REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(Coram: Chunga, C.J., Akiwumi & Owuor, JJ.A.)
CRIMINAL APPEAL NO. 4 OF 2000

JOHN OKETCH ABONGO.....APPELLANT

AND

REPUBLIC.....RESPON DENT

(Appeal from the judgment of the High Court of Kenya at Kisumu
(Wambilyangah, J.) dated 14th January, 2000
in
H.C.CR.APPEAL NO. 195 OF 1999)
****

JUDGMENT OF THE COURT:

The appellant John Oketch Abongo was tried, convicted, and sentenced to serve 4 years imprisonment by the Resident Magistrate Nyando on 25th August, 1999. The charge against him was grievous harm contrary to section 234 of the Penal Code, Cap 63 Laws of Kenya and the particulars averred were as follows:

"John Oketch Abongo on the 4th day of February, 1999 at Kamagaga Sub-Location in Nyando District of the Nyanza Province unlawfully assaulted Rispah Atieno occasioning her grievous harm."

After his conviction and sentence, the appellant appealed to the High Court at Kisumu which, on 14th of January, 2000, dismissed the appeal against conviction and sentence in a short judgment which read as follows;

"There was ample and credible evidence which proved the appellant's guilt beyond reasonable doubt. The offence was an evil one. A sharp weapon was used against a defenceless woman. She is inflicted a deep cut on her head. I find no merit in the appeal and I dismiss it in its entirety."

Before considering the appellant's grounds of appeal and submissions by his Counsel, a short outline of the facts as found by the trial court is necessary.

The appellant was apparently related to the complainant. He was the step brother of the complainant's husband. On the 4th of February, 1999 the complainant returned home from her nearby shamba at about 1.00 p.m. She was at the shamba with the appellant and left him there to return to her home.

Immediately the complainant reached home, the appellant followed her and found her preparing meals for the day. The appellant sought to take away from the complainant's home a bicycle which, according to the complainant, had been left to her husband by her deceased husband's father. The complainant refused the

appellant's attempt to take the bicycle whereupon a disagreement ensued between the two.

It was the complainant's evidence that the appellant then started beating her and, in so doing, the appellant used the complainant's panga to cut the complainant on the head. He also tried to strangle the complainant. The complainant screamed as a result of which her husband who was lying sick in the house came out and also screamed or raised an alarm for help. The screams raised by the complainant and her husband brought neighbours to the scene including one Alex Odhiambo who gave evidence in the subordinate court. The complainant's husband also gave evidence in the subordinate court fully supporting the complainant.

Alex Odhiambo heard noises and ran to the complainant's home and found her bleeding from the head. He saw a panga stained with blood and when many other people arrived, the appellant attempted to run away but was arrested and subsequently escorted to Ahero Police Station. In his unsworn statement in the subordinate court, the appellant gave the date of the incident as 6th of February, 1999. He said that he returned home from the shamba and found his bicycle placed near the complainant's house. He attempted to take the bicycle whereupon the complainant screamed alleging that a thief had come to her house and neighbours arrived. The neighbours were armed with rungus with which some of them struck the appellant. In the course of the commotion, according to the appellant, the complainant's husband hit the complainant with a rungu. Thereafter, according to the appellant, the complainant and her husband claimed that the appellant was the one who had caused the incident.

The learned trial magistrate, having heard evidence from both sides accepted the prosecution case and found that the charge had been proved against the appellant beyond reasonable doubt. He rejected the appellant's account of the events.

In his grounds of appeal and submissions by his counsel before us, the appellant complained that the learned High Court judge on first appeal, failed to analyze the evidence and to make his own independent findings as required in law by a first appellate court. It was submitted on behalf of the appellant, that failure by the High Court to do so was fatal because, the High Court disregarded obvious contradictions between the medical evidence on the one hand and the eye witnesses' evidence on the other hand.

The duty of a first appellate court in regard to the evidence and facts is now settled in law. It is required to subject the evidence to fresh and independent analysis and, in appropriate circumstances, even to make its own independent findings and conclusions. In doing so however, the first appellate court must bear in mind that it has only the record and has not enjoyed the advantage of seeing and observing witnesses under testimony.

We have, earlier, in this judgment, quoted what formed the entirety of the High Court's judgment on first appeal in this matter. Mr. Gacivih submitted that although the judgment was short, it dealt with all the issues raised in the appeal to the High Court and indeed, even in the appeal before us.

It is a good attribute, in writing a judgment, to be short, concise and to the point. But that does not lessen the need for first appellate court to carefully examine the evidence on record before it and subject the same to an independent evaluation. Failure to do so, in our judgment, is, indeed, an error of law. We are of the opinion that the judgment of the High Court on first appeal failed to discharge the duty as required of it in law with regard to the evidence on record. In our judgment Mr. Onsongo was right to submit that the judgment fell short of examining the evidence in the manner required of it. On the other hand however and for reasons which will emerge later in this judgment, we are not satisfied that the failure by the High Court judge to treat the evidence as required by law was necessarily fatal to the conviction, in the particular circumstances of this case .

The second ground raised and argued by Mr. Onsongo on behalf of the appellant, was in regard to the medical evidence on the injury which the complainant suffered. Mr. Onsongo vigorously submitted, although there was injury suffered, it did not either medically or legally amount to grievous harm as alleged in the charge. Accordingly Mr. Onsongo submitted further that the charge as laid was not proved by the evidence. He referred us to the evidence of the Clinical Officer, the P3 form produced by the

Clinical Officer, and the evidence of the complainant herself. In particular, Mr. Onsongo emphasised that the complainant was examined on 5th February, 1999 and the injury was certified to be two hours old whereas the complainant and the other prosecution witnesses gave evidence that she was assaulted at 1 p.m. on 4th February 1999. Under these circumstances, Mr. Onsongo therefore submitted that the medical evidence was at variance with the complainant's evidence and that of the other prosecution witnesses.

Mr. Onsongo also referred us to the definition of grievous harm as contained in the P3 form and also in section 4 of the Penal Code. He submitted that the nature of the injury disclosed did not fall within these definitions. According to him, therefore, the complainant's injury amounted to no more that actual bodily harm under section 251 of the Penal Code.

Mr. Gacivih did not agree with Mr. Onsongo's submissions as indicated in the preceding paragraphs. According to him, the injury suffered by the complainant fully comes within the definition of grievous harm as contained in section 4 of the Penal Code.

We have given the submissions of Mr. Onsongo anxious consideration. We think we should first quote verbatim the definition of grievous harm as found in section 4 of the Penal Code Chapter 63 Laws of Kenya which reads as follows:

"grievous harm means any harm which amounts to maim or dangerous harm or seriously and permanently injures health, or which is likely so to injure health, or which extends to the permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense."

It now remains to consider the evidence on record to see whether that evidence disclosed grievous harm as defined or otherwise. This is what the Clinical Officer said on oath in the subordinate court:

"I recall on 5th February, 1999 I examined one Rispa Atieno with a history of assault. There was a deep cup on the left temple region. An X-ray was done. There was slight chest pain. Both upper and lower limbs were normal. Approximate age of injury was 2 hours. Probable weapon was sharp. The degree of harm was grievous harm. I produce the P3."

The P3 form produced by the Clinical Officer in the relevant part reads as follows;

"deep cut on left temple region. 6 cm length. 1.5 cm depth. Stitched (8) stitches. Sent for skull X-ray in Kisumu District Hospital."

We observe that both in the P3 form and in the evidence in court, the Clinical Officer gave a detailed description of the injury. It was a deep cut with the length and depth as already mentioned. Treatment given was stitching made up of 8 stitches. Not being satisfied with this, the complainant was sent for a skull X-ray.

Whether or not grievous harm or any other form of harm is disclosed must be a matter for the court to find from the evidence led and guided by the definition in the Penal Code. A court will be assisted by medical evidence given in coming to the conclusion on the nature and classification of the injury. In many cases the courts have accepted and gone by the findings and opinions in the medical evidence. But, in appropriate circumstances, the court is at liberty to form its own opinion, having regard to the evidence before it as to the nature and classification of the injury.

In this case we have carefully considered the medical evidence and the findings made by the Clinical Officer both in the P3 form and in the evidence in court. We have also carefully considered the definition of grievous harm as contained, not only in the Penal Code already quoted in this judgment, but also in the P3 form to which we were referred by Mr. Onsongo.

We are satisfied that the complainant's injury amounted to grievous harm as defined in the Penal Code. The definition contains several ingredients of what constitutes grievous harm. We are of the opinion that the presence of any one of these ingredients would suffice to disclose grievous harm. Here, we are

satisfied that the complainant's injury did amount to dangerous or serious injury to health both of which are ingredients contained in the definition.

For the preceding reasons, we are unable to agree with Mr. Onsongo's submissions that the evidence led fell short of proving grievous harm. This ground appeal accordingly fails.

The third ground argued by Mr. Onsongo was in regard to the charge. He submitted that the particulars of the charge were duplex. According to him the particulars contain elements of both grievous harm and actual bodily harm. Therefore, Mr. Onsongo said, the charge appears to be both under section 251 and section 234 of the Penal Code.

Mr. Gacivih replied that the charge was quite clear. It was not duplex and it contained all the relevant ingredients of the charge as read.

We are not persuaded that the charge was duplex. Nor do we think that the charge was vague or ambiguous. The particulars were not precise and some unnecessary words appear to have been used by those who drafted it. However, the unnecessary words do not make the charge duplex. The particulars clearly contain all the ingredients of the offence. The place where the offence was committed, the date it was committed, and the fact that the injury occasioned was grievous harm were all mentioned. We think that anything else mentioned in the particulars of the charge was merely suppllasage but did not make the charge duplex. In any event, there was no complaint of prejudice to the appellant.

For the reasons we have stated above, we arrive at the conclusion that Mr. Onsongo's 3rd ground of appeal based on the particulars of the charge, must similarly fail.

Lastly, Mr. Onsongo submitted vigorously on what he described as the discrepancy between the eye witnesses' evidence and the medical evidence. First, he complained that the complainant and her husband had a grudge and bias against the appellant because of the previous alleged assault by the appellant on the complainant's husband. Therefore Mr. Onsongo said the evidence of the complainant and her husband alone could not sustain the conviction.

Furthermore, Mr. Onsongo submitted that according to the appellant, the complainant was assaulted with a rungu by her husband. This evidence Mr. Onsongo says received no consideration from the High Court on first appeal.

We had earlier, in this judgment, referred to the evidence of Alex Odhiambo. He was a neighbour of the complainant. He rushed to the complainant's home at about 1.00 p.m on the fateful day upon hearing screams. He found the complainant bleeding on the head. He saw a panga stained with blood. He found the appellant who attempted to run away but was arrested by the neighbours and escorted to the Police Station. We are of the opinion that Alex Odhiambo's evidence was independent evidence. Although he did not witness the actual attack, he arrived so soon thereafter to find the appellant and the complainant still at the scene. His observation of the scene and the events at the scene are fully in support of the evidence of the complainant and her husband.

Similarly, there is the evidence of the Clinical Officer. According to this evidence, the injury was occasioned by a sharp weapon. It was a deep cut with the length and width as described in the P3 form. This, in our opinion, fortifies the complainant's evidence that she was attacked with a panga. It also fortifies the evidence of Alex Odhiambo as to the weapon he found at the scene when he arrived.

We must take the evidence on record in its entirety. The evidence of the prosecution witnesses must be taken together with the evidence of the appellant. We are satisfied that, the entire evidence on record left no doubt, as the subordinate court found, that the appellant assaulted the complainant in the manner described by the complainant and supported by other witnesses.

In the foregoing circumstances we arrive at the conclusion that although the first appellate court failed to evaluate the evidence as required by law, the guilt of the appellant was so obvious and manifest that no

miscarriage of justice was occasioned to him by the omissions of the first appellate court.

Before we conclude this judgment, we must point out one other matter. In the course of his submissions, we drew the attention of Mr. Onsongo to a passage in the subordinate court's judgment which appeared to place the burden of proof on the appellant. This is what the subordinate court had said;

"The defence put up by the accused in unsworn statement is not corroborated and remains a mere denial. It is hard to believe the accused in the circumstances as the prosecution evidence against him is overwhelming. My view is that his defence is mere fabrication in an attempt to evade the consequences of his act."

Viewed in isolation the passage would qualify for a misdirection in so far as it appears to place the burden of proof on the appellant. However, the entire judgment must be taken together. And, in the last paragraph of the judgment, the subordinate court correctly and properly directed itself on the onus of proof and it said as follows;

"I am satisfied the prosecution has proved its case to the required degree beyond reasonable doubt."

The passage above quoted clearly shows that the magistrate had the correct test and approach in mind and quite clearly stated it in his judgment. Accordingly, what had earlier appeared as a misdirection occasioned no injustice.

We have considered everything raised and argued before us. We arrive at the conclusion that the guilt of the appellant was proved beyond reasonable doubt by overwhelming evidence on record. Accordingly, all the grounds raised and advanced before us by Mr. Onsongo must fail and we order the appeal dismissed in its entirety.

Dated and delivered at Kisumu this 14th day of June, 2000.

B. CHUNGA

.....

CHIEF JUSTICE

A.M. AKIMBO

.....

JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR