



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO.101 OF 2012

KELVIN MUKUNDI KIVUTIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From original conviction and sentence in Cr. Case No. 485 of 2011 at the Principal Magistrate's Court at Runyenjes by HON. J.P. NANDI – RM on 27/6/2012

J U D G M E N T

1. **KELVIN MUKUNDI KIVUTI** the Appellant was charged with the offence of Grievous Harm contrary to section 234 Penal Code. The particulars of the charge as stated in the charge sheet were as follows;

“On the 17th day of April 2011 at Kwanjara sub-location within Embu County, did grievous harm to one Michael Njue Stephen”.

2. The matter proceeded to full hearing and was convicted on 27/6/2012 and sentenced to serve seven (7) years imprisonment.
3. He was aggrieved by the Judgment and filed this appeal against both conviction and sentence citing the following grounds;
 1. ***That the learned trial Magistrate erred in law and facts when he convicted the Appellant relying on evidence which was inconsistent and uncorroborated.***
 2. ***That the learned trial Magistrate erred in Law and facts when he convicted the Appellant without considering that there was grudge between the Appellant and the mother of the complainant.***
 3. ***That the learned trial Magistrate erred in law and fact when he failed to consider that the evidence of PW1 was contradicted by PW2 who was his daughter and supposed to be the key witness on alleged offence.***
 4. ***That the learned trial Magistrate erred in law and facts when he convicted the Appellant on the Prosecution case only failing to give him the benefit of doubts and before hearing the defence.***
 5. ***That the learned trial Magistrate erred in law and fact when he failed to consider that there was no documentary evidence which was produced to prove that the alleged offence was committed.***
4. The Prosecution case was that PW1 (**Michael Njue Stephen**) who is a neighbor to the Appellant was on 17/4/2011 at 11am cutting Nappier grass on their farm when the Appellant came there.
5. The path had been blocked so he asked him to use the main road. The Appellant was not happy with the issue of the path being blocked.
6. The Appellant went and unblocked the path and pulled a stick and came up to where PW1 was.

- Using the stick he knocked PW1's left hand. PW1 then fell down and the Appellant sat on him, took his 2nd digit finger and bit it.
7. He screamed and his daughter (**PW2 Sara Wambeti**) also joined in the screaming. When PW1 and PW2 went home they found the Appellant waiting for them at their gate while armed with a stick and he even removed his shirt.
 8. No one came to PW1's rescue as it was a Sunday and most of the people had gone to church.
 9. The matter was reported to the Runyenjes police Station on 17/4/2011 at 11.30am according to PW4 (**Cpl Joel Nandoya**).
 10. PW1 was referred to Runyenjes District Hospital where he was treated and a P3 Form filled by Dr. Waweru at Embu Provincial General Hospital. The P3 was produced on his behalf by Dr. Munene (PW4).
 11. In his unsworn defence the Appellant denied the charge. He explained that on this unnamed date he was at his employer's home doing chores upto 2pm. After delivering milk at 3.30pm he went to relax upto 7.30pm when he returned to his employer's home. When he quit his job he was arrested for something he knew not. It was then that he saw PW1 with whom he had grudges over an unrelated matter.
 12. When the appeal came for hearing the Appellant presented the Court with written submissions which have expounded his grounds of appeal. He challenges the evidence of Dr. Munene (PW3).
 13. The State through learned State Counsel Mr. Wanyonyi opposed the appeal saying the evidence adduced was sufficient to sustain the conviction. He further submitted that the sentence was lawful and should not be interfered with. He referred to the cases of;

- i. ***SMK –V- REPUBLIC – KERUGOYA HCRA NO.38/13***
- ii. ***CHRISPINOS MATOFALI –VS- REPUBLIC KAKAMEGA HCRA NO.251/12***

14. This being a first appeal this Court is enjoined to reconsider the evidence adduced in the trial Court and come to its own conclusion. I am alive to the fact that I did not have the advantage of seeing or hearing the witnesses. I am guided by the cases of;

- i. ***OKENO –V- REPUBLIC [1972] EA 32***
- ii. ***KIILU –V- REPUBLIC [2005]1 KLR 174***

15. And being so guided I have considered the submissions of the Appellant and of the learned State Counsel. I have equally considered the evidence on recorded and grounds of appeal.
16. In totality the grounds of appeal are attacking the evidence adduced as being inconsistent and could not therefore uphold a conviction.
17. I will therefore merge all the grounds and consider them together.
18. The production of the P3 Form by Dr. Munene (PW3) has been attacked. The record shows that on several occasions the matter was adjourned for failure by the Prosecution to avail the doctor who filled the P3 Form.
19. On 7/2/2012 another Doctor was availed by the Ministry of Health Embu Provincial General Harm. This is Doctor Munene (PW3). A basis was laid as to why Dr. Waweru who filled the P3 was not available and how PW4 knew him. The Appellant in apparent response to a question at page 13 line 13 stated;

“No objection to the Dr. (Munene) producing the P3 Form”.

20. Even if the Court did not record it was doing this under section 77 Evidence Act, it's clear that the Court adopted the Correct procedure. Secondly the Doctor's evidence confirmed the injuries complained of.
21. The incident herein occurred at 11am which was broad daylight. PW1 and the Appellant are neighbours and they know each other very well.
22. PW2 confirmed to the Court on oath that she responded to the screams and found the Appellant lying on her father (PW1) and PW1's finger was in the Appellant's mouth.
23. The issue of grudges was denied by PW1 in cross examination. There was therefore no other evidence save for the Appellant's statement in defence.

24. PW1 promptly reported the incident to the police but the Appellant was arrested about four (4) months later. And he explains in his defence that he was in employment. And after 5-7 months he returned home only to be arrested on the 2nd day of his arrival.
25. From his own evidence it is clear he disappeared after this incident and he was immediately arrested upon his return. The charge sheet shows the offence was committed on 17/4/2011 and reported on the same day. It was not until 18/8/2011 that the Appellant was arrested.
26. I am satisfied that the evidence of PW2 very well corroborated that of PW1. The circumstances for identification were favourable. And the learned trial Magistrate analysed this evidence well.
27. The complainant (PW1) sustained very serious injuries as is noted from the P3 Form. He suffered a fracture and his left finger which the Appellant bit was amputated. The sentence for Grievous Harm is life imprisonment. The Appellant was sentenced to seven (7) years imprisonment. The said sentence is lawful but I reduce it to six (6) years due to the fact that PW1 and Appellant are neighbours who had never collided before and still need each other. The conviction is thus upheld. The sentence of seven (7) years is set aside. It is substituted with the sentence of six (6) years imprisonment. To that extent only does the appeal succeed.

Right of appeal explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 2ND DAY OF
MAY 2014**

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Mbae for State

Appellant

Kirong/Mutero – C/c