



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 26 OF 2008

ZAKARY KIHKA MUGAMBIAPPELLANT

VERSUS

REPUBLICPROSECUTOR

From original conviction and sentence in Criminal Case No. 2212 OF 2006 at the Kangema Magistrate's Court at MURANGA by Hon. S.N. MBUNGI – RM on 7/2/2008

J U D G M E N T

ZAKARY KIHKA MUGAMBI the Appellant herein was charged with the offences of Grievous Harm contrary to section 234 of the Penal Code.

The particulars as stated in the charge sheet were as follows;

ZAKARY KIHKA MUGAMBI: On the 15th day of October 2005, at Kiriani township in Muranga district within Central Province, unlawfully did grievous harm to JAMES NDIRANGU MWANGI.

The matter was heard and the Appellant was convicted and fined shs.60,000/= in default one (1) year imprisonment. He was dissatisfied with the Judgment and filed this appeal raising the following grounds;

1. *That the learned trial Magistrate erred in law and fact by convicting the Appellant on a defective charge which did not elaborate which action caused the grievous harm rendering the whole trial nullity.*
2. *That the trial Magistrate erred in law and facts by convicting the Appellant as no witness identified the Appellant person properly and even on the dock.*
3. *That the learned trial Magistrate erred in law and fact by convicting and sentencing the Appellant based on only eye witness evidence of PW2 which evidence was inconsistent whereas all the other witness were hearsay evidence and unworthy.*
4. *That the learned trial Magistrate erred in law and fact by relying on the medical evidence which was hearsay and uncorroborated and contradictory, which evidence did not support the offence of grievous harm as is required.*
5. *That the learned trial Magistrate erred in law and facts by relying only on the evidence of the PW1 on the issue of injuries which evidence was not corroborated by the doctor's evidence and the doctor's evidence did not qualify the evidence act further the medical evidence does not support the conviction and judgment.*
6. *That the learned trial Magistrate erred in law and fact by upholding the evidence of PW2 as being unbiased for being a bar maid while disregarding that of DW2 whereas the complainant*

- testified that he did not know what work PW2 did making the evidence unreliable.*
7. *That the learned trial Magistrate erred in law and facts by delivering judgment supported by inconsistent and uncorroborated evidence and which evidence was secondary evidence which did not support conviction and judgment which matter needed direct and concrete evidence.*
 8. *That the trial Magistrate erred in law and facts by convicting the Appellant whereas the prosecution failed to call all the material witnesses required.*
 9. *That the learned trial Magistrate erred in law and fact as it refers to the right eye being impaired in the judgment, whereas the evidence refers to the left eye and while the judgment states medical reports show that the complainant right eye can't see, there was no such evidence produced thus the judgment is not supported by the evidence on record.*
 10. *That the learned trial Magistrate erred in law and fact in offering a very severe sentence in the circumstances.*

The case of the Prosecution was that PW1 a taxi driver was called to Rono bar in Kiriani township Muranga on 15/10/2005 at 9pm, to pick Timothy. He went and met the Appellant before even talking to the said Timothy. The Appellant owed him shs.200/= for his taxi services. He asked him for the money. The Appellant denied owing him any money and instead insulted him calling him a poor man. He then took a beer bottle and hit him on his left/right eye. He fell down bleeding. He had to seek medical treatment. Inside the bar were several people. A report was made to Kiriani police post and the Appellant was later arrested. A bar maid (PW2) gave evidence in support of PW1's claims. PW5 and PW6 gave medical evidence. The Appellant gave a sworn defence. He confirmed having been at Rono bar drinking with his brother (DW1). He stated that it was PW1 who came abusing him and attacked him. He threw a glass at him in self defence. DW1 supported that evidence.

When the appeal came for hearing Mr. Kimwere for the Appellant made submissions expounding on the grounds filed. The learned State Counsel Mr. Miiri opposed the appeal saying the evidence was overwhelming. I have considered these submissions. And as a 1st appeal Court I have re-evaluated and reconsidered the evidence bearing in mind that I did not have the chance of seeing or hearing the witnesses. I am guided by the case of **REPUBLIC -V- NGUI [1984] KLR 729** where the Court of Appeal stated;

The first appellate Court must reconsider the evidence, evaluate it itself and draw its own conclusions in order to satisfy itself that there was no failure of justice, it is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trial Court's findings and conclusions.

The Appellant through learned Counsel has raised ten (10) grounds of appeal. I will cluster them together and reduce the issues to three (3) viz;

1. ***Whether the charge sheet was defective***
2. ***Whether the evidence was contradictory***
3. ***Whether there was sufficient evidence to uphold a conviction.***

It has been submitted that the charge sheet was defective as it did not contain the *Mens rea* and *actus reus*. Section 234 of the Penal Code defines Grievous Harm as follows;

“Any person who unlawfully does Grievous Harm to another is guilty of a felony and is liable to imprisonment for life”

The particulars of the charge sheet follow that pattern in the definition. The *actus reus* is that he **did Grievous Harm** to the complainant. The words “**unlawfully**” represent the mind of the accused at the time of the commission of the offence. The Appellant understood this very well and that is why he explained in his defence that the assault was lawful as he was doing it in self defence. I therefore find no defect in the charge.

On the evidence there are two eye witnesses i.e. PW1 and PW2. PW1 at page 6 line 16 referred to the left

eye as the one that had been injured. Thereafter he explains at page 7 line 1 that its indeed the right eye that was injured. He repeats the same at page 7 lines 12 and 22. PW2 plus the doctors all refer to the right eye as the one that was injured. PW5 and PW6 produced reports on behalf of other doctors after confirming where the other doctors were and after indicating they were familiar with the doctors' handwriting and signatures. The Defence never objected to the production of those reports.

PW1 and PW2 both stated that it was the Appellant who was the aggressor. The Appellant and his brother (DW1) however stated that it was PW1 who was the aggressor and the Appellant acted in self defence. If indeed PW1 was the aggressor how come it's only him who suffered very serious injuries? The Appellant suffered no injuries. The learned trial Magistrate remarked that he saw PW2 testify and she was composed and appeared honest. He believed her. I have no reason to doubt that finding as I did not have the privilege of seeing that witness testify. The medical reports in their original form show it is the R/E (Right Eye) which was perforated. The left eye only had an Oedema. I therefore find no contradictions in this material evidence.

My assessment of this evidence does not reveal any inconsistency nor contradiction. Coming to the 3rd issue my findings are that both PW1 and Appellant were at Rono bar on the material night. Indeed the Appellant had been there drinking with his brother (DW1). No one knows his level of soberness. It's also true that PW1 came there later and there was a confrontation between him and the Appellant. PW1 was seriously injured while the Appellant received no injury at all. Did he then have any reason to assault PW1 to that degree? What was he defending himself against?

I am satisfied that the learned trial Magistrate analyzed the evidence well and arrived at the correct conclusion. I find no reason to make me interfere with both the conviction and sentence. The sentence was very lenient. The result is that the appeal is dismissed and conviction and sentence confirmed.

Right of appeal explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 3RD DAY OF JULY 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ing'ahizu for State

Mr. Githinji for Kimwele for Appellant

Appellant

Njue – C/c