REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA.

CRIMINAL APPEAL NO. 72 OF 2015

(From original conviction and sentence in Criminal Case No. 92 of 2015 of the PM's Magistrate's Court at Mwingi –G.W Kirugumi–R.M).

JOHN MUTUA MUTISYA .....APPELLANT

V E R SU S

REPUBLIC ..... RESPONDENT

JUDGMENT

The appellant John Mutua Mutisya was charged before the Magistrate's court at Mwingi with grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that on 22nd March 2011 at Mwingi Township Mwingi Central District within Kitui County, unlawfully did grievous harm to Musili Muthui. He denied the charge. After a full trial he was convicted of the offence and sentenced to serve 5 years imprisonment.

Dissatisfied with the decision of the trial court, he filed his appeal on 24th July 2015. However before his appeal was heard, he filed an amended petition of appeal and written submissions. His grounds of appeal can be summarized as follows:-

1. That the trial magistrate erred in convicting him while the charge sheet was defective.
2. That the trial magistrate erred in convicting him while, other than PWI, no other witness in the market was called to testify for the prosecution to prove the case.
3. That the trial magistrate erred in convicting him without considering that the case took very long before plea was taken.
4. The trial magistrate erred in convicting him without considering that there was a grudge existing between him and PWI after he started business nearby at the market.
5. The learned magistrate erred in convicting him while the complainants PWI's evidence was contradictory and inconsistent.
6. The sentence five years imprisonment was harsh and excessive.

At the hearing of the appeal the appellant relied on his new grounds as well as written submissions. He elected not to make oral submission. I have perused and considered the written submissions of the appellant.

The learned Prosecuting Counsel Mr. Okemwa, opposed the appeal and emphasized that after committing the offence on 22nd March 2011, the appellant escaped to Nairobi only to surface in February 2015 when he was arrested. According to counsel, the conduct of the appellant was consistent with

commission of the offence.

Counsel submitted that the evidence of PWI the complainant was very clear on how he was engaged with the appellant that day in the morning at the market, when the appellant asked for Kshs 50/- from PWI to give change to a customer only later to punch the complainant, who lost his tooth. Counsel emphasized that the medical practitioner PW2 confirmed treating the complainant and also produced the P3 form in which the injury was described as maim.

With regard to sentence, counsel submitted that the maximum sentence for the offence was life imprisonment. Therefore, the appellant was lucky to have been being sentenced by the magistrate to 5 years imprisonment.

In response to the Prosecuting Counsel's submissions, the appellant said that he did not have anything to add.

In brief the facts of the case are as follows. The prosecution called 3 witnesses. The evidence was that the complainant PWI Musila Muthui was at the market in Mwingi town on 22nd March 2011 selling second hand clothes, when appellant arrived and started doing the same. The appellant thereafter, borrowed Kshs 50/- note from the complainant as change to serve a customer which he was given.

The appellant again borrowed Kshs 50/= from the complainant where upon the complainant gave him a Kshs 100/= note. The appellant then left and came back shortly and claimed that the complainant had given him torn money and, without any provocation, punched the complainant in the mouth injuring him and loosening two of the complainant's front teeth. The appellant then escaped.

The complainant reported the incident to the police and went for medical treatment at Mwingi hospital where PW2 Fredrick Mutua a Clinical Officer treated him and filled a P3 form in which he described the injury suffered as maim. The knocked out tooth was taken to the police and left there while the appellant was sought. The appellant was ultimately arrested in 2015 and charged in court with the offence.

When put on his defence, the appellant gave sworn testimony. He stated that the complainant was jealous because the appellant attracted more customers at the market where both sold second hand clothes. He stated that the complainant had weak teeth and denied assaulting. He stated also that he went to Nairobi for work between 2011 and 2015. He stated that the charge against him was a frame up due to business rivalry.

In cross examination, he denied asking for change from the complainant and denied escaping from Mwingi and started that the complainant already had a missing tooth prior to the alleged incident.

This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanor and give due allowance to that fact. See the case of ***Okeno -vs- Republic (1972) EA 32***.

In criminal cases, the burden is always on the prosecution to prove their case against an accused person beyond any reasonable doubt. The accused does not have a burden to prove his innocence. See ***Woolmington –vs- DPP(1935) AC 462.***

The appellant herein was convicted of grievous harm. He has come to this court on appeal, on several grounds. He has stated first that the charge is defective as his date of arrest was said to be in 2014.

I have perused the charge sheet. Indeed the date of arrest was said to be in 2014. The appellant said in his defence that he was arrested in January 2015. In my view, the state made a mistake in indicating that he was arrested in 2014. The mistake however did not cause a miscourage of justice. He himself

admitted that he was arrested, and was arrested in January 2015. The statement of offence and particulars of offence are substantively in compliance with the provision of section 134 of the Criminal Procedure Code (cap.75). There is nothing in the charge sheet that showed that the appellant was misled or prejudiced in any way by the mistake of the date of arrest. I dismiss that complaint.

The appellant has complained that it took long for him to be charged in court with the offence. Indeed, the offence was alleged to have been committed in March 2011, and he was charged in 2015. The cause of the delay in charging him was however clearly explained by the fact that the prosecution said that he was not at Mwingi and therefore was not arrested and charged for some years. He himself said in his defence that he was in Nairobi between 2011 and 2015 where he was working.

Both the prosecution and defence position was that the appellant was in Nairobi and therefore could not be arrested and charged at Mwingi. In those circumstances, I find nothing wrong with the delay in charging him at Mwingi between 2011 and 2015 because the appellant himself admitted that he was in Nairobi then. If the appellant says that he was arrested and kept in custody longer than 24 hours as required by the Constitution of Kenya 2010 before being charged in a court of law, in my view such a violation of his Constitution right if proved, can be the basis for a claim in a civil court for compensation in form of damages, but cannot vitiate or nullify criminal proceedings or a conviction. I dismiss that complaint.

With regard to complaint of contradictions of the evidence of the complainant PWI, I have perused the proceedings. I find no contradictions in the evidence of prosecution witnesses. The appellant himself has not pointed to any particular contradiction. I dismiss that ground.

The appellant has complained that the witnesses at the market or from the market other than the complainant PWI were not called by the prosecution to testify. Indeed only the complainant PWI was called by the prosecution to testify with regard to what happened at the market. The alleged assault incident occurred in broad daylight, but the complainant did not say if any other person from the market came to intervene or saw the appellant hitting him or took interest in what was happening.

I am aware that courts have held that where the prosecution fails to call crucial witnesses, then the court may make an adverse inference on the prosecution case – see the case of ***Bukenya -vs – Uganda (1972)EA 549***. In the present case however, no crucial witness has been identified or mentioned who was not called by the prosecution to testfy. The appellant himself said that he used to sell second hand clothes near or next to the complainant in 2011. He also said that there was business rivalry between the two. In my view, if he wanted to call anybody from the market up to the time he left for Nairobi to support his defence, he should also have done so. Otherwise in the absence of the identity or mention of any other crucial witness, the prosecution is entitled to call the witness or witnesses available.

The issue is whether the evidence the single witness PWI the complainant herein case was reliable. Courts have held that the evidence of a single witness can perfectly sustain a conviction, provided it is believable and is believed by the trial court – see the case of ***Abdalla Bin Wendo -vs- R.(1953) 20EACA 166*** Therefore in my view the fact that no witness was called other than the complainant PWI from the market, is not a reason for a court to make an adverse inference on the prosecution case.

As I have said earlier in this Judgment, the burden is always on the prosecution to prove its case against an accused person guilty beyond any reasonable doubt. In the present case the assault incident occurred during broad day light. I am convinced that there was no possibility of mistaken identity as both the complainant PWI and the appellant confirmed that they knew each other before and were infact selling second hand clothes side by side at the Mwingi market. There is also evidence that the complainant PWI reported the incident immediately to the police and also went for treatment at Mwingi Hospital. The exhibits produced also confirmed that the complainant was seriously injured in the mouth consistent with the blow or punch and that he lost a tooth. Both the P3 form and the tooth were produced in court as exhibits.

Thought he appellant claimed that the case was a frame up and that the complainant had loose teeth, that

defence is not believable. In addition it is clear that the appellant ran away from Mwingi to Nairobi and spent about 3 years hoping that the problem will go away. That is guilty conscience. Though the appellant had no burden to prove his defence of alibi see the case of ***Leonard Aniseth –vs- Republic (1963) EA 206,*** his defence of alibi herein is not belieavable. I find that the prosecution proved its case against the appellant beyond any reasonable doubt.

With regard to sentence the trial court called for and considered a Probation Officers report before sentencing the appellant to serve 5 years imprisonment. The sentence was within the law and in my view was not harsh and excessive in the circumstances of the case.

Consequently, I find no merits in the appeal. I dismiss the appeal of the appellant and uphold both the conviction and the sentence of the trial court. Right of appeal is explained.

Dated and delivered at Garissa this 5th day of July 2016.

GEORGE DULU

JUDGE