



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Criminal Appeal 128 of 2007

JAMES NGUNDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, **James Ngundo**, was charged with the offence of assault causing actual bodily harm contrary to the provisions of Section 251 of the Penal Code.

The particulars are that on the 27th day of December 200at around 9.00pm at Laza Trading Centre in Zabaki Location of the Tana River District within the Coast Province willfully and unlawfully assaulted Rose Linge thereby occasioning her actual bodily harm.

He was convicted after trial and sentenced to serve prison term of three (3) years.

He has appealed against his conviction and sentence and was represented by learned counsel Mr Magolo. Mr Magolo, drew eight grounds of appeal in his memorandum of appeal which is convenient to use as an index. Counsel sought for leave of the court to argue grounds 1 and 2 together, ground 3-6 together and grounds 7 and 8 together. There being no objection, by the state counsel, I allowed the said application.

In ground 1 and 2 the appellant argued that judgment was read on 17th July, 2007. Sentence was deferred to enable the District Community Service Officer to be availed. Then on 27th September, 2007 judgment was read yet again. The accused was convicted and sentenced to serve 3 years imprisonment. Counsel contended that having ordered for the Probation Officer's report, the court was bound to obtain the report and consider it before sentencing the appellant. Failure to do so was an error in law.

In respect of ground 3,4, 5 and 6, counsel contended that the charge was not proved beyond reasonable doubt. Counsel took the position that there were conflicting testimonies on the part of the prosecution witnesses, to wit:

One, the offence was committed on 27th December 2003, as per the charge sheet and the evidence of PW 1.

Two, PW 4 –Erick Wanjala – saw the patient on 29th December 2003 – 2 days after the event. On that day, in his professional assessment, the injury was 4 days old. Going by the medical

evidence aforesaid the complainant would have been injured two days before the commotion that led to the offence.

Three, the patient-complainant – had been treated earlier – on 28th December 2003. The following day 29th December 2003, she went to the police and was issued with a P3. The police officer's evidence suggests that she had been to the District Hospital.

Four, the complainant says a torch was shone on her face. The appellant asked her if she knew him (appellant). If they were known to one another there was not need to ask such a question.

The complainant's claim that she received 200 blows and 100 kicks is not supported by medical evidence. It was contended that it was an exaggeration particularly when she says the assault was for about 1 hour- 9.00 pm to 10.00pm.

Quite apart from the foregoing, at no time did the court consider the defence. It is towards the end of the judgment that the learned trial magistrate tried to justify the conclusion by which time it was too late in the day so to do.

In respect of grounds 7 and 8, counsel contended that the sentence of 3 years for an offence classified as misdemeanour was harsh and excessive. The maximum is 5 years and the sentence was therefore not illegal. However, considering that the accused was a first offender there was no justification for a sentence of 3 years. Moreso in the light of the fact that the injuries established by medical science were bruises on the legs and pain in the stomach – all superficial.

Mr Ogoti, learned state counsel, conceded the appeal. He argued that the first discrepancy was with regard to the scene of crime. PW 1 says it was a corridor, while PW 2 says it was at the back of the building.

The second discrepancy was with regard to the torch. While appellant says he had a torch and asked the complainant whether she could identify herself, the complainant claims that the appellant asked her if she could identify him.

The third discrepancy was with regard to the date of the assault. The doctor testified that he took medical history from the complainant. The approximate age of the injury was about 4 days. Four days takes us back to 25th. Yet the date of the offence as per charge sheet is 27th December 2003. The date the report was made to the police was 29th December 2003. That is a discrepancy of 2 days.

Last but not least, it was conceded that the learned trial magistrate did not consider the defence of the appellant, and his witnesses. He failed to analyse each and every set of evidence presented to the court with the consequence that he came to a wrong conclusion.

This being a first appeal I have endeavoured to re-evaluate the evidence as I am bound to do. Having done so I make the following findings:

One, having called for probation officer's report the learned trial magistrate was obliged/entitled to consider the same. If it was positive he should have put the appellant on probation. In failing to consider it after ordering for the same he fell in error.

Two, the offence, as per charge sheet and evidence of PW 1, was committed on 27th December 2003. Erick Wanjala – (PW 4) saw the complainant 2 days after the event i.e. 29th December 2003. In his professional assessment the injury was 4 days old. That takes us back to 25th December 2003. If the medical report and the said doctor's evidence is anything to go by the complainant would have been injured two days before the incident of assault.

Three, the complainant claims that the appellant shone a torch on her face and asked if he knew him (appellant). If they were known to one another there would have been no need to ask such a question.

Four, the complainant claims that the appellant administered on her 200 blows and 100 kicks. If that was the case the complainant would have sustained more serious injuries than borne out by medical evidence.

Five, the learned trial magistrate did not evaluate the prosecution's case together with the defence case. In so doing he fell in error. **See OKETHI OKALE Vs REPUBLIC (1965) E.A. Page 555.** His attempt to consider the defence case at the end of the judgment was too little too late.

Six, on sentence I take the view that given the injuries as borne by medical evidence the sentence of 3 years was harsh and excessive in the circumstances.

For those reasons the appeal against both conviction and sentence is allowed. The conviction is quashed. Sentence is set aside and in its place it is ordered that the sentence is reduced to a period already served. Otherwise the appellant is set free unless lawfully held for some lawful reason.

Dated and delivered at Malindi the 5th day of May 2009.

N.R.O. OMBIJA

JUDGE

Mr Ogoti for Republic

N/A for Accused