



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Criminal Appeal 129 of 2009

PATRICK KEMONI KEMBOI..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

[From original conviction and sentence in Criminal Case number 1303 of 2008 of the Senior Resident Magistrate's Court at Winam]

JUDGMENT

This appeal arises from the decision and judgment of the Resident Magistrate at Winam in Criminal Case number 1303 of 2008 in which the appellant **Peter Kemoni Kemboi** was convicted and sentenced to two (2) years imprisonment for the offence of grievous harm contrary to Section 234 of the Penal Code.

The particulars of the charge were that on the 12th September 2008 at Brilliant Bar Kisumu, unlawfully did grievous harm to **Sammy Rioba Wambura**.

The prosecution evidence on record showed that on the material date at about 11:00 p.m. the complainant **Sammy Rioba Wambura (PW1)** was at a bar called Brilliant playing a game of pool with other patrons when a dispute or quarrel ensued between him and the appellant whom he knew as “Patrick “ or “Patty” over a payment for the game. In the process, he was held and head-butted on the mouth by the appellant and as a result lost an upper incisor tooth. He reported to the police at Kondele Police Station and thereafter proceeded to the New Nyanza Hospital where a loosened tooth was removed.

Rhoda Okal (PW2), a clinical officer at the New Nyanza Hospital examined the complainant and found his upper incisor tooth missing. She thereafter completed and signed the necessary medical examination report (P3 form).

P. C. Peter Kiberenge (PW3) arrested the appellant and charged him with the present offence.

In defence, the appellant said that he was a sweeper at Brilliant Hotel and on the 9th September 2008 at about 11:00 p.m. the complainant and another person quarreled and engaged in a fight inside the hotel. He (appellant) was later arrested and charged with the material offence.

John Oketch (DW2) was in the said bar/ hotel on the material 12th September 2008 when a commotion ensued between one Mr. Kuria and one Mr. Rugo. The appellant then entered the bar at that juncture and proceeded to restrain the two individuals but one of them (Kuria) threw words at the appellant until he was asked to leave the bar by its proprietor.

On 21st September 2008 John (DW2) learnt that the appellant had been arrested yet he did not see any scuffle between him (appellant) and Kuria who alleged that he had lost a tooth. The proprietor of the bar **Elijah Owino (DW3)** said that on that material date and time, some patrons were playing pool and drinking. In the process, Mr. Rugo, the proprietor of the pool game demanded payment from Mr. Kuria. The two held each other and fell down. They were separated but resumed their arguments after a while. This time, the appellant came into the bar and restrained them. They went away but Kuria returned and started banging the gate. The appellant continued cleaning the place as was his duty.

Elijah (DW3) said that on the 21st September 2008 the appellant was arrested and later taken to court.

The foregoing evidence was considered by the learned Resident Magistrate who concluded that the prosecution had proved its case beyond reasonable doubt.

In arriving at the said conclusion, the learned trial magistrate believed the complainant's version of the evidence and found nothing to suggest that the complainant was motivated by malice and ill will to implicate the appellant.

Consequently, the appellant was convicted and sentenced accordingly.

Being dissatisfied with the conviction and sentence, the appellant preferred ten grounds of appeal contained in the petition of appeal dated

10th September 2009.

Learned Counsel, **Mr. Onsongo**, argued the grounds on behalf of the appellant. He submitted that both the prosecution and the defence called witnesses and for a sound judgment, the trial court was required to comply with the provisions of Section 169 of the Criminal Procedure Code but did not do so thereby occasioning a miscarriage of justice.

Learned Counsel also submitted that the trial court having found that a fight occurred over non-payment of pool money then both the complainant and appellant should have been found guilty of affray instead of the trial court laying blame on the appellant on the basis of propositions unfounded by evidence.

It was further submitted by the learned counsel that the appellant raised several issues in his defence but these were not considered by the trial court and that with regard to the missing tooth, the prosecution evidence was unbelievable.

In opposing the appeal, the learned Senior State Counsel, **Miss Oundo**, contended that the learned trial magistrate complied with Section 169 of the Criminal Procedure Code and if this was not done, the error may be corrected by this court by re-examining the evidence and coming to its own conclusions.

The learned State Counsel submitted that the charge could not be that of affray as there was no medical evidence to show that the appellant was injured. Also, the appellant hit the complainant with his head and caused loss of two teeth. This constituted permanent disfigurement under Section 4 of the Penal Code. The learned State Counsel further submitted that the appellant's defence was considered and rejected by the learned trial magistrate. Therefore, this appeal lacks merit and ought to be dismissed.

Having considered the foregoing submissions and having also re-examined the evidence afresh as is the duty of a first appellate court while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses, this court is minded to find that notwithstanding whether there was loss of one tooth or two teeth, the offence of grievous harm contrary to Section 234 of the Penal Code was established and more so by the evidence of the complainant (PW1) and the clinical officer (PW2).

As to whether the harm was occasioned by the appellant's unlawful act of head butting the complainant or by a fight between the appellant and the complainant, this court may not fault the finding by the learned trial magistrate largely based on credibility that it was the appellant's act of assaulting the complainant which occasioned the harm.

In **Republic vs Oyer [1985] KLR 353**, it was held that a first appellate court cannot interfere with those findings of a lower court which are based on the credibility of witnesses unless no reasonable tribunal could make such findings or where it is shown that there existed error of law.

The learned trial magistrate treated the complainant's evidence with care and found it more credible than that given by the appellant and his witnesses.

Even though the learned trial magistrate noted that a fight might have occurred over payment of a pool game, she found that the fight did not involve the complainant and the appellant and therefore the appellant was not justified in intervening in the matter since he was not the owner of the pool game.

This court would agree with the learned trial magistrate and add that the evidence showed that the appellant took upon himself to "**discipline**" the complainant over non-payment of a pool game. Instead of peacefully restraining the complainant and the owner of the pool game, the appellant decided to assault the complainant and in the process took the law into his own hands and ended up committing the criminal offence of causing grievous harm.

It was submitted by the appellant's learned counsel that the judgment of the trial court was unlawful in that the provisions of Section 169 of the Criminal Procedure Code were not complied with by the learned trial magistrate. However, this court does not think that there was non-compliance with the aforementioned provisions of the law. The learned trial magistrate considered the entire evidence in its totality and found that not only was the offence committed but also that the appellant was responsible. The commission of the offence and the identification of the offender were the major points for determination.

There was nothing unlawful about the judgment of the trial court to prevail upon this court to interfere with the appellant's conviction by the learned trial magistrate which conviction is hereby upheld.

The sentence of two (2) years imprisonment imposed upon the appellant was too lenient considering that the offence carries a maximum sentence of life imprisonment. However, this court does not wish to interfere with it. In any event, the respondent did not call for enhancement of the sentence.

In the end result, this appeal is dismissed.

Dated, signed and delivered at Kisumu this 17th day of May 2010

J. R. KARANJA

JUDGE

JRK/aao