



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CRIMINAL APPEAL NO. 9 OF 2016
(CONSOLIDATED WITH APPEAL NO. 10 OF 2016)
(CORAM: J.A. MAKAU-J.)

MAGALLO ADEN BISHAR 1ST APPELLANT

AHMED DHAHIR 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence dated 19.2.2016, in Criminal

Case No. 145 of 2013 in Siaya By Hon. R.M. – S.R.M.)

JUDGMENT

1. The Appellant **MAGALLO ADEN BISHAR** and **AHMED DAHIR** formerly the 1st and 2nd Accused respectively at the Lower Court, were jointly charged with one count of assault **Causing actual bodily harm contrary to section 251 of the Penal Code**. The particulars of the offence are that on 24th day of May 2013 at Segu Sub-Location, Ugenya District within Siaya County, jointly, willfully and unlawfully assaulted Mr. Abdiwel Hussein Abdulle thereby occasioning him actual bodily harm.

2. After full trial the Appellant were found guilty, convicted and placed on probation for one (1) year.

3. Aggrieved by the conviction and sentence delivered on 12th February, 2016 the Appellants preferred these appeals setting out similar grounds of appeal through their joint Advocates M/s. Ashioya and Company Advocate being as follows:-

1. That the trial Magistrate erred in law and in fact in failing to appreciate that the complainant who is a Muslim by faith declined to be sworn by the Quran and opted to swear by the Bible at the time of giving his testimony to the Court hence rendering his testimony worthless unreliable and inadmissible.

2. That the learned trial Magistrate erred in law and in fact in finding the appellant guilty when the evidence of the complainant in respect of his injuries were materially contradicted by the testimony of the clinical officer who filled the P3 form.

3. That the learned trial Magistrate erred in law and in failing to find that the complainant had

no injuries to support the charge of assault.

4. At the hearing of the appeal Mr. Ipapu learned Advocate appeared for the Appellants whereas M/s. Mourine Odhiambo, Learned State Counsel, appeared for the State.

5. I am the first appellate court and as such I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the **Court of Appeal case Okeno V. R. (1972) E.A. 32** where the Court set out *the duties of a first appellate court thus:-*

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See Peters V. Sunday Post, (1958) E.A. 434”

6. Mr. Ipapu, Learned Advocate, for the Appellants submitted that the complainant failure to swear by Quran, but Bible being a Muslim at the time of giving his testimony to the Court he rendered his evidence worthless, unreliable and inadmissible, that the complainant's evidence was materially contradicted by the testimony of the Clinical Officer who filled the P3 form and trial Court erred in law in finding the appellants guilty on such contradictory evidence and lastly the trial court erred in law in failing to find and hold the complainant had no injuries to support the charge of assault.

7. M/s. Maurice Odumba, Learned State Counsel, opposed the appeal urging that though the complainant was sworn using Bible instead of Quran the trial Court relied on evidence of other witnesses who were examined on oath. She further submitted the prosecution's evidence was consistent and not contradictory and supported the prosecution's case. She added if there were any inconsistencies they are not fatal to the prosecution's case nor have the appellants been prejudiced. On Clinical notes she submitted failure to Produce Clinical notes were not fatal to the prosecutions' case as P3 form was completed by the maker of the Clinical notes which he relied upon and that there was confirmation of treatment. On the sentence the state submitted that the appellants were given lenient sentence.

8. The facts of the prosecution case is as follows: that on 24.5.2013 at 7.30 p.m. the complainant was going to Mosque to pray when he saw someone known to him following him carrying water in a jug. The lady who was following the complainant splashed the water at the complainant and started screaming saying he had accused her of witchcraft. The lady hit him with a jug and her husband joined her and he also assaulted the complainant. People gathered at the scene and enquired from them why they were doing that. That provoking the 2nd accused, to stripe naked as he boxed the complainant, Police came and arrested them. The complainant went to hospital and a P3 form was filled at Ambira. He identified it as (MFI-P1). The accused were subsequently charged with this offence.

9. The Court record do not indicate the option that was taken by the accused persons on being put on their defence, however the first appellant gave an unsworn statement denying the offence and stated they did not assault the complainant.

10. The Appellants contends that the complainant who is a Muslim by faith declined to be sworn by the Quran and opted to swear by the Bible at the time of giving his testimony to the court, hence rendering his testimony worthless, unreliable and inadmissible. PW1 in his evidence stated that he is a Muslim but had sworn using the Bible urging that he can use any Holy Book. Mr. Ipapu Learned Advocate for the Appellants contended that the complainant was swearing using Bible instead of Quran and as such he was not sworn and as such his evidence was of no probative value.

11. An Oath is a verbal promise to tell the truth. The witness may choose to swear on oath using religious text as it is not mandatory that a religious text be used in taking oath as one can affirm, which is made in place of an oath. A person may choose to make an affirmation rather than taking an oath as both affirmation and oath have the same effect. Where an oath is to be taken, it ought to be properly administered and taken. The fact that the person to whom the oath was administered had no religious belief at the time does not affect the validity of an oath. **Section 151 of the Criminal Procedure Code** provides:-

“151. Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath.”

12. The above Section is clear that in a criminal matter every witness is required to be examined on oath or upon affirmation. There is in my view the requirement of a witness either being affirmed or have oath administered before being examined. There is no requirement that one be sworn using the religious text of his faith. The purpose of an oath is as stated hereinabove, a verbal promise to tell the truth as the demeanor of a witness is not determined by the type of oathing or affirmation but by testing the evidence through cross-examination and Court’s evaluation and analysis of the evidence of a witness. I therefore do not find that evidence given using a different Holy text other than ones religious Holy text book worthless, unreliable and inadmissible as there is no meter with which to measure ones faith and the truthfulness using ones holy textbook. The swearing using a holy text book cannot be a measure of ones truthfulness on giving evidence before court. I find the oath taken by PW1 was in accordance with **Section 151 of Criminal Procedure Code**, and admissible before Court as there is no requirement that one be sworn using a particular Holy Text book but according to the faith that one professes and which is deep in his/her heart and cannot be measured physically.

13. This Appellants contend that the evidence of the complainant in respect of the injuries were materially contradicted by the testimony of the Clinical Officer who filled the P3 form. PW1 testified that the Appellants assaulted him, that the 2nd Appellant boxed him and he went to the hospital. PW3 a Clinical Officer examined PW1 who had been hit by blows and noted he had internal chest wall tenderness which was three days old and classified the injury as harm. P3 form exhibit P1 showed the complainant complained of anterior chest wall tenderness. Mr. Ipapu, Learned Advocate, urged the complainant stated be sustained injury to the chest and neck whereas P3 form showed injury were on the thorax and abdomen and as such he urged there was contradiction on the evidence of PW1 and PW2. That the complainant went to the hospital after 3 days and that no treatment note were produced and as such it is probable he was not injured by the Appellants but could have picked his injuries elsewhere.

14. In cross-examination the complainant stated the 2nd Appellant hit him on the neck with a blow and threw him to the ground and he also hit his chest. I have examined the evidence of PW2 and the P3 from exhibit P1 and noted that PW2 under Section “B” on page 2 of the P3 form under Thorax and abdomen, PW2 indicated the complaint’s anterior chest wall had tenderness. This was one of the injuries the complainant sustained when appellants assaulted him. The fact that PW2 did notice any injury to the neck do not negate the fact that the complainant was assaulted. PW3 testified that on 24.5.2015 he got a call from the complainant that he had been assaulted by the appellants. PW3 went to the scene of crime with PC Arnold and found the complainant at the scene and noted he had been assaulted. The appellants were arrested and investigation started. PW4 testified that he saw Mama Kelele, shouting behind them, saw her pour water on complainant and her husband (2nd Appellant) come and hit the complainant. PW5 testified the complainant reported the incident on 24.5.2013 at 19 hours and they booked the report. He issued P3 form which was filled and returned.

15. The evidence of PW1, is corroborated by PW2, PW3, PW4 and PW5 that on 24.5.2013 he was assaulted by the appellants. There’s evidence from PW1 and PW4 who witnessed the incident that the appellants assaulted PW1. PW2’s evidence corroborated evidence of PW1 and PW4 on the fact that the complainant was assaulted. The injuries noted by PW2, I believe were occasioned by the appellants when they jointly and severally assaulted PW1. There is no dispute that PW3 noted that the complainant had injuries to the chest. I find no contradictions on evidence of PW1 and that of PW2. Treatment notes

there is no requirement to be produced in proving a charge of assault, the same were produced, incidentally in the instant case PW2, a Clinical Officer at Ambira Sub-District Hospital stated that he is the one who examined the complainant on 27.5.2013 after assault and filed the P3 form. He stated he had no clinical notes in court. PW2 having been the first person who examined the complainant and made treatment notes did not need to produce the treatment notes which he made and used to fill the P3 form. The general treatment of the complainant as a patient including data relevant to the offence is well documented in the P3 form on page 1 under paragraph 2 and 3 made by PW2. I therefore find that it was not necessary to have the treatment notes produced and failure to do so did not prejudice the complainant in anyway.

16. Can delay to go to the hospital immediately and going after 3 days prejudice the prosecution's case as there is no limited period within which one should then go to hospital? Secondly the Appellants did not call evidence to show this case was actuated by malice or they were framed by the Appellant and his witnesses.

17. The Appellants contend the trial court erred in law by failing to find that the complainant had no injuries to support the charge of assault. PW1 stated that the 1st appellant assaulted him and the 2nd Appellant boxed him. PW4 witnessed PW1 being assaulted by the Appellants. PW1 reported the incident to PW3 and PW5. PW5 issued P3 form to the complainant. PW2 treated the complainant and noted that he had interior chest wall tenderness, filed P3 form exhibit P1. From evidence of PW1, PW2, PW3, PW4 and PW5 and exhibit P1 there is evidence that the complainant sustained injuries as a result of assault by the appellants. I find no error in the trial courts findings that the complainant had sustained injuries and I find the charge was supported by evidence of the prosecution witnesses.

18. On sentence **Section 251 of Penal Code** provides:

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

The sentence meted against the appellants by being placed on probation for 1 year instead of custodial sentence is lenient but as the complainant sustained light injuries and the state did not appeal against the sentence, I shall not interfere with same.

19. The upshot is that the appellant's appeals have no merits. I dismiss both appeals. Accordingly, the conviction is upheld and sentence confirmed.

DATED AT SIAYA THIS 25TH DAY OF JANUARY, 2017.

J. A. MAKAU

JUDGE

DELIVERED IN THE OPEN COURT IN THE PRESENCE OF:

ASHIOYA FOR THE APPELLANT

M/S. M. ODUMBA FOR THE STATE

1ST APPELLANT PRESENT IN PERSON

2ND APPELLANT PRESENT IN PERSON

C.A.

1. PATIENCE BERYL OCHIENG

2. LEONIDA ATIKA

3. SARAH OORO

J. A. MAKAU

JUDGE