



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO 93 OF 2012

From original conviction and sentence of the Resident Magistrate (V.A. Otieno, RM) in Principal Magistrate's Criminal Case No. 341 of 2011.

DICKSON NGUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

Dickson Ngui, the appellant was charged with assault causing actual bodily harm contrary to section 251 of the Penal Code. It is alleged that on 18th May 2011 at Mwingi Bus Stage, in Mwingi Location of Mwingi District Kitui County he unlawfully assaulted Charles Kyalo Kitheka thereby occasioning actual bodily harm.

The prosecutor in the lower court called five witnesses. The trial court was convinced after considering the evidence that the charge had been proved beyond reasonable doubt and convicted the appellant. He was sentenced to three years imprisonment.

Petition of Appeal

The appellant filed on 27th February 2013 a petition of appeal in which he is challenging the mode of arrest and that there existed personal and work related differences between him and the complainant. He also claims that the evidence was fabricated and lacked corroboration. With leave of this court, the appellant amended his petition of appeal and filed on 12th November 2013 an amended petition with eight grounds.

In summary, the appellant claims the case was not proved beyond reasonable doubt; that the prosecution evidence was inconsistent and contradictory; that he was not identified as the assailant; that the mode of arrest was not established (sic); that the trial magistrate failed to consider his medical evidence and that the language used by witnesses is not recorded.

He submitted that PW1 and PW2 gave different versions of their evidence with PW1 saying he was punched, slapped and attacked by a knife while PW2 said that a stone was used to hit PW1 at the bark of his head; that PW2 and PW3 did not identify the appellant either at the scene or in court; that the doctor did not state whether he knows the one who filled the P3 form and that the medical report does not support the charge of assault and that there is no evidence to show how the appellant was arrested.

Respondent's submissions

The respondent opposed the appeal. The learned state counsel submitted that the appellant understood the proceedings of the court and participated in cross examining witnesses; that the ground that the language used by the witnesses is not indicated has no merit; that it is immaterial who arrested the appellant and the appellant did not raise the issue with the trial court; that the injuries suffered by the complainant and the part of the body he was injured are shown on the P3 form; that the appellant was properly identified by the witnesses; that the evidence is corroborated by medical evidence; that the P3 form was produced in accordance with section 77 of the Evidence Act; that the appellant did not report to the police to be issued with P3 form. Counsel submitted that the appeal lacks merit and ought to be dismissed.

Evidence

Charles Kyalo Kitheka, PW1, testified that on 18th May 2011 he was at Mwingi where he parked his vehicle. The passengers started boarding his vehicle but the appellant prevented them from boarding. PW1 tried to find out why the appellant was doing this at which the appellant slapped and punched him. The appellant unsheathed a knife and attacked PW1 who ran away to escape. As a result PW1 was injured on the back of the head. He reported the matter to the police and was issued with a P3 form.

Douglas Kathoka Ngatia, PW2, testified that on 18th May 2011 at 11.00am he was at Mwingi Bus stage when the appellant prevented passengers from getting into PW1's vehicle; that when PW1 tried to find out why the appellant was doing this, the appellant hit him with a stone at the back of the head and unsheathed a knife and that PW1 was injured on the head.

According to Stephen Muthui, PW3, who testified that he witnessed the appellant attack PW1 when the latter tried to find out why the appellant was preventing passengers from entering his vehicle said that the appellant attacked PW1 with a rock and the appellant also unsheathed a knife.

Anthony Kilonzo, PW4 produced a P3 form completed by Frederick Mutua. He told the court that the injuries on PW1 were found on the left neck. PW5, PC Dennis Wafula investigated the case and recorded statements of witnesses.

The appellant told the court that there existed a 'vendetta' between him and PW1 over inspection of PW1's vehicles and that on 18th May 2011 PW1 used abusive words towards him and attacked him. The appellant said that PW1 injured him and he was treated at Waita dispensary. He produced treatment notes and a note allegedly from Mwingi Police Station asking the Medical Officer at Mwingi District Hospital to treat the appellant.

Determination

I have examined and evaluated the evidence afresh. I note that the trial magistrate treated the matter too casually. The language of the court is not shown on record all the way from the date of the plea to the conclusion of the trial. There is no indication that section 211 CPC was explained to the appellant. The appellant may have followed the proceedings and participated in the trial but a judicial officer needs to demonstrate that he is alive to the requirements of procedure some of which goes to the root of an accused person's right to a fair trial. The trial magistrate found the case proved beyond reasonable doubt and convicted the appellant.

I have analyzed this evidence. I find the evidence touching on the injuries inconsistent and contradictory. Firstly PW1 said he was slapped and punched. Although he said a knife was unsheathed, he did not say that knife was used on him. He was categorical that he was injured at the back of his head. He never mentioned a stone or rock being used on him.

PW2 and PW3 said they witnessed the appellant hit PW1 with a stone (PW2) and a rock (PW3). PW2 said that PW1 was injured at the back of his head. PW3 did not specify where PW1 was injured. The P3

form completed on 24th May 2011 shows PW1 had injuries on the left side of the neck. When PW1 reported the matter at the Police Station, PW5 said he noted facial injuries on PW1.

It is obvious that injuries at the back of the head are not the same as those on the face or the left side of the neck. The injuries found by the clinical officer on examining PW1 are not the same injuries PW1 alleges to have sustained.

The evidence contradicts on material facts and the trial magistrate ought to have noted these serious contradictions. Either the case is fabricated or PW1 lied to court.

Further, if PW2 and PW3 were indeed at the scene, their evidence too ought to have agreed with that of PW1 that he was slapped and punched. It is noteworthy that PW1 did not even specify where he was punched or slapped.

PW5 did not testify as to how the appellant was arrested. However, this is a minor issue considering that he is in court. He must have been arrested.

It is my finding that the appeal has merit due to the contradictions noted in evidence. A criminal case must be proved beyond reasonable doubt and this one has not been so proved. The trial magistrate misdirected himself in law that the case was proved. There are serious doubts in the prosecution evidence. The appellant will benefit from those doubts.

The appeal is hereby allowed. The conviction is quashed and the sentence is set aside. The appellant is free to go home. He shall be released from custody forthwith unless for any lawful reason he is held in custody. I make orders accordingly.

Dated, signed and delivered this 13th February 2014.

S.N.MUTUKU

JUDGE