



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.132 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. J.M. Omido – Ag.PM delivered on 23rd September 2016 in Nairobi CMC. CR. Case No.1427 of 2009)

TIMOTHY MBURUGU MWENDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Timothy Mburugu Mwenda was charged with the offence of **causing grievous harm** contrary to **Section 234** of the **Penal Code**. The particulars of the offence were that on 2nd August 2009 at Shell Petrol Station near Wilson Airport along Langata Road in Nairobi, the Appellant unlawfully caused grievous harm to Isaac Chege Njuguna (the complainant). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to serve three years imprisonment. He was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted despite the prosecution failing to prove its case to the required standard of proof. The Appellant was of the view that the evidence adduced against him was contradictory and the facts did not support the findings reached by the trial court. The Appellant faulted the court that sentenced him for having done so without jurisdiction. The Appellant took issue with the fact that the trial court did not take into account the evidence that he had adduced in his defence before reaching the verdict that he was indeed guilty as charged. For the above reasons, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Mwiti for the Appellant and by Ms. Kimiri for the State. Mr. Mwiti submitted that the prosecution failed to prove the *actus reus* and *mens rea* in support of the charge so as to reach the conclusion that the charge had been established to the required standard of the law. Whereas the Appellant conceded that indeed a shooting took place on the material day, he was of the view that the circumstances leading to the shooting exonerated him from the crime. Learned counsel submitted that there was an altercation between the Appellant and the complainant which started at a club before it escalated at the Shell Petrol Station along Langata Road a few metres outside the club. He stated that during the altercation at the club, the Appellant took the complainant's spectacles and told him to collect the same from the police station. The Appellant and his two friends walked out of the club and walked towards the Shell Petrol Station. The

complainant followed them in his car to the petrol station. The complainant hit the Appellant and threw him into a ditch. The Appellant shot the complainant in self-defence. Learned counsel asserted that the totality of the evidence adduced indeed showed that it was the complainant who was the aggressor. The Appellant acted in self-defence and had no *mens rea*. The Appellant was of the view that the custodial sentence that was imposed on him was harsh and excessive taking into consideration the circumstances of the case that showed that he was provoked. He urged the court to take into account his mitigation and the fact that he has been in prison for nine months since his conviction. For the above reasons he urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

Ms. Kimiri for the State noted that from the submission made by the Appellant, it was clear that he was not challenging his conviction and does not dispute what transpired. On sentence, he urged the court to exercise its discretion and mete out an appropriate but reduced custodial sentence.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **causing grievous harm** to the complainant contrary to **Section 234** of the **Penal Code**.

On re-evaluation of the evidence adduced before the trial magistrate’s court, it was clear to this court that there are certain facts that are not in dispute. It is not disputed that the Appellant at the time of the incident, being a police officer, was lawfully entitled to carry a firearm, in this case a Ceska pistol. It is further not disputed that on the material day, the Appellant fired two shots that resulted in injury being sustained by the complainant. The complainant sustained serious injuries which were assessed by the doctor to constitute grievous harm. There was conflicting evidence regarding the events leading to the shooting. Whereas the Appellant contends that the complainant, for no apparent reason, confronted him while they were together at a club, the complainant on his part testified that it was the Appellant who went to the table where he was sitting with his friends, removed his spectacles from his face and took them away without any justification. From the evidence adduced, it was apparent that at the time this incident was taking place, both the Appellant and the complainant, and those accompanying them were drunk. They had taken alcohol for several hours prior to the incident. It is therefore clear that intoxication on the part of both the Appellant and the complainant may have contributed to a large extent to the escalation of a simple misunderstanding to the serious turn that it took.

The thrust of the Appellant’s appeal is that he was provoked by the complainant. He submitted that it was the complainant who followed him to the Shell Petrol Station and then assaulted him. It was in reaction to this provocation that he shot the complainant. On the other hand, there was cogent and credible evidence which was adduced by the prosecution witnesses which attributed the provocation to the decision by the Appellant to take away the complainant’s spectacles. It was in pursuit of the spectacles that led the complainant to follow the Appellant and his friends from the club where they were taking drinks to Shell Petrol Station. The Appellant testified that he took the complainant’s spectacles in order to secure his attendance at the police station where presumably he was going to lodge a complaint of the alleged assault. This, in this court’s considered opinion, was provocation on the part of the Appellant. From the evidence adduced, it was clear that the complainant could not function without his spectacles hence his distress in not having the spectacles. The Appellant’s refusal to hand over the spectacles to the complainant must have extremely provoked the complainant. The finding of guilty reached by the trial

court cannot be faulted. In Page 12 of the Judgment, the trial court stated thus:

“All in all, being of the findings above, I find that the accused person was the aggressor when he took the complainant’s spectacles, forcing the complainant to pursue him to recover them. It has been proved by the prosecution beyond reasonable doubt that this accused person thereafter caused the complainant to suffer the injuries classified by Dr. Kamau as grievous harm. The prosecution has discharged its onus of proving the charge against the accused person beyond reasonable doubt.”

It is clear from the foregoing that the Appellant’s appeal on conviction is for dismissal. It is hereby dismissed.

On sentence, it was clear from the evidence that the Appellant was intoxicated at the time of the incident. His sense of judgment and proportion was probably impaired to the extent that a simple misunderstanding got out of control resulting in the Appellant shooting the complainant. Even if the court were to accept the Appellant’s contention that he was provoked, the extent of the provocation did not justify the excessive force in response that was used by the Appellant. **Section 13(4)** of the **Penal Code** allows the court in the circumstance where it is established that the accused was intoxicated to diminish or reduce the Appellant’s criminal intent. This court is of the view that the custodial sentence that was imposed by the trial court did not take into consideration the Appellant’s diminished responsibility as a result of intoxication. Taking into consideration the entire circumstances of this case, including the fact that the complainant has recovered from the shooting, this court is of the view that the period that the Appellant has been in prison is sufficient punishment for him. In the premises therefore, the Appellant’s custodial sentence is commuted to the period served. He ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF JUNE 2017

L. KAMARU

JUDGE