REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 80 OF 2012

PAUL KIPSIGEI RONO...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an Appeal from the Conviction and Sentence of J. Kwena, Senior Principal Magistrate at Bomet in Bomet Criminal Case No.55 of 2011 delivered on the 30th November, 2012)

JUDGEMENT

PAUL KIPSIGEI RONO, the appellant herein, was tried on a charge of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code**. At the conclusion of the trial, the appellant was convicted and sentenced to five (5) months imprisonment. Being dissatisfied the appellant preferred this appeal.

On appeal, the appellant put forward the following grounds in his Petition:

1. **THAT the learned Magistrate erred in both fact and in law by failing to find that the evidence tendered by prosecution witnesses clearly disclosed offence of Affray and that the charge sheet was therefore fatally defective.**

2. **THAT the learned trial Magistrate erred in both fact and in law by failing to consider evidence tendered by the prosecution witnesses during cross-examination by counsel then on record for the Appellant.**

3. **THAT the learned trial Magistrate erred in both fact and in law by failing to attach any due weight to the defence tendered by the appellant and further failed to outline cogent reasons in rejecting the same thereby shifting the burden of proof to the appellant.**

4. **THAT the learned trial Magistrate erred in both fact and in law by not exercising her discretion judicially when sentencing the Appellant by sentencing the Appellant to serve five (5) months imprisonment thereby remanding the appellant in custody contrary to Article 49(2) of the Constitution of Kenya 2010.**

5. **THAT the learned trial Magistrate erred in both fact and in law in not taking into account all the factors tendered in mitigation.**

6. **THAT the learned trial Magistrate erred in both fact and in law in giving a sentence that was manifestly harsh in the circumstances.**

When the appeal came up for hearing, Mr. Matwere learned advocate for the appellant argued ground 1 separately and grounds 2 and 3 together while grounds 4,5 and 6 were argued together.

Before delving deeper into the substance of the appeal let me set out in brief the case that was before the trial court. The Prosecution's case was supported by the evidence of six witnesses. It was the evidence of the appellant that on 15th January 2011 he visited **Plot no.8939/31**, in Bomet Township to put up a shade. The aforesaid plot is said to be co-owned by the appellant and his brother who is the complainant. When the appellant arrived at the plot, he found a tractor which had transported for him some building materials parked outside the plot. At the entrance of the plot was a sign showing there is no parking. The appellant alighted from his car to remove the sign but before doing so he saw his brother charging towards him. He stood, held his brother i.e Johana Kipkemoi Rono who in turn held him by the feet. The appellant's sons whom he had earlier sent to put up the shade joined him to fight the complainant. The complainant was pressed on the ground but managed to free himself. He tried to retreat when he saw the appellant holding a stone with intentions of hitting him on the head. The complainant is said to have fallen down due to the impact of the stone. The complainant managed to rise and was helped to jump into his motor vehicle. He was rushed to Tenwek Mission Hospital. It is said the complainant lost conscience while undergoing treatment. Upon being discharged the complainant went to report at the police station. One Johnson Kipyegon Chebusit (P.W.2) said he saw the complainant attempt to remove the no parking sign and shortly he saw the appellant run towards the complainant where he held him by the legs. As the duo struggled the appellant's sons joined the fray and beat the complainant. P.W.2 said he saw the appellant pick a stone and hit the complainant on the head causing him to fall down. Erick Cheruiyot (P.W.6) a Clinical Officer examined the complainant and noted that he was injured on the head and bruises on the left ear lobe. When placed on his defence, the appellant, denied committing the offence. He claimed that while inside the plot in question he saw the complainant's sons come while armed with metal tools. He concluded that the boys were up to no good and decided to report the boys to the police, who came, picked them up and placed them in custody. The appellant further stated that when he went to the plot he found his brother (complainant) was furious and challenged him to a fight. He claimed he even became unconscious and was in fact rescued by his sons. He produced a copy of the police occurrence book for 15/1/2011 to show he also made a report to the police. He denied knowledge of the deceased's injuries. After considering the evidence and the submissions the learned Senior Principal Magistrate convicted the appellant.

Let me now turn my attention to the substance of the appeal. It is the submission of Mr. Matwere that the appellant and the complainant should have been jointly charged with the offence of affray since the duo fought in public and each sustained bodily injuries. Mr. Lopokoyit, learned Prosecuting State Counsel opposed this ground of appeal stating that the same is without merit. It is his submission of Mr. Lopokoyit the appellant was properly tried on a competent charge of assault as opposed to affray. I have considered the rival arguments and it would appear this court has been asked to determine whether the appellant and complainant should have charged with the offence of affray as opposed to the appellant being charged with the offence of assault. The offence of affray is stated under **Section 92** of the **Penal Code**. It is stated that any person who takes part in a public place is guilty of a misdemeanor known as affray. What is affray then? **The Black Law Dictionary 9th Edition** defines affray as follows:

> ***"The fighting by mutual consent of two or more persons in some public place to the terror of on-lookers. The fighting must be mutual. If one person unlawfully attacks another who resorts to self defence, the first is guilty of assault and battery but there is no affray."***

It is obvious from the definition given for affray that the fight between the appellant and his brother cannot be treated as affray. There was no mutual consent. The charge of assault preferred against the appellant cannot therefore be said to be defective. The prosecution tendered eye witnesses whose evidence were corroborated by the medical evidence of the Clinical Officer who examined the complainant. The appellant was seen picking a stone which he used to hit at the complainant on the head. Mr. Matwere faulted the evidence of P.W.1, P.W.2, P.W.3 and P.W.4 to be full of contradictions. It is said that the assertion that the appellant threw a stone at the complainant was contradicted by PW5 hence the appellant should not have been convicted. I have re-evaluated the evidence that was presented

before the trial court. The point the appellant now raises on appeal was ably considered by the learned Senior Principal Magistrate stated that she observed the demeanor of P.W.5 and concluded that he was not open but was evasive. She further concluded that P.W5 wanted to stand in the middle ground and not to appear to favour any side. It was opined that P.W.5 deliberately confused himself. The learned Magistrate did not rely on the evidence of P.W.5 to convict but instead relied on those of P.W.1, P.W.2, P.W.3, P.W.4 and P.W.6 to convict. With respect, I agree with the learned Senior Principal Magistrate. Again I see no merit on this ground.

The final ground argued on appeal is to the effect that the appellant was not taken into account. Mr. Lopokoyit was of the view that the appellant's defence was considered and properly rejected. I have on my part examined the record and it is clear that the learned Senior Principal Magistrate took into account the appellant's defence but did not believe it. In fact she analysed the manner in which the appellant used the court to secure evidence fro the police. It would appear the appellant conduct displeased the trial Magistrate to the extent that she did not find any credibility in his evidence. The record shows the trial Magistrate gave serious consideration to the appellant's defence but did not see any merit in it. It is apparent that the Appellant denied assaulting the complainant and instead blamed him for causing bodily harm on him. I have already stated that the evidence of P.W.1, P.W.2,P.W.3,P.W.4 and P.W.6 were consistent that the appellant hit the complainant using a stone. His defence therefore was displaced.

In the end, this 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.

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J.K.SERGON

JUDGE

<u>In the presence of:</u>

Miss. Kivali for Director of Public Prosecution

Miss. Maritim holding brief for Mr. Matwere for Appellant