



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL APPEAL NO. 43 OF 2008.

JOHN ANGOLO :::::::::::::::::::::::::::::::::::::::1ST APPELLANT

LILIAN MALALA ::::::::::::::::::::::::::::::::::::::: 2ND APPELLANT

AND

MACDONALD OMWAKA:::::::::::::::::::::::::::::::::: 3RD APPELLANT

VERSUS

REPUBLIC ::::::::::::::::::::::::::::::::::::::: RESPONDENT.

(An appeal from the conviction and sentence of Hon. B.O. OCHIENG -AG.SRM in the Senior Resident Magistrate's Court in Butere Criminal Case No. 129 of 2007 delivered on 27th June, 2008.)

J U D G M E N T

1. The appellants herein were arraigned in court on 13/2/2007 and charged with the offence of causing grievous harm contrary to section 234 of the penal code. The particulars were that on the 6th day of December, 2006 at Shikunga village, Shikunga sub-location, Marenyo location in Butere/Mumias District within Western province, jointly did grievous harm to Musa Indetie.
2. The appellants were found guilty as charged and sentenced to serve five (5) years imprisonment each. They were dissatisfied with the conviction and sentence imposed on them which prompted each to file a Petition of Appeal. All the said petitions have similar grounds of appeal viz:-
 - i. *The learned trial magistrate erred in law and fact in convicting and sentencing the appellant on a defective charge of Grievous Harm, when in actual fact, if at all an offence was committed, then it ought to have been "Affray" as the appellant was also beaten and that the same was in a public place, at the same time, the appellant was the first to report to police (sic) but the police ignored his report;*
 - ii. *That the learned trial magistrate erred in law and fact in relying on the evidence of prosecution witnesses which evidence was full of contradictions in all circumstances;*
 - iii. *That the learned trial magistrate erred in law and fact in convicting the appellant on uncorroborated evidence of a single witness (PW1) and which evidence was also insufficient to enable a conviction to ensue;*
 - iv. *That the learned trial magistrate erred in law and fact in convicting and sentencing the appellant, when the prosecution had not discharged its burden of proof beyond reasonable doubts (sic) and at the same time, the trial magistrate failed to fully evaluate the evidence and hence arrived at a wrong decision;*

- v. *That the conviction and sentence was against the weight of evidence (sic) adduced;*
 - vi. *The learned trial magistrate erred in law and fact in failing to realize that there existed a grudge and or bad blood between the appellant and the complainant which would result in fanned up charges against the appellant;*
 - vii. *That the learned trial magistrate erred in law and fact by failing to realize that failure by the prosecution to call key witnesses such as the Chief and Assistant Chief who were present and many other independent witnesses present at the commission of the offence (sic) weakened the prosecution case and hence a benefit of doubt (sic) ought to have gone to the appellant.*
3. This court notes that the Petitions of Appeal were filed on 9th July, 2008, and the appellants released on bail pending appeal on 24th July, 2008. It is therefore over seven (7) years since the appeals were filed which does not reflect well on the part of the counsel on record who went on slumber in this matter instead of expediting the hearing of the appeals. The appeals were consolidated and heard on 5th November, 2015 as Kakamega High Court Criminal Appeal No. 42 of 2008.

The appellants' submissions

4. Mr. Onsando learned counsel, held brief for Mr. Getanda for the appellants. He submitted on ground Nos. 1, 2, 6 and 7 as follows:-
- i. *Ground 1:- There were two (2) P3 forms produced. One was for the complainant and the other one for the 3rd appellant, MacDonald. This shows that there was a fight and the offence of affray occurred;*
 - ii. *Ground 2:- The evidence by the prosecution was full of contradictions. PW1, the complainant testified that the 1st appellant held him and that they struggled. PW1 did not say that the 1st appellant hit him. There was no corroboration as per the P3 form and what PW1 told the court when giving evidence. PW1 told the court the 3rd appellant hit him on the leg and the 2nd appellant on the head. The P3 form shows that the injuries were on the knee and the head which were occasioned by a piece of wood, some injuries were caused by blows and kicks. PW1's shoulder and elbow were also injured as per the P3 form. PW1's evidence was in some particulars at variance with the findings on the P3 form;*
 - iii. *Ground 6:- There was a grudge between PW1 and the appellants over a land dispute. On cross examination, PW1 stated that he was beaten on 6th December, 2016, and that the appellant's father had died on that day and he was not at the shamba. There is therefore the possibility that emotions were running high as the appellants had lost their father;*
 - iv. *Ground 7:- There was no corroboration by an independent witness. PW1 and PW2 were father and son, respectively. PW1 said that the Chief and the Assistant chief were present when the offence occurred. They were however not called to give evidence. Mr. Onsando submitted that the alleged assault did not take place. PW6, the investigating officer, stated that the 1st appellant used fists and sticks, the 2nd appellant used sticks and fists and the 3rd appellant used a whip and slippers to assault PW1. PW1 did not state in his evidence that a whip, fists and slippers were used.*

Mr. Onsando prayed that the appeal be allowed.

The respondent's submissions

5. Mr. Oroni, learned counsel for the State conceded to the appeal. He referred the Court to the evidence of PW1 on page 3 at line 19, where PW1 stated that there was a dispute respecting land parcels LR. No. Marama/Shikunga 177 and 178 which Surveyors had gone to demarcate. The Chief was present and a Village Elder. In the process of the survey, a scuffle ensued and the exercise was abandoned. The Chief, Village Elder and Surveyors were not called to corroborate the evidence of PW1 on if there was an assault occasioning grievous harm. PW1 and his son were called to testify. Mr. Oroni further submitted that since land is an emotive issue, the evidence of

independent witnesses was crucial for corroboration. He prayed that the appeal be allowed.

Analysis and re-evaluation of the evidence

6. Although the State conceded to the appeal, this court is not bound by the stand taken by Mr. Oroni.
7. In the Court of Appeal decision of **Mark Ouiruri Mose vs. R. [2013] eKLR**, it was held that this court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

This Court will therefore undertake the above duty as obligated by the law.

The Prosecution's case

8. The evidence of PW1, Musa Indetie was to the effect that on the 6th day of December, 2006, at 4.00 p.m., Surveyors went to undertake survey on land parcel Nos. Marama/Shikunga 177 and 178 pursuant to a court order from Kakamega Law Courts. The Surveyors went to the 1st appellant's home, John Angolo, to put the boundaries. PW1 was in the company of Omito Omano, to whom he had sold land parcel No. Marama/Shikunga 178. PW1 informed the court that there were four to five (4 to 5) Surveyors, the Chief and Sub-chief were there. There were also other neighbours present.

It was PW1's evidence that the 1st appellant and the 3rd appellant who are sons of Aswani and the 2nd appellant who is Aswani's daughter-in-law, became rowdy as they said that their land was being taken.

9. It was the evidence of PW1 that the chief ordered him to leave, as he was doing so, the 1st appellant appeared with a panga and moved to cut PW1. PW1 took a stick and blocked the blow aimed at him. He held the 1st appellant and a struggle ensued. The 3rd appellant appeared, took a stick and hit PW1 four (4) times on the right leg at the heel. The 2nd appellant appeared with a stick saying that PW1 was always disturbing them. She hit PW1's head with the stick until it fell. PW1 further testified that police officers from Marenyo went to the scene and held (sic) the 1st appellant and took away the panga. They took PW1 to hospital at Shikunga. While there, the 1st appellant appeared and held PW1's son, Denis on the shoulder and took him to a verandah. The 1st appellant pushed Denis, who held onto the appellant, the two fell down. The Doctors locked PW1 in the hospital to protect him. He was referred to Butere hospital for further treatment. He then reported to the police and was given a P3 form. He identified in court the P3 form, MFI-P1, which was filled. PW1 informed the court that he sustained injuries on the legs, his back and hands which were still hurting at the time he was testifying in court. He stated that the 1st appellant hit his legs. PW1 told the court that he had no differences with the appellants.
10. On cross-examination, PW1 informed the court that he had a case with Aswani, his neighbour. PW1 was beaten on the 6th day of December, 2006. Aswani had died on that day he was not at the shamba. Later in cross examination, he said that the person who had a case with the appellants' father was one Zablon Omeno to whom PW1 had sold a piece of land. The said Omeno was there when PW1 was assaulted. Omeno is the one who had called the Surveyors to the site. PW1 further said that the appellants were agitated that PW1 sold the land to a 3rd party in the year 2004. The Surveyors placed a boundary and took some space from the appellant's home. PW1 further said that the Chief took away the panga and that he saw the 1st appellant going to attack PW1. PW1 denied beating up the 1st appellant.

11. PW2, Perez Amakombe was at home on the 6th day of December, 2006 when he heard noise as if people were attacking each other at the boundary where land subdivision was being done. He ran towards the direction of the noise and found his father, PW1, full of blood. He was dirty, bleeding and could not walk. He said that he was assaulted. PW2 took PW1 to Shikunga hospital. As PW2 stood waiting with his father at the said hospital, the 1st appellant appeared asking where PW1 was. On seeing PW1 and PW2, the 1st appellant said he was going to kill PW1. The 1st appellant pulled PW2 as he tried to stand between PW1 and the 1st appellant. He held PW2 and fell aside (sic) with him. The Doctors took away PW1 and locked him (in the hospital). The 1st appellant continued to abuse PW1 and then left after the Doctors threatened to take him to the police. PW2 confirmed that there was a land dispute after his father sold land.
12. On cross examination, PW2 said that PW1 was injured on the hands, which were swollen with blood, he had injuries on his head and legs and he could not walk well.
13. PW3 and PW4's evidence is not material in this case as they were erroneously called to adduce evidence.
14. PW5, Joshua Imbandu, a Clinical Officer stated that on 13th December, 2006 while at Butere Hospital, he received a patient, PW1, who complained of having been assaulted on the 6th day of December, 2006. On examination, PW1 had a tender swelling at the back of his head and on both sides of the head. There were multiple areas of tenderness on the chest and both shoulders. There was tenderness during movement of the right knee and a bruised swelling below the left elbow. The right knee was swollen and had accumulated blood. PW5 assessed the degree of injury as grievous harm and informed the court that the probable type of weapon used was blunt. PW5 produced PW1's P3 form as exhibit P1 and his treatment record as exhibit P2.
15. On cross examination, PW5 indicated to the court that he examined PW1 seven (7) days post injury and that he had previously been treated at Shikunga Health Centre.
16. PW1 further said that he examined the 1st appellant and filled his P3 form after he went to hospital on 10th January, 2007. He had a bruised swelling on the left side of the neck, the right index and middle finger were bruised and swollen. PW5 filled the P3 form for the 1st appellant twelve (12) days post injury. He informed the court that the type of weapon used was blunt. PW5 assessed the degree of injury as harm. The 1st appellant was treated before PW5 filled the P3 form. PW5 produced the 1st appellant's P3 form as exhibit D1.
17. PW6, PC George Wanyama, took over investigations in this matter and charged the appellants. He visited the scene of assault at Marama Shikunga plot No. 177 and 178 where the dispute herein started. He testified that PW1 was attacked by the appellants who beat him up. When PW6 saw him, PW1 had tenderness on the right knee which was swollen. PW6 produced a walking stick as exhibit P2. He informed the court that the walking stick was snatched from PW1 by the appellants who used it to assault him. PW6 further stated that PW1's clothes were soiled. PW6 produced them as exhibits P 3 (a) and (b).
18. On cross examination, PW6 informed the court that the 1st appellant used fists and kicks on PW1, the 2nd appellant used slippers and whips and the 3rd appellant assaulted PW1 on the chest and right knee with a walking stick. He stated that he called one Administration Police Officer who refused to record a statement. The Chief did not testify and the Surveyors too. He indicated that he knew that the 1st appellant was also assaulted and issued with a P3 form on the 6th day of December, 2006.

The defence case

19. At the close of the prosecution case, the appellants were put on their defence. The 1st appellant,

John Angolo, denied having assaulted PW1 and informed the court that it was PW1 who assaulted him with a walking stick. That when the demarcation was ongoing, they heard some noise and ran towards the direction where the noise was coming from and that is when he was assaulted. He was treated at Shikunga Health Centre and referred to Butere District hospital where his P3 form, exhibit D1 was filled. He said that when the incident occurred, the 3rd appellant was not at the scene as he had been sent to the nearby shops.

20. On cross examination, the 1st appellant indicated that the boundary was measured until (sic) his door and he was not happy about that. The 1st appellant had no treatment notes. Exhibit D1, his P3 shows that his long sleeved checked shirt had blood stains.
21. The 2nd appellant, Lilian Malala denied having beaten up PW1 with the other two (2) appellants. She stated that on the 6th day of December, 2006, she was at home when she heard noise. She saw people crowding the Surveyor's vehicle and on reaching there, she saw that her mother-in-law Nora Aswani had been injured. She saw the 1st appellant who had blood on the ear going to hospital. She did not see PW1.
22. The 3rd appellant, MacDonald Omwaka Aswani, denied being at the scene when the incident happened as he had been sent to the shops by Simon Malala. On return, he found his mother with an eye injury. The 3rd appellant did not find PW1 at the scene.
23. DW4, Nora Aswani informed the court that she was at home on the 6th day of December, 2006 when Surveyors went to the home of Angolo. She stated that PW1 hit the 1st appellant with a rungu. She was also assaulted by a 3rd party. She denied that the appellants assaulted PW1. She indicated that the 2nd appellant was at her home which is about 1 km away from the scene of crime and that the 3rd appellant had gone to his elder brother Simon (sic). She did not see PW1 with an injury or being beaten.
24. On re-examination, she stated that she asked the 1st appellant what had happened and he said he was assaulted by PW1.
25. The learned trial magistrate after considering the prosecution and defence case convicted the appellants for the offence of grievous harm and sentenced each to serve five (5) years imprisonment.

Determination of the appeal

The issue for determination in this appeal is if the appellants were properly convicted and sentenced to serve five (5) years imprisonment each in light of the prosecution evidence that was adduced.

26. I have considered the submissions by Mr. Onsando, counsel for the appellants and Mr. Oroni for the State. It is clear that Mr. Onsando in his submissions jumbled up the identities of the 1st and 3rd appellants as regards the person who was injured between the two. I find no merit in ground Nos. 1, 2 and 6 of the appeal. It is my considered opinion that the most critical element in this appeal is embedded in ground No. 7 of the petition of appeal, in that the prosecution failed to call key witnesses. The 1st appellant and PW1 sustained injuries, were treated and issued with P3 forms which were duly filled by PW5 who produced them in evidence. That being the case, the prosecution was obligated to establish if PW1 was acting in self defence when he inflicted injuries on the 1st appellant to ward off an attack by the appellants or if there was a fight between PW1 and the appellants. This court has however noted that the 1st appellant was an aggressor in that he threatened to kill PW1 later that day, when he found PW1 at Shikunga Health Centre.
27. Further, to set the record straight, contrary to Mr. Onsando's submission, the lower court record

does not state that the appellants' father had died on the date the offence occurred which could have made the appellants emotions to run high. The record indicates that the appellants' father was not present when demarcation was being done because he had died. The record did not indicate that he died on the 6th day of December, 2006

28. This being a criminal matter, the prosecution was under duty to call at least one other witness who was at the scene of the incident to adduce evidence in support of their case. PW6 however took this duty casually and did not call any witness who was present when the confrontation between PW1 and the 1st appellant happened so as to shed light on the true state of affairs appertaining at that time. Apart from stating that one Administration Police Officer refused to record a statement, no explanation was adduced by PW6 as to why he did not call either the Chief or Sub-chief, one of the Surveyors or one of the neighbours who was present at the time the offence occurred.

29. Although the Evidence Act in Section 143 provides that no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact; it is my finding that from the evidence presented before the trial court, there was need for the prosecution to call at least one other witness who was present when the events that led to PW1 being assaulted unfolded.

30. In the case of **Bukenya & Others vs. Uganda (1972) EA 549**, the former East Africa Court of Appeal held that:-

"The prosecution must make available all the witnesses necessary to establish the truth, even if their evidence may be inconsistent. That the court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case; and where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

31. In the present case, I find that failure to call any other witness who was at the scene of crime casts a dark shadow of doubt on the prosecution's case. The only presumption that this court can arrive at is that, if the said witnesses had been called, they would have adduced evidence that would have prejudiced the prosecution's case.

32. Having made the above finding, I am in agreement with Mr. Onsando, that there was no corroboration of PW1's evidence and that the prosecution failed to discharge its burden of proof to the required standard.

33. For the foregoing reasons, the appeals herein are allowed, the convictions quashed and the sentence imposed on each appellant is hereby set aside. The appellants are set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** on this11th day ofFebruary....., 2016.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... **for the Appellants.**

..... **for the Respondent.**

..... **Court Assistant**