



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

HCCRA NO. 9 OF 2015

(CORAM: J.A. MAKAU – J.)

ERICK OMONDI ODERO.....APPELLANT

VS

REPUBLICRESPONDENT

JUDGMENT

1. The Appellant **ERICK OMONDI ODERO** is charged with the offence of assault causing actual bodily harm contrary to **Section 251 of the Penal code**. The particulars of the offence are that on the 20th day of September 2013 at around 9.00am at Gobei Secondary in Bondo district within Siaya County unlawfully assaulted one **BECKY ACHIENG AETE** thereby occasioning bodily harm.

2. After full hearing, the Appellant was found guilty, committed and sentenced to pay a fine of Kshs. 10,000/= in default to serve six (6) months imprisonment.

3. Aggrieved by both conviction and sentence he preferred this appeal setting out six grounds of appeal as follows: -

- 1. The Learned Trial Magistrate erred in law and fact in convicting the Appellant while the prosecution had failed to prove its case beyond reasonable doubt.*
- 2. The Trial Magistrate erred in law and fact in convicting the applicant in the face of contradictory and unreliable evidence of the prosecution witnesses.*
- 3. The Trial Magistrate erred in law and fact in convicting the Appellant while key prosecution witnesses whose evidence would have been crucial were never called nor testified.*
- 4. The Trial Magistrate erred in law disregarding the Appellants wholly unchallenged evidence without giving a proper explanation or reasons.*
- 5. That the Trial Magistrate erred in relying on the medical evidence which was wholly unsatisfactory and grossly insufficient.*
- 6. The Judgment and findings is against the weight of evidence on record.*

4. 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) EA 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)”

5. The facts of the Prosecution's case form part of the record of appeal herein and I need not reproduce the same, however, I shall make a brief summary of the Prosecution's case and the defence.

6. The Prosecution's case is that both the complainant and the appellant were secondary school teachers at Gobei High School in which the appellant was the Deputy Principal. That on 20/9/2014 at 9.00am the complainant on entering the office of the Deputy Principal, she found him with Samson Abudho who told her he had a matter to discuss with her. He showed her a list of names of some students, while standing and shouting at her harshly forcing one Christine Joyce from the next office to join them and save the complainant but the appellant grabbed the complainant on her breasts and braids and threw her against the wall. That her face hit the wall and she fell down in the corridor. The complainant lost her consciousness and later found herself at Bondo District Hospital on a stretcher. She had a painful nose, swollen nose, throbbing pain at the back of the head. The complainant was treated; later reported the matter to police, on 20/9/2013, referred to Kotiende Police Station where statements of witnesses were recorded. The complainant was subsequently issued with a P3 form and upon her examination the same was filled showing the degree of injury as harm. The appellant was subsequently arrested and charged with this offence.

7. The Appellant denied the offence, stating that on 19/9/2013, he sought from the complainant whether she knew about two textbooks, which were different from the list, to which she complained the appellant was too strict about books. That on 20/9/2014 upon comparing the charge sheet that had been issued he discovered the student was right. The appellant called storekeeper one Samson; who he showed the list and the record of books and realized there was a discrepancy. That meanwhile the complainant walked into the appellant's office and got straight away into the discussions that they had the previous day, complaining the appellant was too strict in a raised voice attracting the attention of Bursar (Christine) who came to appellant's office. The appellant requested them to leave. The storekeeper left but the complainant insisted he would not leave until her problem was solved. Eventually she left banging the door behind her. The appellant also requested the Bursar also to leave, who later returned and reported the complainant was crying on the corridor. Appellant denied having assaulted the complainant.

8. At the hearing of the appeal, Mr. Kowino, Learned Advocate, appeared for the Appellant whereas M/S M. Odumba appeared for the State.

9. Mr. Kowino combined all the grounds of appeal and mainly urged that the Prosecution did not prove the charge against the appellant; that the appellant was convicted on contradicting and unreliable evidence; and in absence of evidence of key witnesses whose evidence could have been crucial having not been availed as they were not called. He urged that the witnesses were not called because their evidence would have not been favourable to the Prosecution and that failure prejudiced the appellant.

10. M/S M. Odumba on her part opposed the appeal both against conviction and sentence urging the

conviction and sentence were both proper. She urged the Prosecution proved the case beyond any reasonable doubt and that the evidence of the complainant was corroborated by PW2, the Clinical Officer who produced P3 form as exhibit P1 and treatment notes as exhibit P2. She urged the appellant was placed at the scene of crime and on the issue of calling witnesses, she urged that the failure to call all witnesses who were at the scene was not fatal to the Prosecution's case as there was other evidence to sustain conviction. She further urged that the contradiction allegedly in the Prosecution's case is not fatal to the Prosecution's case.

11. Whether the Prosecution case was unreliable and riddled with contradiction? The Prosecution's case is that the complainant was assaulted by the appellant on 20/9/2013 at Gobei Secondary School. The Appellant's counsel urged that the complainant urged that she was assaulted by the appellant's in presence of two persons, Samson Abudho and Christine. However, PW3 Samson Omondi denied witnessing the assault. He urged the appellant in his sworn statement testified, in the office, that they three: Samson, the complainant and school bursar Christine. That the storekeeper left first and the complainant left after the storekeeper. That out of the three people mentioned by the appellant only Samson, the storekeeper gave evidence as PW3. The complainant in her evidence she did not give the names of the people present to include those of Samson Abudho and Christine Joyce. The trial court was not told whether Samson Abudho was also called by or is referred to as Samson Omondi. DW1 stated that PW3 left before the complainant and I believe that is why PW3 in his evidence told the court **"when I came back I found PW1 already down"**. This to me means PW3 at certain time walked out of the appellant's office and on return found the complainant down and further on cross-examination, he said he did not witness the assault as he was not present when the assault took place. PW3 stated the complainant was lying on the corridor. DW1 also stated the school bursar reported to him the complainant was crying in the corridor. He did not in his evidence state whether the complainant was standing or lying on the ground. PW1 in her evidence identified the appellant as her assailant. I have noted that the incident took place, during daytime and that the appellant and the complainant knew each as fellow teachers. The two had exchanged heated arguments before the appellant held the complainant on her breasts and braids, before throwing her against the wall; whereby her face hit the wall and she fell on the corridor where PW3 found her.

12. I have very carefully evaluated and analysed the evidence of PW1, PW2 and PW3 and I have not found any contradictions or inconsistencies that discredits the Prosecution's case and that could make it unreliable as submitted by the Appellant's counsel as regards when the incident occurred. PW3 stated he had walked out and returned after the incident. The only evidence is that of PW1, which is well corroborated by PW2's evidence, who attended to the complainant on 20/9/2013. The injuries noted by PW2 were consistent to the injuries the complainant stated were inflicted on her by the appellant when he threw her against the wall. The degree of injury was assessed as harm as per exhibits P1 and P2. I find that the Prosecution case is not contradictory and unreliable. I find the Prosecution proved its case to the required standard, thus beyond reasonable doubt.

13. Whether failure to avail all witnesses who would have been called is fatal to the Prosecution's case and whether failure to avail such witnesses would amount to drawing of an inference, that the witnesses were not called because their evidence was not favourable to the Prosecution case? The Prosecution urged crucial witnesses who were at the scene of the incident such as Christine and another were not called by the Prosecution and no explanation for such failure was given and as such the evidence tendered did not warrant conviction and that the court should have drawn adverse inference.

14. In case of **Samuel Karanja Kuria V Republic Criminal Appeal No. 459 of 2007 (Nairobi)**, the Court of Appeal sitting at Nairobi partly held: -

".....the appellant's suggestion that the potential witnesses who were not called to testify knew something about the killing was not supported by any evidence and the fact that they were not called as witnesses could not have reasonably invited an inference from the trial court because the Prosecution's evidence was already strong enough to support a conviction."

15. In **Tetu Ole Sepha V Republic Criminal Appeal No. 15 of 2008**, the Court of Appeal sitting in

Nairobi held: -

“ ...Although the evidence of the Administration Police would have buttressed the Prosecution case, there was sufficient evidence which placed the appellant at the scene of the crime and therefore, the omission could not have been the basis of any adverse inference.”

16. In the instant case, the Prosecution did not call one Christine who the complainant mentioned was present. The appellant on his part gave a different date of incident as **20/9/2014**, whereas the date in issue was 20/9/2013. He gave the names of those present as Samson, (PW3) the storekeeper; the complainant and school bursar Christine. The appellant did not state what Christine would have been called to come to say as regards this matter, that would have made the court draw an inference; that the failure to call her was because she would have given unfavourable evidence for the Prosecution. He did not further state how such a failure to call her as a witness prejudiced his case. The complainant's evidence coupled with that of PW2, the Clinical officer, was in my view sufficient to sustain a conviction. Furthermore, the evidence of PW1 and PW3 placed the appellant at the scene of crime and PW3 witnessed the two talking resulting to the appellant becoming emotional as they exchanged words. PW3 did not mention there being any other person when the complainant was arguing with the appellant. I therefore find and hold that the failure to call all witnesses at the scene of incident did not prejudice the appellant in anyway and further no inference can be drawn that such failure was due to the fact that had the witnesses been called, they would have given adverse evidence against the Prosecution as there was sufficient evidence to sustain a conviction.

17. The upshot is that the Appeal is not meritorious and the Appeal is dismissed, conviction upheld and sentence confirmed.

DATED AT SIAYA THIS 9TH DAY OF FEBRUARY 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 9TH DAY OF FEBRUARY, 2017.

In the presence of:

Mr. Kowino: for the Accused

M/S Maurine Odumba: for State

Accused - Present

Court Assistants:

1. Patience Beryl Ochieng

2. Leonidah Atika

3. Sarah Ooro

J.A. MAKAU

JUDGE