



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 565 OF 2010

BETWEEN

FRANCIS NYANCHAMA NYARIBOAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a Judgment of the High Court of Kenya at

Kisii, (Musinga, J) dated 15th July 2010

in

HCCRA NO. 88 OF 2006)

JUDGEMENT OF THE COURT

This is a second appeal and by dint of Section 361 (1) (a) of the Criminal Procedure Code we can only entertain matters of law for we should not interfere with decision of the trial or first appellate court on matters of fact unless it is apparent that on the evidence no reasonable tribunal could have reached such a decision.

The appellant Francis Nyanchama Nyaribo was charged before the Senior Resident Magistrates Court at Nyamira with the offence of Grievous Harm contrary to Section 234 of the Penal Code.

Particulars of the charge were that on the 5th day of June, 2005 at Nyangoge sub – location in Nyamira District within Nyanza Province the appellant unlawfully did grievous harm to Nyangau Nyaribo. The prosecution case was through five (5) witnesses. The trial magistrate

(L. Komingoi, SRM) put the appellant on his defence. The appellant gave an unsworn statement but was convicted and sentenced to serve twenty (20) years imprisonment.

The appellant appealed to the High Court (D. Musinga, J – as he then was) and in a judgement delivered on 15th July, 2010 the appeal was found without merit and was dismissed. This provoked the appeal before us.

The appellant who appeared in person filed eight (8) grounds of appeal drawn by himself and also filed submissions in support of the grounds of appeal.

The grounds may be summarized as: breach of the appellants constitutional rights in that he was not taken to court within the legally acceptable timeliness; that essential witnesses were not called by the prosecution; that the P3 form produced was invalid; that prosecution evidence was bad and the 2 courts erred in relying on such evidence of relatives and that the two courts erred in dismissing alibi defence.

When the hearing commenced before the trial magistrate on 15th September, 2005 the Court Prosecutor addressed the court and said:

“PROSECUTOR: The complainant is present in court.

He was previously normal and could talk and do everything

for himself. The injuries affected his brain and has created

his inability to talk. He can hear and understand but

cannot talk. He is in court...”

The magistrate then observed on the record that the complainant had visible scars on the left side of the head and that the complainant had pointed to the appellant as the person who inflicted the injuries. The magistrate therefore noted that the complainant could not testify due to inability to talk.

Beatrice Mora Nyangau (Beatrice) (PW2) is the wife of the complainant and sister in law of the appellant. She testified that on 5th June 2005 at about 8:00 p.m. she was in her house with the complainant and their children when she heard the appellant talking outside her house. The appellant was saying loudly that he wanted to see the man who had taken a calf from his mother's house. Beatrice also heard the appellant say that he could make someone a corpse.

Upon hearing the appellant talking outside the complainant went outside his house followed closely by Beatrice. Beatrice observed the appellant cut the complainant several times on the head with a panga. The appellant continued cutting the complainant even after the complainant had fallen to the ground. Screams by Beatrice attracted neighbours to the scene. The complainant was taken to Nyamira Nursing Home where he was admitted for one (1) month. The complainant could communicate and talk before the incident.

Catherine Mora Nyaibo (Catherine) (PW3) is mother of both the complainant and the appellant. She testified that on 5th June, 2005 the complainant untied a calf from her compound and took it to his house. This angered the appellant. Catherine later learnt that the appellant had attacked the complainant which she confirmed when she visited the complainant in hospital. Catherine was unable to communicate through talking to her son the complainant because he had lost ability to talk.

Tom Saboke Onchoro (PW4) was the Clinical Officer attached to Nyamira District Hospital. He received and attended the complainant who had been treated at another hospital. He observed an extensive scar from the left side of the head to the left angle of the mouth 10cm in diameter. The complainants' speech was incoherent; the type of weapon used was “sharp” and the degree of injury was “grievous harm”. The injuries caused permanent impairment. This witness produced P3 Form as exhibit in the case.

No. 63102 PC Stephen Wafula (PW5) took over investigations and testified in the matter.

This is the evidence the trial magistrate relied upon to find that there was a case calling on the appellant to answer. The appellant chose to answer through an unsworn statement where he denied the charge and stated that on the material day he was away in Kericho pursuing his occupation as a “wood

sawyer”. He did not go back home until 16th June, 2005. Upon his return he was attacked by Beatrice and others because he had refused the complainant to sell land belonging to a deceased brother. He was arrested and charged.

The trial magistrate weighed the appellants' defence and the prosecution case. The magistrate believed the evidence of Beatrice who was present when the appellant attacked the complainant. Beatrice of course knew the complainant and the appellant, who were her husband and brother in law respectively. The trial magistrate was also influenced by the medical evidence which confirmed the injuries suffered by the complainant in the attack witnessed and enumerated by Beatrice.

The appellant has complained before us as part of the grounds of appeal that his constitutional rights were violated because he was not taken to court within twenty four (24) hours of being arrested . Apart from the fact that our perusal of the record shows that this issue was not raised at all before the trial magistrate so that it could properly be ventilated at an early opportunity we note that the issue was raised for the first time before the learned Judge on the first appeal. This is how the learned Judge addressed the issue:

“...the petitioner also filed an originating notice of motion urging this court to declare that his conviction and sentence was null and void because his constitutional rights had been violated for the reason that he was not arraigned in court within twenty four hours of his arrest . However, that application was dismissed on 8th June, 2009 for want of prosecution.....”

We note that the appellant was not represented at the trial court but was represented on the first appeal. Alleged breach of constitutional rights was not raised at the earliest opportunity before the magistrate but the appellants counsel took a formal step to take that as a single main issue by filing a formal application before the High Court. That application was not pursued and was eventually dismissed for want of prosecution. We have not had the benefit of an explanation, and none is on record, why the appellant did not pursue that application before the High Court. In the premises where the appellant filed formal application for investigation of alleged constitutional breaches but which application was dismissed as it was not pursued we cannot reopen the matter on a 2nd appeal as it is too late. The line of authorities on this issue will show that allegation of constitutional rights violations must be made at the first opportunity to enable proper investigations to be conducted – see **Albanus Mwasia Mutua v Republic** Criminal Appeal No. 120 of 2004 (ur); **Domnic Mutie Mwalimu v Republic** Criminal Appeal No. 217 of 2005 (ur) and **Paul Mwangi v Republic** Criminal Appeal 169 of 2006 (ur).

The other complaint by the appellant relates to failure by the prosecution to call some witnesses and also that the witnesses called were related creating, according to the appellant, possibility of collusion. The learned Judge on first appeal was alive to this issue which he analysed at length. He observed, as we do, that the appellant, the complainant, Beatrice and Catherine are close relatives. The complainant had early in the day untied a calf from his mothers (Catherine's) house and took it to his house. This action angered the appellant. The appellant was heard on the material day talking loudly and issuing threats. The complainant went out of the house closely followed by Beatrice. Beatrice witnessed the vicious attack by the appellant on the complainant. The whole incident took place within the family compound and there was no possibility that Beatrice could have made a mistake on either the attacker or the victim. Immediately after the attack Beatrice and others took the complainant to hospital. Catherine visited the complainant in hospital and confirmed the attack and injuries suffered as a result which made the complainant unable to communicate through talking. The Clinical Officer confirmed the injuries.

The learned Judge on re-evaluation of the whole evidence believed, as we do, that there was no doubt that it was the appellant who attacked the complainant.

It is true that there are witnesses who were not called such as the neighbours who came to the scene of attack when Beatrice screamed for help. But the evidence before the trial court was consistent and was sufficient to establish the guilt of the accused. That failure to call some witnesses did not weaken the prosecution case and had no effect on the case at all. There is no legal provision that dictates the number of witnesses to be called in a case – we are satisfied that material witnesses were called. This court held in **Benjamin Mbugua Gitau v Republic** Eldoret Criminal Appeal No. 257 of 2009 (ur) that:-

“.....This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires - see Section 143 Evidence Act. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys....”

See also **Anthony Kiogora Kithinji v Republic** Nyeri Criminal Appeal No. 298 of 2010 (ur).

We are satisfied that no prejudice was suffered by the appellant by alleged failure by the prosecution to call some witnesses.

The complaint raised as a ground of appeal relating to P3 Form being invalid is not clear to us at all. The document was prepared and completed by the Clinical Officer who produced it in court as exhibit. He signed the same. The document is valid and the complaint is misplaced.

The other ground of appeal relating to alibi is idle in the premises where it has been found that the evidence of attack was overwhelming and the appellant could not have been in Kericho as alleged. He was at home on 5th June, 2005 at Nyangoge sub-location in Nyamira. Beatrice is as he says, his relative and she saw him at the scene. He was angered by his brother the complainants' act of removing a calf from their mothers house and taking it to his own. He attacked the complainant in such a vicious way that the complainant lost power of speech and was partially paralysed.

The trial court and the first appellate court were perfectly entitled, on the evidence, to the findings they reached. There is no merit at all in this appeal which we accordingly dismiss.

Dated and Delivered at Kisumu this 12th day of July 2013

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true
copy of the original.

DEPUTY REGISTRAR