate and I am satisfied that the charge was proved to the required standards. I must nevertheless consider the grounds of appeal on merits.

1. Contradictions and inconsistencies.

The appellant points out the following contradictions;

a) Complainant was assaulted by large piece of wood/stick. According to the medical officer it was a sharp object.

The complainant, PW 2 and PW 3 who were eye witnesses all confirmed that the appellant took a piece of wood and hit the complainant on the head whereby he lost consciousness. The medical officer stated that it was a sharp object which could even mean a piece of split wood.

b) Complainant alleges to have been admitted for 4 days but the medical officer states the admission was for 1 week while the discharge summary indicates he was in hospital for 2 days.

The complainant, PW 2 and PW 3 all confirmed that the complainant was admitted for 4 days. PW 4 the medical officer produced treatment notes indicating that the complainant had been admitted on 30/10/2014 and discharged on 01/11/2014. This is a period of 3 days therefore the contradiction is only for one day which is minor. The minor contradiction which is not material and does not affect the substance of the charge is of no consequence. I disregard the contradiction on the number of days the complainant was admitted in hospital as it is proved that he was indeed admitted.

2. Charge Not proved beyond reasonable doubt.

In **James Muriithi Njoroge v Republic [2016] eKLR**

The court in holding that the prosecution had proved its case beyond reasonable doubt, stated;

What is reasonable doubt? Denning J in the case of *MILLIER – V- MINISTER OF PENSIONS [1947]* Explained what reasonable doubt is. He stated:

"It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable."

the case is proved beyond reasonable doubt, but nothing short of that will suffice."

Lord Diplock in the case *WALTER– V- REPUBLIC [1969]* explained reasonable doubt as that quality and kind of doubt which when you are dealing with matters of importance in your own affair, you may allow to influence you one way or the other. It also can be said that it is a doubt that can be given or assign reason as opposed to speculation.

The appellant raises the following issues on this ground:

a) The type of weapon used is not clear.

All the witnesses proved that the complainant was hit by a piece of wood.

b) Weapon used was not produced in court

This did not negate the fact that the complainant was injured by a piece of wood. The appellant testified that the complainant fell off from the lorry and landed on a piece of firewood. He therefore confirmed that the wood caused the complainant's injury. The weapon causing the injury is not in dispute. The prosecution did however prove the manner in which the injury was caused and disapproved the defence of the accused that the complainant fell down and was injured by a piece of firewood.

c) No treatment notes were produced by complainant.

Discharge summary from Kerugoya District Hospital was produced. The allegation is a sham.

d) The lorry driver didn't testify on the plate number of the lorry.

The number plate of the lorry was irrelevant in this case as all the parties even the appellant and his witnesses confirmed of the existence of the lorry. Failure to call the lorry driver to give the registration number cannot vitiate the conviction.

The guilt of the appellant was proved beyond reasonable doubt by overwhelming evidence on record.

3. Grudge.

That there was an existing grudge between the complainant and the appellant whereby the matter had been taken to the area chief and he was told not to destroy other people's fences.

DW 2 stated that the lorry could not pass properly so the complainant started cutting the fence, the sub-chief and 10 housing community security initiative members had stopped the complainant from cutting the fence. However, none of them were called to testify on the incident or existence of the said grudge. In any case, the prosecution proved that the accused assaulted the complainant and it is not out of the said grudge that the appellant was charged.

4. Sentence.

That the magistrate gave him a harsh sentence with no option of fine yet he was a first offender. Sentencing is the discretion of the trial Magistrate.

In the case of **Bernard Kimani Gacheru V Republic [2002] eKLR**

The Court in holding that sentence given was well deserved and found absolutely no reason to interfere with it stated;

> **It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.**

This has properly set out the law with regard to appeals on the sentence. The appellant must show that the sentence was excessive, unlawful and court considered irrelevant matters or acted on wrong principle.

> **Section 251 of Penal Code provides:**
>
> ***Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years.***

The penalty for assault under **Section 251** above is five years. The sentence of two years imposed upon the appellant was lawful. There is no reason whatsoever for this court to interfere with the sentence meted out to the appellant by the trial court as the same was neither harsh nor overly excessive. The appellant shall serve the sentence meted out by the trial court.

The entire evidence on record left no doubt, as the trial court found, that the appellant assaulted the Complainant in the manner described by the witnesses. The trial court considered all the aspects that were before it and having done so, came to a proper and inevitable conclusion. The appeal is without merits and is dismissed.

Dated at Kerugoya this 19th day of November 2018.

L. W. GITARI

JUDGE