REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL NO. E027 OF 2021

NYAGA MUTHARA...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal against the judgment by Hon Gichimu SPM Runyenjes in Criminal Case No. 123 of 2019 and delivered on 18.03.2021)

JUDGMENT

A. Introduction

1. The appellant Nyaga Muthara was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal code. It was alleged that on 26.02.2019 at about 1400 hrs at Kathageri Sub location within Embu County, he wilfully and unlawfully assaulted Erick Njeru Nyaga thereby occasioning him actual bodily harm.

2. The appellant pleaded not guilty to the charge and a full trial was conducted. The prosecution called five witnesses in support of their case and at the close of the prosecution's case, the trial magistrate placed the appellant on his defence.

3. The appellant gave sworn statement and in its judgement delivered on 18/03/2021, the court convicted him and sentenced him to pay a fine of Kshs. 50,000/= in default to serve one (1) month imprisonment.

4. The appellant moved this court vide a petition of appeal dated 29.03.2021 citing the following grounds that:

1) The learned trial magistrate erred in law and fact in convicting the appellant against the weight of evidence.

2) The learned trial magistrate erred when he failed to find that the evidence on record was inconsistent and contradictory and did not support the charge.

3) The learned trial magistrate erred in law in failing to find that the prosecution did not prove the elements of the offence of assault causing actual bodily harm contrary to section 251 of the penal code as required by the law.

4) The learned trial magistrate failed to properly consider the appellant's defence which if he had, would have arrived at an acquittal verdict.

5. The appellant prays that the conviction and sentence be set aside.

6. The appellant submitted that the discrepancies and inconsistencies by all the prosecution witnesses were so fundamental to justify

a conviction of the appellant for the reasons that the date of the alleged offence was not clear from the testimony by all the witnesses; the date the complainant was allegedly assaulted was not in tandem with the date of the alleged assault as per the abstract and that the prosecution did not avail the assault weapon.

7. The appellant relied on the case of **Ndaa v Republic [1984] KLR and Patrick Nzaka Watu v Republic (2016) CR APP 29 of 2015.**

B. Prosecution's Evidence

8. PW1, Erick Njeru stated that on the 5.05.2019 while passing near the accused person's land, the accused hit him on the head with a metal bar on the allegation that he had stolen his miraa. That he bled on the head and was taken to hospital by PW2 after which they reported the matter to the police.

9. PW2, Nyaga Muruawega stated that PW1 is his son and that on the 27.02.2019 while on his way home, he met the accused person and after exchange of greetings, the accused person informed him that he was from the police station having reported that PW1 allegedly stole his miraa. That PW3 joined them and proceeded to inform PW2 that the accused had assaulted PW1 and had injured him on the head. That he then took PW1 to police station and thereafter to a private medical centre for treatment; and then to Runyenjes District Hospital for further treatment.

10. PW3, Ephantus Njiru stated that on 26.02.2019 PW1 went to his home looking for work upon which he told him to pick some posts to build a cow shed. That after 20 minutes, the accused arrived at his home carrying a spear and a panga and upon seeing PW1, he enquired from him why he had trespassed on his land and picked his mangoes. At that point, the accused hit PW1's head with the blunt side of the spear.

11. PW4, Jackson Gitonga who was the investigation officer stated that on the 26th.02.2019 at Kathanjuri police post, the accused reported that he found PW1 harvesting his miraa and mangoes and that he ran after him and caught up with him at his neighbour's home. That thereafter, the complainant arrived reporting that he had been assaulted by the accused person. He thus arrested the accused person and charged him with the offence of assault.

12. PW5, Samuel Murithi, a clinical officer testified that he filled the P3 form for PW1 and classified the injury as harm and further that PW1 had already been treated in a different facility.

C. Defence Evidence

13. When he was put on his defence, DW1 stated that on the 26th.02.2019 while at his shamba hiding, he saw PW1 enter his land and stole miraa. He asked him to stop but instead, he ran away. That he then reported the matter to the police but after about two hours, he was instead arrested on the allegation that he had assaulted PW1.He maintained that he never assaulted PW1.

D. Determination and Analysis

14. I have considered the appeal before me, the written submissions, the proceedings and the judgment of the trial court; the issues for determination in this appeal are:

i. *Whether the prosecution adduced sufficient evidence to prove the charge of assault against the appellant.*

ii. *Whether the sentence imposed by the trial magistrate is harsh and/or excessive.*

15. This being a first appeal, it is the obligation of the court to reconsider and re-evaluate the evidence afresh and come to its own conclusion (see **Okeno –vs- Republic [1972] E A 32)**.

16. The trial court reached the conclusion that the prosecution had proved their case against the appellant and thus convicted and sentenced him.

Whether the prosecution proved their case beyond reasonable doubt

17. The legal burden of proof in criminal cases rests on the shoulders of the prosecution; to prove the guilt of the accused beyond reasonable doubt. Viscount Sankey L.C puts it more subtly;

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt….

18. The appellant was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal code which provides;

Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

19. Accordingly, to secure a conviction on the offence of assault, the prosecution must prove beyond reasonable doubt:

i. *Assaulting the complainant*

ii. *Occasioning actual bodily harm.*

20. Of actual bodily hurt or injury, in ***Rex vs Donovan CCA 1934,*** *Swift J* stated:-

"For this purpose, we think that "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the complainant. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling."

21. I have carefully evaluated the evidence adduced by the prosecution witnesses. The prosecution must, therefore, show that the assault resulted in actual bodily harm. There must be an intention to assault (*mens rea*) and the assault must have taken place (*actus reus*). PW5 a clinical officer adduced medical evidence to corroborate the evidence of the complainant that he sustained actual bodily harm or injury as a result of the assault by the appellant.

22. In the same breath, it is alleged that there was material contradiction in the evidence adduced by the prosecution witnesses. The incident was alleged to have taken place on the 26.02.2019 at 1400 hrs at the farm of PW3 while the complainant stated that the offence occurred on the 5.05.2019 when he was passing through the appellant's land.

23. The issue is further compounded by the testimony of the other witnesses which presented different possible dates that do not add up yet the witnesses insisted that the dates they stated were the correct dates while the complainant indicated a different date which was almost two months after the date that the appellant allegedly assaulted the complainant.

24. The evidence of PW1 does not tally with PW2's testimony and further that of PW3 who even confirms that he was present when the appellant hit the complainant on the head. The charge sheet on the other hand indicates that the offence occurred on the 26.02.2019 while interestingly the P3 form issued by the police indicates that the date of the offence was on the 27.02.2019 at around 14.00 hours. The treatment notes were not produced before the trial court yet PW2 stated that he took PW1 to hospital and he was treated.

25. In my view, any thread of evidence that may have connected the appellant to the crime was dismantled by the contradictions as to the date and place of the commission of the offence which were material contradictions.

26. In the case of **Erick Onyango Ondeng' vs. R [2014] eKLR**, the Court reasoned that:

"The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyze that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers."

27. The kind of evidence adduced against the appellant in this case did not meet the threshold for reaching the conclusion that he actually assaulted the complainant. The contradictory nature of the evidence adduced as to the date and the place the offence was committed leave room for doubts as to the culpability of the appellant. The benefit of doubt ought to have gone to him.

E. Of Sentence

28. Sentencing is at the discretion of the trial court except that, the discretion must be exercised judiciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors in the case and not irrelevant factors. The appellate court would only interfere with the sentence imposed by the trial court if the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously. See Makhandia J (as he then was in ***Simon Ndungu Murage vs Republic, Criminal appeal No. 275 of 2007, Nyeri.***

29. *Similarly,* in ***Shadrack Kipchoge Kogo vs Republic, Criminal Appeal No. 253 of 2003* (Eldoret),** Omolo, O'kubasu & Onyango JJA) the Court of Appeal stated:

"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"

30. Section 251 of the Penal Code provides that a person who is guilty of the offence of assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years. The appellant was sentenced to pay Kshs. 50,000/= in default to serve one month in prison.

31. I have considered the nature of the offence, the principles of sentencing and the length of sentence imposed. The sentence provided for in Section 251 of the Penal Code is five years. In my view, the sentence was not excessive but as earlier stated, the prosecution did not prove the case against the appellant to the required standard.

32. In view of the above, I find that:

i. *The appeal has merit and it is hereby allowed.*

ii. *The conviction is quashed and the sentence set aside.*

iii. *The appellant is set free forthwith unless otherwise lawfully held.*

DELIVERED, DATED AND SIGNED AT EMBU THIS 10TH DAY OF NOVEMBER, 2021.

L. NJUGUNA

JUDGE

…………………………….……......for the Accused

……………………………………….for the Respondent

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