



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 4 OF 2006

JOHN KIPKURUI KOECHAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Arising from the Conviction and Sentence by the Honourable J.K. Ngeno, Principal Magistrate at Kericho in Criminal Case No. 3683 of 2003 in Judgement Delivered

on 25.1.2006)

JUDGMENT

The Appellant herein, **John Kipkurui Koech**, was tried and convicted for the offence of grievous harm contrary to **Section 234** of the **Penal Code**. The particulars of the offence were that on 17th November, 2003 at Sigowet Trading Centre within Kericho District, the Appellant unlawfully did grievous harm to **Wilson Kipkurui Lang'at**. After conviction, the Appellant was sentenced to a fine of Kshs. 20,000/= in default to serve 12 months imprisonment. Being aggrieved, the Appellant preferred this appeal in which he put forward the following grounds:

1. **That the learned trial magistrate erred in both fact and in law in failing to find that the charge of causing grievous harm is defective in substance and make an order for the alteration of the charge by way of amendment of the charge or by the substitution of a new charge and all APC Wesley Kiprono Rugut and APC Bishara then at Sigowet District Officer's AP camp as core accused to meet the circumstances of the case before the close of the case for the prosecution.**
2. **That the learned trial magistrate erred in both fact and in law in failing to find that the evidence of Wilson Kipkurui Langat (PW1) regarding the weapon used to assault him was at variance with that of the only eye witness to the incident that is to say, Joseph Koskei (PW2).**
3. **That the learned trial magistrate erred in both fact and in law in finding and holding that the accused assaulted the complainant in the presence of Administrative Police at Sigowet District Officer's office on the night of 17th November, 2003.**
4. **That the learned trial magistrate erred in both fact and in law by relying on the prosecution's evidence that was not corroborated and insufficient in both quantity and quality to warrant the conviction and sentence of the Appellant.**
5. **That the learned trial magistrate erred in both fact and in law by failing to find that it was**

practically impossible for Joseph Koskei (PW2) to positively continue identifying the appellant as the person that the assaulting Wilson Kipkurui Langat (PW1) until late in the night since he had been chased away from the Administrative Police Camp.

- 6. That the learned trial magistrate erred in both fact and in law by failing to find that the prosecution case was poorly investigated and that the Administrative police from Sigowet District Officer's Office that had actually carried out arrest, escorted and locked in the complainant at their cell did not write any witness statements and they were not called into court to give evidence in regard to the assault of the complainant on 17th November, 2003.**

The aforesaid grounds were summarized to three when the appeal came up for hearing.

It is appropriate at this stage to set out the case that was before the trial court before considering the substance of the appeal. The prosecution's case was supported by the evidence of five witnesses. It is the evidence of Wilson Kipkurui Langat (PW1) that on 17th November, 2003 he was picked up by three A.P.C's who included A.P.C. Kiprono and A.P.C Rugut. The complainant was picked from a Kiosk he was operating at Sigowet Centre. PW1 said he was taken to where the Appellant was. He was handcuffed and taken to the nearby A.P's camp at Sigowet D.O.'s office. PW1 alleged that the Appellant was given a bicycle chain by the A.P's which the Appellant used to assault him. The Complainant was locked up the A.P's cells and remained there until the next morning. Upon his release, PW1 said, he sought for treatment and thereafter reported to the police and was issued with a P3 form. In cross examination PW1 admitted that his family and the Appellant had a land dispute. **Joseph Koskei**(PW2), claimed, he was at PW1's kiosk when A.P's came to arrest the complainant (PW1). PW2 said he closely followed them upto the A.P's camp and witnessed PW1 being assaulted. He claimed he was chased away when he attempted to rescue the complainant. PW2 who stated that he lives near the camp claimed that he heard PW1 screaming upto late in the night. **P.C. Joel Ouko** (PW4) confirmed that on the material date the complainant, PW1, was placed in custody at the A.P's camp at the D.O's office. **Yego Kirwa**(PW5) a clinical officer based at Kericho District Hospital produced a medical report which showed that the complainant suffered injuries assessed as grievous harm.

When placed on his defence the Appellant denied the offence. He stated that on the particular day the complainant threatened to kill him over a boundary dispute. The Appellant claimed he reported the matter to Sigowet D.O's office and only learned the next day from the complainant's mother that the complainant had been arrested. It is said that the dispute was amicably settled by clan elders. He categorically denied assaulting the complainant claiming the case was a frame up arising from a land dispute. The learned Resident Magistrate, after considering all the evidence convicted the Appellant.

On appeal, **Mr. Matwere** learned advocate for the Appellant argued three main grounds. In his first ground of appeal Mr. Matwere urged this court to find that there was no sufficient evidence to sustain a conviction. He argued that there was no eye witness who testified and that the weapon used was not produced in evidence. **Miss Kivali**, learned Prosecuting State Counsel was of the view that there was sufficient evidence that the complainant was assaulted and that there was direct evidence from PW2 who saw the complainant being assaulted. I have re-evaluated the evidence on record and it is clear that the evidence of PW1, PW2 and PW3 were consistent. The evidence of PW1 and PW2 were not rebutted. The Appellant's assertion that he did not assault the complainant is not true in view of the uncontroverted evidence of PW1, PW2 and PW5. The learned Resident Magistrate did not fall into error when she concluded that the prosecution's case was proved to the required standards of beyond reasonable doubt.

Mr. Matwere further argued that the evidence of PW2 and PW3 were hearsay evidence. Miss Kivali, urged this court to find the evidence of PW2 uncontroverted. I have critically examined the evidence of PW2. This witness stated that he was at the complainant's kiosk when A.Ps came to arrest him. He closely followed and witnessed the Appellant assault the complainant using a bicycle chain. This piece of evidence was never rebutted. The evidence of PW2 cannot therefore be regarded as hearsay. I see no merit on this ground.

Mr. Matwere's final ground argued is to the effect that the cells where the complainant was held is a

protected area hence there is doubt as to whether anyone saw him being assaulted. I do not find any credit on this ground because, the evidence tendered is that the complainant was actually assaulted out the A.P's camp and not inside the cells, hence this ground cannot stand.

In the end, the appeal is found to be without merit. It is dismissed in its entirety.

Dated, signed and delivered in open court this 7th day of March, 2014

J.K. SERGON

JUDGE

In the presence of

Miss Kivali for Director of Public Prosecutions

Miss Maritim holding brief for Matwere for Appellant