



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 207 OF 2011

SILAS MUCHANGI IRERIAPPELLANT

VERSUS

REPUBLICPROSECUTOR

From original conviction and sentence in Criminal Case No. 1767 of 2010 at the Chief Magistrate's Court at Embu by Hon. L.K. MUTAI - PM on 25/11/2011

J U D G M E N T

SILAS MUCHANGI IRERI the Appellant was charged with the offence of Grievous Harm contrary to section 234 of the Penal Code.

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

SILAS MUCHANGI IRERI: On the 23rd February 2010 in Embu District within the Eastern Province unlawfully did grievous harm to FRIDA MUKAMI.

The Appellant denied the charge and the matter was fully heard, and the Appellant was convicted and sentenced to five (5) years imprisonment. He was aggrieved by the Judgment and filed this appeal citing the following grounds;

1. ***That the Appellant pleaded not guilty to the charge.***
2. ***That the learned trial Magistrate erred in both law and facts by convicting the Appellant for five (5) years because the complainant did not proof to Court that he was the one who really beat her on the night of 23/2/2010.***
3. ***That the learned trial Magistrate erred in law and fact by relying on the Prosecution side, whereby the complainant was advised on how to tell the Court, which was total corruption and mere injustice.***
4. ***That the trial Magistrate erred in law and fact by accepting the statement of the complainant and yet she narrated in the investigating diary that she was beaten by two people at the midnight of 23/2/2010.***
5. ***That the learned trial Magistrate erred in law and facts by not considering the charge because he was arrested on 23/2/2010 and stayed in police cells for 3 days before the Appellant was given a bond. This is a true violation of his constitutional rights as he stayed at police custody for more than 24 hours.***
6. ***The learned trial Magistrate erred in law and fact since the Prosecution failed to produce any witnesses in the Court.***
7. ***PW2 who is the doctor narrated that he treated the complainant on 23/2/2010 but the P3 form shows that it was written on 23/6/2010. There was uncorroborated evidence between the***

Prosecution and PW3. This proves injustice.

The brief facts are that PW1 had been at Highway Bar Embu with friends. At midnight she left the bar in the company of another. This other person who was a man got a taxi cab and left her waiting for a cab. While there the Appellant came and started insulting her and beat her. She fell in a ditch and injured her left hand, cracked her tooth and got a wound on the cheek. Police officers arrested the Appellant at the scene. PW1 was escorted to the hospital for treatment and later a P3 was issued to her. She was able to see the Appellant with the help of light from security lights from the bar.

In his sworn defence the Appellant denied the charge. He said he had been at the show when he met two (2) people. He was pushing his handcart. Thereafter he met three (3) police officers who arrested him with a drunk lady. They asked him where he was from. He explained but the drunk lady said the Appellant was among those who had hit her. He was taken to the Police Station and released on a cash bail of shs.5000/=.

When the appeal came for hearing the Appellant presented the Court with written submissions. His main submission is that the Prosecution did not prove its case to the required standard. He further says there were inconsistencies in the evidence. He wondered why PW2's colleagues did not testify or record statements.

The State through learned State Counsel M/s Ing'ahizu opposed the appeal. She said the Appellant was identified and arrested at the scene. And that the complainant sustained injuries which were confirmed by the medical evidence.

And this being a 1st appeal this Court has a duty to reevaluate all the evidence and come to its own conclusion. I am also alive to the fact that I did not see or hear the witnesses. This was the holding in the cases of;

- i. ***OKENO –V- REPUBLIC [1972]E.A. 32***
- ii. ***SOKI -V- REPUBLIC [2004]2 KLR 21***
- iii. ***KINYANJUI –V- REPUBLIC [2004]2 KLR 364***

I have considered the submissions by both the Appellant and the State. I have equally considered the grounds of appeal and the evidence on record. Some of the grounds raised by the Appellant are not supported by the record e.g.

Ground 3

There is nowhere indicated on record that the complainant was advised by anyone on what to come and tell the Court. The allegations of corruption and injustice were never made in Court.

Ground 4

The investigation diary was not produced in Court for the learned trial Magistrate to see what was recorded by the complainant in it. The Appellant never raised this issue of the investigation diary to the complainant, or to the Court.

Ground 5

The charge sheet shows he was arrested on 7/9/2010 and arraigned in Court on 8/9/2010. When he was first arrested on 23/2/2010 he was taken to the Police Station and released on police bond by the OCS. He disappeared only to be arrested on 7/9/2010. Again the issue of having been kept in cells for three (3) days from 23/2/2010 was never raised in the cross examination of PW2.

Ground 6

The Prosecution produced three (3) witnesses in Court and it was on the basis of their evidence that he was convicted.

Ground 7

It is nowhere indicated that PW3 treated the complainant on 23/2/2010. The P3 is dated 23/6/2010 which is the date of examination. Grounds 3-7 must all fail as they have no basis.

I will now deal with ground number 2 which is about the evidence that was adduced in support of the charge. The Prosecution called a total of three (3) witnesses. The Court had to determine two (2) issues viz;

- i. Whether PW1 suffered the injuries complained about
- ii. Whether the Appellant is the one who caused these injuries

PW1 in her evidence explained the injuries she suffered. PW3 is the doctor who examined her. He is not the one who treated PW1 in the first instance. He said she had a healed cut wound on the cheek and a healed fracture of the bone which had at first resulted in a malunion (EXB1). He did not refer to the treatment notes which were in the possession of PW1. The injuries were assessed as Maim. It can therefore be confirmed that PW1 suffered the injuries stated by PW3.

The 2nd issue is whether the Appellant is the person who assaulted PW1. This incident is said to have occurred on 23/2/2010 at midnight. PW1 was at the bar with friends. Having been in a bar with friends she cannot be expected to have been taking soft drinks or water. Had that been so she could have clearly stated so. What was her level of sobriety? Secondly from her evidence this was happening at Highway Bar. Was there no one at the bar who heard her being beaten and insulted? Was she screaming as she was being beaten? There is no evidence of screaming by PW1 nor of anyone from the bar coming to her rescue. She then says she fell in a ditch and fractured her hand. She does not say it's the Appellant who pushed her into the ditch. How did she sustain these other injuries? She does not explain what the Appellant was beating her with. She further says Police Officers came to the scene and arrested the Appellant. Both of them were taken to the Police Station where the Appellant was locked up. One of the Police Officers who arrested the Appellant testified as PW2. He stated that him and three (3) others were on patrol within Embu town when they heard screams and found the Appellant beating the complainant. They arrested the Appellant. The Appellant and PW1 were at Maina Highway roundabout next to KCB. This was not at the Bar. If indeed what PW2 is saying is true then it means as stated by PW1 she had fallen into the ditch, fractured her hand and come out and was struggling with the Appellant. PW2 went ahead to state that the Appellant was released on bond by the OCS but he never turned up since February 2010. It was on 20/9/2010 while on patrol that PW2 came across the Appellant at the same scene and arrested him. This cannot be the truth. The charge sheet shows that the Appellant was arrested on 7th September 2010 and arraigned in Court on 8th September 2010. The Appellant in his sworn defence stated that he was arrested as he came from the show. The Police were with a drunk lady who said she was one of those who had hit her.

My analysis of the evidence of PW1 raises doubts as to the level of her sobriety when she was beaten or got injured. Her narrative of the sequence of events does not add up at all. PW2's evidence is also not credible when considered with that of PW1. The Appellant gave sworn evidence which ought to have been considered alongside that of PW1 and PW2. My finding is that PW1 was injured but she was too drunk to know who assaulted her. Even the person she was with at the bar left her. All these factors put together should have created a doubt in the mind of the trial Court as to the credibility of PW1's evidence.

I find merit in the appeal which I allow. The conviction is quashed and the sentence set aside. The Appellant to be released unless otherwise lawfully held under a separate warrant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 7TH DAY OF NOVEMBER 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ing'ahizu for State

Appellant

Njue – C/c