



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 86 OF 2013

AGGREY AYIETA ONDIEK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement and sentence of B.R Kipyegon (RM) in Bondo Crim. Case No.307 of 2013)

J U D G E M E N T

The Appellant herein was charged with causing grievous harm contrary to section 234 of the Penal Code. The particulars of the charge were that on the 26th day of March 2013 at Ajigo sub location in Bondo District within Siaya County, he unlawfully did grievous harm to JOSEPH ODIYO OLUOCH (PW1).

The prosecution called four witnesses who testified during the trial. The accused chose to give sworn evidence and call two witnesses. He, however, did not call the witnesses.

The trial court analysed the evidence adduced before it found that the offence of causing grievous harm had been proved as against the accused. He was convicted and sentenced to 10years imprisonment. It is against this judgement and sentence that he appealed and cited the following grounds:-

1. that the trial magistrate erred in law and fact by relying and basing his conviction on sole evidence of the complainant;
2. that the trial magistrate erred in law and fact by not evaluating the context of the information given;
3. that the trial magistrate erred in law and fact by not considering the evidence of PW2 when cross-examined by the appellant; and
4. that the trial magistrate erred in law and in fact by failing to comply with provisions of section 329 of the CPC.

In his written submissions, the appellant contended that his conviction by the trial court was based on insufficient evidence that was not watertight as it was founded on the evidence of two witnesses (PW1 and PW2). Further, that the trial magistrate did not properly evaluate the evidence tendered before the court as well as his defence. He thus prayed that the appeal be allowed and the sentence be set aside.

This being a first appeal, this court will reiterate the principle as laid out in the case of **OKENO – VS- REPUBLIC (1972) EA 32** where it was stated that on first appeal, the court was mandated to

analyse, reconsider and re-evaluate the evidence tendered before the trial court and arrive at its own independent conclusion keeping in mind that the trial court had the advantage of hearing the witnesses and assessing their demeanour.

From perusal of the trial court's proceedings, four prosecution witnesses testified. PW1 (Joseph Odiyo Oluoch) testified that the alleged incident took place at 8.30 am on his way to Ajigo. He was in the company of PW2 (Henry Otieno), when they met the appellant who blamed him for reporting him to the police as a suspect for stealing his items. He went on to state that the appellant slapped him on his right cheek with a panga, held him by the neck and bit his left small finger, his right hand and left shoulder. He was rescued by some cyclists who pulled the appellant off him. That account was corroborated by PW2 who was in the company of PW1 when he was attacked. His testimony was consistent with that of PW1. He testified that it was the appellant who was beating PW1 using a panga and biting him (PW1). Both PW1 and PW2 stated that they knew the appellant before the incident as he was their neighbour.

PW4(JAPHETH ODUOR) was a clinical officer at Bondo District Hospital. He examined PW1 whom he found with injury on the posterior shoulder, bruise on right wrist joint caused by human bite and other human bite on the 2nd and 4th finger of the same hand. The proximal digit of left index finger was missing. He had suffered "maim". The medical evidence supported the fact of injury on the part of PW1.

The appellants sworn defence was that he met PW1 and another man. They greeted him. Suddenly, PW1 jumped on him and held him by the neck. He tried to free himself and in the process, accidentally, bit his small finger.

The trial court considered the prosecution and defence evidence and accepted that of the former. I consider that PW1 denied while being cross-examined that he had held the appellant's neck. Both PW1 and PW2 stated that the appellant was the aggressor. They testified that the appellant's grievance was that PW1 had complained that the appellant had stolen his items. The attack by the appellant was therefore intentional.

I accept the finding by the trial court and find that the appellant was convicted on sufficient evidence.

On sentence, I consider that the trial court sought to place the appellant on probation and called for a probation report. When the report was availed, it showed that he had in another case been placed on Community Service Orders punishment but that he had absconded leading to a warrant of arrest being issued. He was therefore not suitable for non-custodial sentence. He was not a first offender.

Nonetheless, I find that a prison term of 10 years was in the circumstances of the offence both harsh and excessive. I reduce it to a 5years jail term. To that extent, the appeal is allowed.

Dated, signed and delivered this.10th day of March, 2014

A. O. MUCHELULE

J U D G E