



REPUBLIC OF KENYA

IN HIGH COURT OF KENYA AT MERU

HCRA 116 OF 2013

AILA DANABO WOSHEAPPELLANT

VRS

REPUBLIC RESPONDENT

J U D G E M E N T

This appeal arises from the decision of the Principal Magistrate's Court, Marsabit where the Appellant, Aila Danabo Woshe was convicted of the offence of Assault causing actual bodily harm contrary to Section 251 of the Penal Code and was sentenced to serve a term of 5 years imprisonment.

The Appellant has appealed against the said conviction and sentence citing the following grounds:-

- 1. *That the court erred by accepting contradictory evidence by the prosecution witness;***
- 2. *That the trial was irregular;***
- 3. *That the court failed to consider the appellant's defence;***
- 4. *That the conviction and sentence is not backed by the weight of the evidence tendered.***

He therefore urges this court to quash the conviction and set aside the sentence.

In support of the appeal, the Appellant sought to explain what transpired between him and his step-brother, the complainant. That in fact it was him who was assaulted and the Doctor confirmed the injuries.

The appeal was opposed and Mr. Mulochi, Learned Counsel for the State argued that there was sufficient evidence by PW1 that he was assaulted by his brother the appellant in the presence of PW2; that though it was at 9.00 p.m. there was moonlight and the Appellant is a person well known to PW1, being a brother; that though the Appellant claims to have been hit with a metal bar, the Doctor found that he had a sutured cut wound. Counsel also told the court that the sentence was legal and the court should not interfere with it.

As the first appellate court, my duty is to review the evidence available and analyze it afresh and come to my own conclusion.

The prosecution called four witnesses in support of their case. Sode Danabo (PW1) is a brother of the Appellant. He recalled that on 27/3/2013 at about 7.30 p.m., he was in the plot where he resides chatting with friends when he received an offensive text from the Appellant. When he called the Appellant, he disconnected. PW1 said that the Appellant kept moving about on the road near where they were seated and about 9.00 p.m. while seated on the verandah, the Appellant went to the fence and said “*huja kufa. Asthma haija kuuwa*”. PW1 said there was moonlight and he knew the Appellant’s voice; that the Appellant entered the plot and PW1 stood to ask why he sent him messages but the Appellant called him prostitute, drew a knife from the right side of the hip and tried to stab PW1 but he blocked with his right hand and he was cut on the right palm. A struggle ensued and Selesa (PW2) who was present took him out of the plot. He was taken to the police station by a nephew, reported and was treated. His clothing which was blood stained were produced in evidence. He denied that he assaulted the Appellant with his friends.

PW2 Salesa Galma Mega reiterated what PW1 said, as to how the Appellant attacked PW1 and he intervened and removed PW1 from the plot. He said that there was moonlight in the plot and he also had a phone with a torch.

PW3 PC Hillary Ruto arrested the Appellant on 18/4/2013. He said that there had been an assault report made by PW1 and a P3 had been filled. PW3 told the court that they had tried to trace Appellant in vain before that date.

PW1 was examined by Dr. David Mangara of Marsabit District Hospital on 5/4/2013 and also filled the P3 Form. PW4 found that the complainant suffered a sutured cut to the right palm which was inflicted by a sharp object. He also produced the P3 for the Appellant which was filled on 16/5/2013. He found the appellant to have a healed cut wound on the forehead and assessed the degree as harm.

When called upon to defend himself, the Appellant opted to make an unsworn statement in which he said, that on 27th he was in his plot about 11.30 p.m. when the complainant and the witness PW2, went where he was; that PW2 had a grudge with him in that he had been letting his goat loose and when he warned PW2, PW2 told him the plot was not his; that the Complainant hit him with a metal on the head and ear and so did the witness and he lost consciousness. He reported to his sisters.

I have reviewed the evidence on record as well as the Appellant’s defence, grounds of appeal and submissions. I found PW1’s evidence to have been corroborated in all material particulars by that of PW2, that this incident occurred on 27/3/2013 at the plot where PW1 lives and that it was at about 9.00 p.m. Both PW1 and PW2 said there was moonlight and PW1 in any event knows his brother’s voice well and there was no doubt as to the identity. During the prosecution case the appellant never alleged that the confrontation occurred where he lives. The appellant had an opportunity to cross-examine both PW1 and 2 and he never alluded of that fact. It is only when cross examining PW1 that he alleged that PW1 and his friends attacked him but he did not say where. I found no inconsistencies in the prosecution evidence as to how the assault occurred.

Whether there a fight between PW1 and the Appellant; no doubt PW1 was injured and made a report of the assault on the same night. His P3 was filled on 4/4/2015, 10 days later. The Appellant did not report anywhere about having been assaulted. According to PW2 and 3, the Appellant went underground till his arrest about a month later. By then he had not made any assault report anywhere. His sisters whom he claims he informed did not testify as witnesses. The Appellant obtained a P3 after his arrest and had it filled by PW4 on 16/5/2015. The Appellant’s conduct was obviously an afterthought. Had he not been arrested, it seems he would never have made this assault report. But of more significance is the injuries the appellant allegedly received. PW4 found the other appellant had only one injury on the forehead – a healed cut wound, probably caused by a sharp object. Appellant however claimed to have been hit on the head with a metal. A cut wound is very different from that inflicted by a metal. Unless the Appellant was referring to a different incident, the injury he suffered is not consistent with the findings of PW4. The Appellants evidence is contradictory. The injury on his forehead may have been inflicted elsewhere.

In his defence the Appellant also alluded to having had a grudge with PW2 over his goat trespassing on onto the Appellant's plot. However the Appellant had an opportunity to cross-examine PW2 and or not time did he allude to such occurrence. I find the defence to be an afterthought. The trial court did consider the appellant's defence and found the medical evidence to be inconsistent with his testimony.

After a careful consideration of all the evidence on record, I am satisfied that it is the Appellant who assaulted PW1, and the source of the conflict seems to be that of the property left by their father. I find that the conviction is safe and I confirm it.

Before sentence the court noted that the Appellant was not remorseful after he alleged that he was being tortured. Upon conviction for criminal offence of assault, the maximum sentence that can be meted is 5 years imprisonment. The court therefore handed the maximum sentence. The injury that PW1 suffered was not very serious, nor were there aggravating circumstances to warrant a maximum sentence.

I therefore find the sentence to have been excessive in the circumstances. So far, the Appellant has served about 1½ years. For that reason, I will call for a probation officer's report to consider whether or not the Appellant can benefit from probation for a term the court will decide.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF JUNE 2015.

R. P. V. WENDOHO

JUDGE.

In the presence of:

Mr. Musyoka for State

Faith, Court Assistant

Appellant in person