



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL APPEAL NO. 40 OF 2016
HABEL KIHORO MUNYEKI.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT
(Appeal against original conviction and sentence in Mukurweini
Principal Magistrates' Court Criminal Case No. 356 of 2015
(Hon. V.O. Chianda, SRM) on 2nd June, 2016)

JUDGMENT

The appellant was charged with the offence of assault causing actual bodily harm contrary to **section 251** of the **Penal Code, cap 63**. The particulars of the offence were that on the 1st day of July, 2015 at around 7 AM at Mukurweini sub County hospital main gate within Mukurweini sub County in Nyeri County, the appellant willfully and unlawfully assaulted Moses Thuo Nyinge thereby occasioning him actual bodily harm.

The trial court convicted him as charged and sentenced him to serve three years imprisonment. He has appealed against the conviction and the sentence and in his petition, he raised the following grounds:

1. The learned trial magistrate erred in law and in fact in not holding that the prosecution had not proved its case beyond reasonable doubt;
2. The learned trial magistrate erred in law and in fact in holding that the ingredients of the offence with which the appellant was charged had been established;
3. The learned magistrate erred in law in convicting the appellant despite contradictions in the prosecution evidence; and,
4. The learned magistrate erred in law and in fact in failing to note that there were doubts in the prosecution case which ought to have been resolved in favour of the appellant.

As usual, this court being the first appellate court, has the legal obligation to evaluate the evidence at the trial afresh and come to its own conclusions (but bearing in mind that the trial court had the advantage of seeing and hearing the witnesses first hand. (See **Okeno versus Republic (1972) EA 32**).

According to the complainant, on 31st day of June, 2015 at about 5 PM he met the appellant with whom he agreed that he (the appellant) was to drive him to some place where he was to attend a funeral ceremony the following day. On that day, the complainant hired an alternative car when the appellant failed to show up as agreed. When the appellant learned that the complainant had engaged somebody else, he assaulted him and dislocated his wrist in the process.

The complainant's wife, **Grace Njeri Thuo (PW2)** who was with the complainant at the material time screamed for help. As the crowd gathered in response, the appellant ran away. She testified that before assaulting the complainant, the appellant threatened to forcefully remove the complainant's shoes if he did not pay him Kshs 200/=. In fact, he attempted to remove the shoes but the complainant resisted. He also attempted to remove money from the complainant's pockets by force and apparently, it is then that he injured the complainant. To stop him from injuring her husband further, Mrs Thuo gave him the money he wanted.

Dr Kimathi Thuo(PW3) examined the complainant and filled his P3 form. He testified that he examined the complainant and filled the P3 form 13 days after the assault. He established that his right wrist had been dislocated but he had been treated earlier and discharged.

Police constable **Caroline Akoth (PW4)** received the complainant's report and also effected the appellant's arrest.

The appellant gave an unsworn statement and stated that he was introduced to the complainant by his sister-in-law and that indeed they met on 1st July, 2015 at Gikondi junction. He admitted that the complainant's wife gave him Kshs 200/= but denied having assaulted him as alleged.

Section 251 of the **Penal Code** under which the appellant was charged states as follows:

251. Assault causing actual bodily harm

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

In order to convict under this provision, the trial court must be satisfied that the accused person has not only assaulted the complainant but also that, as a result of the assault, there was actual bodily harm.

Looking at the evidence of the prosecution together with the unsworn statement by the appellant, there is no doubt that the complainant, his wife and the appellant met at some place on 1st July, 2015. I have no reason to doubt the complainant's and his wife's testimony that they met so that the appellant could drive them to a particular place to attend a funeral. The complainant's evidence that the appellant used to drive motor vehicle registration number KBX 603A which the complainant had apparently hired for this purpose was not controverted.

I also found to be plausible the complainant's and his wife's evidence that the appellant may have been infuriated with the complainant's decision to hire an alternative car when the appellant failed to show up in time. His anger must have been driven by the fact that he lost business and perhaps his own money when he took his time to come and collect the complainant only to find that he had engaged some other person. He acknowledged having received Kshs 200/= from the complainant's wife but fell short of explaining the purpose for which he received this money. If he did not take the complainant to where he was to go, I believe the complainant's wife's testimony that she paid the money to save her husband from further assault by the appellant.

In these circumstances, I agree with the learned magistrate's finding that indeed the appellant assaulted the complainant. There is nothing on record to suggest that he could possibly have reached a different conclusion.

As to whether the complainant's assault amounted to actual bodily harm, the uncontroverted evidence of

Dr Kimathi was that in his assessment, the degree of injury which the complainant sustained was classified as “harm”. This certainly is consistent with the nature of injury contemplated under **Section 251** of the **Penal Code**. It follows that, the learned magistrate came to the correct conclusion that as a result of the appellant’s assault he caused the complainant “actual bodily harm” as contemplated under this provision of the law.

I also find that the appellant’s unsworn statement did not cast any reasonable doubt on the otherwise concrete, consistent and credible evidence of the prosecution and the learned magistrate was correct in dismissing it. For these reasons, I do not find the appellant’s appeal to have merit and I hereby dismiss it.

Dated, signed and delivered in open court this 12th May, 2017

Ngaah Jairus

JUDGE