



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL CASE NO. 144 OF 2012

[Being an appeal from the proceedings, judgement and sentence of SPMC NO. 240 of 2010 by Hon. E.C. Cherono – PM delivered on 24th May and 4th June, 2012]

MARGARET KHALILI KHASHONO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant **MARGARET KHALILI ASHONO** was charged and convicted of assault in SPMCC No. 240 of 2010 and sentenced to probation for 3 years.
2. The appellant was dissatisfied with the judgment and appealed to this court on grounds that the trial court failed to consider the evidence on record; failed to hold that there were material contradictions in the prosecution case that cast doubt in the case, 3 years probation period was excessive; trial court failed to establish age of the complainant; whether the complainant was intelligent enough to enable him testify and whether his testimony could be relied upon.
3. In his submissions at the hearing defence counsel reiterated the grounds of appeal and stated that there were contradictions in the prosecution case, the case was not proved beyond reasonable doubt; **PW2** mother to the victim was and had refused and/or evaded to answer questions put to her. The initial medical reports were not produced as exhibits although marked; the trial court in analyzing the evidence ignored the defence case and alibi raised; further that the account of the incident given by **PW1 & 2** varies; the doctors opinion varies with the charge that faced the appellant and that the court did not make a finding of age of the victim and whether he ought to have testified.
4. On the other hand the state opposed the appeal and was of the view that the prosecution proved its case; the defence evidence was contradictory, yet the prosecution witnesses were credible and there was no alibi raised as argued by the defence.
5. This is the first appellate court and has considered the evidence afresh. The issue for determination is whether the victim was assaulted and if so whether the assailant was the appellant.
6. The prosecution case is that on the 7th day of January, 2010 the victim herein **PW1** was grazing cows that wandered into the appellant's sweet potato crop and ate the same being angry the appellant caned **PW1**, twisted his right hand causing a fracture on the same. The defence denied the allegation that the appellant caned and twisted **PW1's** hand causing him a fracture. The defence admitted that the appellant's crop were destroyed and further the incident resulted into an altercation between the appellant

and **PW2**. That **PW1** was brought to the appellant by his mother much later where the allegation of assault was framed.

PW1 a minor M J B was examined by court (*voire Dire*) and found to be intelligent enough to testify though the court did not ascertain his age. In his evidence he stated that while herding cows the appellant went and whipped him two times on his buttock and squeezed his right hand. He was thereafter taken to Makutano dispensary, later to Elgon hospital.

In cross examination **PW1** said that when the incident happened he was with his brother who later ran to call their mother.

PW2 stated that on 7.1.2010 at about 5 pm she heard her child cry, she went to the scene and found the appellant holding the child's hand at which point the appellant left the child and went towards her and tried to push her. That when she looked at the child's hand the same had been twisted. She took the child to Makutano dispensary with aid of neighbors and from there she was referred to Kitale hospital where she arrived late and a therefore she took the child to Mt. Elgon where the child was treated and discharged. she thereafter reported the matter to the police on 11.1.2010 and since the hand was still swollen the child was taken to Webuye on 12.1.2010 where he continued medication until 24.4.2010. The child was later issued with a P3 form.

PW3 a doctor from Webuye, though he did not examine the victim or fill the P3 form he produced the same as maker was not available. He indeed confirmed from the treatment notes and P3 that a fracture had been sustained by the victim. He gave the initial date of examination as 7.1.2010. He further stated that the victim was assaulted and sustained a fracture of the left ulna and radius bone on 28.2.2010 (see page 21 line 9 – 10) and was attended to at Webuye District hospital. That the P3 form was filled by a clinical officer one Kaikai on 25th January, 2010 and the patient's age assessed at 5 years. He gave the probable weapon used as blunt.

He also stated that P3 form was filled after 18 days of the injury.

PW4 a neighbor assisted to take the child to Makutano dispensary on 7.1.2010 where the child was given pain killers and referred to Kitale. He saw the hand bend.

PW5 he received the complaint of assault on 11.1.2010. The child had been treated at Makutano and referred to Kitale where a P3 form was filled. At the point of report the complainant was injured on the right wrist and elbow. He did not know whether there was a fracture.

7. It is trite law that the prosecution case must be proved beyond all reasonable doubt and this onus squarely lies upon the prosecution. From the evidence on record there are glaring contradictions of what injuries if any were inflicted upon **PW1** by the appellant and how **PW1** states that he was caned and his right wrist squeezed. He does not indeed say that a plaster was placed where his hand was squeezed **PW2** says the hand was twisted and had turned the other way.

PW4 says he saw the left hand bent.

PW5 saw a swollen hand. He is the investigating officer and by 11th of January, 2010 5 days after the incident he was not aware of a fracture.

8. The alleged incident happened on 7th of January 2010. Some hospital cards from Makutano and Mt. Elgon were marked and not produced as exhibits and were of no evidential value. Tendered in evidence were P3 form and medical card from Webuye. A close look at the two indicate the following;

Exhibit 3 – patient record of M B aged 5 dated 1st day was 28.2.2010 where he had a swollen right upper limb X-ray done.

Further treatment was on 29.3.2010. In his explanation PW3 stated that there was a fracture, detected and POP (plaster of Paris) I suppose placed.

Exhibit 4 dated 11.1.2010 P3 form there is an eraser. Initially the month and year were different. Date and time of the police report was also erased initially the same read the 11 in the month is not clear 2009. The doctor observed that there was fracture of ulna and radius and Plaster of Paris placed on fore arm. Same was signed on 25.1.2010.

9. From the above 2 the P3 form was filled before the X-ray was done and the Plaster of Paris placed on the patient yet the same speaks of the same.

10. Further there is no explanation by the prosecution when the fracture was discovered and how the clinical officer was able to detect the same before the X-ray was done. There is no explanation either why Mt. Elgon hospital did not treat for fracture and why it took more than 1 ½ months for the treatment at Webuye.

11. The above contradiction cast doubt as to what exactly the injuries if any sustained on 7th of January, 2010 and if indeed the same were similar to what was being treated on 28.2.2010. Could the victim have sustained the injuries treated on the 28th of February, 2010 later and in different circumstances.

12. The doubt left in the mind of the court must be to the benefit of the appellant herein.

13. There are definite gaps which reduce the prosecution case to a standard lower than what is required to return a conviction of guilt. Consequently, the appeal succeeds.

The conviction is quashed, the sentence set aside.

DATED and DELIVERED at BUNGOMA this 10th day of November, 2016.

ALI-ARONI

JUDGE.