



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 152 OF 2012

HILLARY WAITITU MWERU.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal against conviction and sentence in Karatina Senior Resident Magistrates' Court Criminal Case No. 791 of 2011 (Hon. D.N. Musyoka) delivered on 30th August, 2012)

JUDGMENT

The appellant was the second accused person in a joint trial where they were charged with the offence of grievous harm contrary to **section 234** of the **Penal Code**. The particulars of the offence were that on the 16th day of September, 2011 at Unjiru village in Mathira West district within Nyeri County, they jointly did grievous harm to Duncan Maina Gichohi.

At the conclusion of the trial, the learned magistrate held that the prosecution had proved its case beyond reasonable doubt and convicted the appellant together with his co-accused as charged; the appellant's co-accused was sentenced to serve 3 years imprisonment while the appellant was sentenced to serve 5 years' imprisonment. Being dissatisfied with the conviction and the sentence, the appellant appealed against the magistrates' judgment on the following grounds: -

1. The trial magistrate erred in law by convicting the appellant on a charge that was defective;
2. The learned trial magistrate erred in law by not appreciating that the plea having been taken on a defective charge it was prejudicial to the appellant and not tenable in law;
3. The learned trial magistrate erred in law and in fact by convicting the appellant of the offence of grievous harm without any proof that the appellant inflicted any injury to the complainant;
4. The learned trial magistrate erred in law and in fact for misdirecting himself on the facts and the law; and,
5. The conviction of the appellant was against the weight of evidence.

As the first appellate court, I have the obligation of interrogating the evidence afresh at the end of which I have to come to my own conclusions but bearing in mind that the Court below had the advantage of seeing and hearing the witnesses.

The complainant himself testified that he was the assistant chief of Ichuga sublocation and that on 16th

September, 2011 at 8 PM he was at his home when he heard people making noise in the vicinity. He proceeded to the road where the noise was coming from. He was able to see the appellant and his brother, Willy Theuri; the latter walked back towards the complainant after he told him to go home instead of hurling insults. He was joined by Erastus Theuri and their grandfather Batista Theuri, the appellant's co-accused and together they came to where the complainant was standing. When the complainant told them that he was the area assistant chief, Batista Theuri struck him with a walking stick on his right eye. Then the appellant grabbed him by the neck as he attempted to escape. The complainant screamed and attracted members of the public who went after them managed to apprehend the appellant and Batista. According to the complainant, the injury was so bad that he lost the use of his eye.

The complainant proceeded to hospital almost immediately and the clinical officer testified that the injury was only one hour old when he examined the complainant. He confirmed that because of the injury, the complainant's eye was rendered blind. The injury, according to him, was caused by a blunt object.

The complainant's husband corroborated her husband's testimony that on 16th September, 2011 at about 8 PM she was in her kitchen when she heard people shouting and hurling insults. Her husband ventured outside apparently to find out what was happening but after about five minutes he returned and told her that he had been hit by the appellant's co-accused. He was bleeding from the right eye. Her neighbours apprehended the assailant and handed him over to the administration police officers.

One of the neighbours who responded to the noise was the complainant's brother, Daniel Kiranga Gichuhi. According to him, the complainant's child called him and told him that his father had been hurt. He immediately left for the complainant's house; the complainant told him that he had been hit by the appellant's co-accused. Together with other neighbours they went after Baptista and apprehended him on his way to Ngandu. The appellant came to his rescue, because he was his grandfather. He was arrested too and handed over to the police officers.

Wilson Maina Ngovia also heard the noises on the material night; he ventured outside to find out what the noises were all about. He found the appellant and his co-accused arrested. They were handed over to the police while the complainant was taken to the police station. According to him, it is the complainant's right eye was injured and was bleeding.

The investigations officer police Constable David Ondieki testified that the appellant and the co-accused were brought to Kiamachibi police station by an administration police officer on 16th September, 2011 on allegations that they had assaulted the complainant. The complainant came along with them and had a fresh injury on the right eye. The officer rearrested the appellant and Baptista and referred the complainant to Karatina district hospital where he was admitted for one week. He produced the walking stick that was allegedly used to assault the complainant.

Both the appellant and Baptista gave unsworn statements in their defence. According to Baptista when the complainant asked them to identify themselves he immediately left. The appellant also left and went to his home in Ngandu but while he was on his way people came running after him. They arrested him and took him to Kiamachibi police station. He denied having committed the offence.

On his part, the appellant said that he was coming from Ngandu when he heard people shouting that someone be burned; out of curiosity he went where they were and established that it was in fact his grandfather Baptista who was being threatened. The appellant told the mob that they should burn him instead of burning Baptista. He was then taken to the police but released on the following day.

Section 234 of the Penal Code under which the appellant and his co-accused were charged reads as follows:

234. Grievous harm

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

Section 4 of the **Penal Code** defines “grievous harm” as “*any harm which amounts to a 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.*”

The uncontroverted evidence on record is that the complainant was injured on his right eye on 16th April, 2011; the extent of the injury was classified by the clinical officer as “grievous harm” perhaps because he had lost vision of an eye as a result of the injury. The only question is whether the learned magistrate was right in his finding that both the appellant and his co-accused jointly did the grievous harm.

The complainant himself was categorical and consistent in his evidence that he was struck by Baptista and not the appellant. All the appellant did was to grab him by the neck when he attempted to escape but even then, it was after her had been struck and injured. The assault weapon with which the appellant’s co-accused was armed was recovered and exhibited in evidence.

It is worth noting that the learned magistrate himself established as a fact that it was the appellant’s co-accused who hit the complainant. He however misdirected himself when he held that since the appellant pounced on the complainant after he had been hit, he was as culpable for the injury that the complainant sustained as much as his co-accused.

I have come to this conclusion because there is no evidence that prior to the complainant’s assault there was any form of agreement between the appellant and his co-accused to injure the complainant. In other words, there was no evidence that the appellant and his co-accused had agreed or set out to execute an unlawful or illegal common venture for which both of them would be liable regardless of who between them actually perpetrated it.

While conceding the appeal, Mr Njue for the state submitted, correctly in my view, that there was no evidence of common intention between the appellant and the co-accused to harm the complainant. In any event if there was such evidence then the appellant and his co-accused could have been charged with the offence of conspiracy to commit a felony as well.

In the absence of proof of any agreement, either express or implied to harm the complainant, the learned magistrate fell into error when he convicted the appellant for unlawful acts committed by another person.

The learned counsel for the appellant also faulted the conviction of the appellant on the ground that the charge sheet was defective to the extent that the word “unlawful” was omitted from the particulars of the offence. I think he had a point here because the legislature must have deliberately included this word in the definition of the offence because not all injuries caused to a person by another are unlawful; for instance, they may be accidental or may arise where a person is acting in self defence. In such cases, it is the obligation of the prosecution to prove that the injury complained of was occasioned by unlawful act of its perpetrator. In **Achoki versus Republic (2002) EA 288** the Court of Appeal held that failure to use the words “unlawful and without” consent in a charge of rape was fatal to a conviction under the relevant section. I would say the same of the charge against the appellant; failure to include the word “unlawful” was detrimental to the prosecution case in the sense that the evidence adduced was inconsistent with the particulars of the offence. Again, in the case of **Kamunya versus Republic (2009) 1 EA 181** the Court of Appeal held that any criminal charge against a person must state explicitly the nature of the offence charged and that it must refer to the specific law that creates the offence. I would add that if the specific law uses words describing particular circumstances, those words must be adopted in the information in order to bring the case against the accused person within the particular circumstances contemplated in that law.

I am of the opinion that, for the reasons I have stated, the appellant’s appeal is merited and ought to be allowed. I hereby allow it. The conviction is quashed and the sentence against the appellant set aside. The appellant is set at liberty unless he is lawfully held.

Dated, signed and delivered in open court this 13th day of January, 2017

Ngaah Jairus

JUDGE