



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO.208 OF 2011

BETWEEN

DANIEL KIMUTAI RONO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence of the SRM's Court at Kilgoris in Criminal

case No. 793 of 2010 delivered on 23rd September, 2011 – Hon. B.O. Ochieng, SRM)

JUDGMENT

1. The appellant DANIEL KIMUTAI RONO was charged with the offence of causing Grievous Harm contrary to **Section 234** of the **Penal Code Cap 63** the particulars of which were that on 15th day of June 2009 at Murkan area of Transmara District within Narok County, unlawfully did grievous harm to PETER MARMUMET TOMPOI.
2. He pleaded not guilty, was tried, convicted and sentenced to serve Ten years imprisonment. Being aggrieved by the said conviction and sentence he filed this appeal and raised the grounds of appeal in his petition of appeal filed on 28th September 2011 which can be summarized as follows:-

- a. *The prosecution case was not proved to the required standard.*
- b. *His defence was rejected without due consideration and without reason for the same.*

1. The appellant further filed submissions and additional grounds in which he stated further that vital witnesses were never called by the prosecution including those who allegedly mentioned his name.
2. When this matter came up for hearing before me, Mr. Majale appeared for the state while the appellant who had earlier been represented by Mr. Bigogo opted to proceed in person.

SUBMISSIONS

3. It was submitted by the appellant that there was inconsistency as to the year of the alleged attack. He submitted that PW1 testified that it was on 15th June 2009 while PW2 said it was 15th June 2010. He further submitted that he was not properly identified and that there was no identification parade conducted. He further submitted that there was no evidence to prove that the knife tendered in as an exhibit was used to cut somebody.
4. It was further submitted by the appellant that there was contradiction as regards the nature of the injuries sustained by the complainant, the days of admission and the time of assault.

5. Mr. Majale for the state submitted that the appellant was well known to the complainant and PW2. He submitted that he was properly identified at the dock by PW4 and 5. He further submitted that the appellant's alibi defence did not dislodge the prosecution case.
 6. This being a first appeal, the court is required to re-evaluate the evidence tendered before the trial court and to come to its own conclusion though taking into account the fact that it did not unlike the trial court have the advantage of seeing and hearing witnesses.
 7. PW1 Peter Marmumet Ole Tumboi testified on oath and his evidence was that on 15th June 2009 acting on a court order was going to evict the father of the appellant from land known as TRANSMARA/KIMINTET B/842 accompanied by police officers including the Deputy OCS when the appellant came with a Masai sword aimed at his head when it missed cutting him on the collar bone. He held the appellant by his jacket and the knife causing it to cut his hand and fingers.
 8. He stated that the police shot in the air causing the appellant to run away and that everybody mentioned DANIEL RONO as the attacker. He was subsequently taken to hospital where he was admitted for two days. The appellant was arrested after two months and he was able to identify him at the police station. He further stated that he had known the appellant since he was staying in his farm where he had gone to evict them.
 9. PW2 DAVID TOBIKO stated that he had accompanied PW1 to execute a court order when he was cut by the appellant and that he is the one who picked the sword which had been used. PW3 DICKSON NENGUSEU the clinical officer confirmed the injuries sustained by the complainant as grievous harm and filed P3 form in respect thereof confirming a fracture of the clavicle. PW4 CPL HASSAN stated that he had accompanied the complainant to execute a court order when the same was attacked by the appellant who disappeared into the maize plantation after the attack. This evidence was confirmed by PW5 CIP LAWRENCE NALO.
 10. When put on his defence, the appellant gave sworn evidence and stated that on 15th June 2009 he had gone to Sotik and thereafter proceeded to Abossi hospital. He slept at a nearby village in the home of Simon Koskey DW2 and the next day he was told that the complainant had burnt their houses. Under cross examination he stated that on 15th June 2011 he got a motor cycle accident at 9.00 a.m but did not report the accident.
 11. DW2 SIMON KOSKEY stated that on 15th June 2009 he was going on a safari when he got message that the houses belonging to the appellant and family were burnt down and that the next day the appellant went to his home and when asked where he had been the previous day he stated that he had not been home and that he slept at Kuntet. Under cross examination he stated that he did not see the appellant on the material day. DW3 JULIUS KIRUI stated that he had gone to check on the appellant but was told that he had gone to Sotik and that he went there after the police had left the home.
 12. DW4 JOSIAH NGETICH KIPKEMOI also corroborated the appellant's defence that on 15th June 2009 they went to Sotik though the appellant went ahead of him and at 9.00 a.m the appellant called him on cellphone and told him that he had been injured. Under cross examination he stated that on 15th June 2009 he was together with the appellant and that when he went to Sotik he left the appellant at the hospital.
 13. From the proceedings and submissions herein the following issues have been identified for determination:-
 - a. *Whether the appellant was properly identified.*
 - b. *Whether the prosecution case was proved beyond reasonable doubt.*
 - c. *Whether the appellant's defence was taken into consideration.*
1. According to the evidence of PW1, the attack took place between 3.00 p.m – 4.00 p.m. The appellant was known to him since him together with his family were staying in his farm. Immediately after the attack everybody mentioned that it was the appellant. PW2 saw the appellant on the said date and was able to identify the appellant at the dock. His identification was further confirmed by PW4 CPL HANAN. I therefore agree with the finding of the trial court that the appellant was properly identified.
 2. On the issue of the appellant's defence, the same raised an alibi that he was away from home on

the material day and where as it is for the prosecution to produce evidence to dislodge the defence, it is clear that the appellant was placed at the place of the attack through the evidence of PW1, PW2, PW4 and PW5 all who were at the place of the attack. The defence witnesses also contradicted the appellant's defence and in particular the evidence of DW2 in whose house the appellant alleged to have slept in on the material day and DW3 who could not account for the appellant's whereabouts after 10.00 a.m.

3. Having re-evaluated the evidence tendered, I find that the prosecution case against the appellant was proved beyond reasonable doubt and that his conviction was safe and would therefore dismiss the appeal on conviction.
4. On the issue of sentence, the appellant should have been sentenced to imprisonment for life and not upto life as stated by the trial court. However in **Criminal Appeal No.24 of 2014 Court of Appeal at Nyeri in Charles Muriuki Mwangi -vs- R.** an appeal arising out of a judgment of this court, the Court of Appeal quoted the decision in **JJW -vs- R [2013] e KLR** where the prosecution did not Cross Appeal as follows:-

“The Notice of Appeal shall constitute the appeal and then what it specifically states is appealing against in Rule 59 (2) is what the appellant is bound to pursue as that is what the appeal is instituted on and not any other.”

5. From the Memorandum of Appeal it is clear that the appellant did not appeal on sentence and since he was not put on notice I shall not interfere with the trial court's sentence.
6. In the final analysis I hereby dismiss the appeal herein as lacking merit on both conviction and sentence.

Signed and dated on this 11th day of March, 2015.

J. WAKIAGA

JUDGE.

In the presence of:

Mr. Boyon for the Respondent

In person for Appellant