REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL NO. 160 OF 2001

From the Original Conviction and Sentence In Criminal case No.375 of 99 of The R.M.'s Court at Makindu: O.J. Ochako Esq., of 2.10.2001.

JACKSON NDILE MBITHI ::::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

REPUBLIC ::RESPONDENT

Coram: R. Nambuye – Judge
Mr. Makau – Advocate for Applicant
Mr. Orinda – state Counsel for Respondent
C/Clerk – Mr. Muli

J U D G E M E N T

The appellant herein was charged jointly with others in count 1 with the offence of grevious harm contrary to section 234 of the penal code in count I. They are alleged to have done grevious harm to one Benjamin Nzuki Mutuku. In count 2 they faced a charge of malicious damage to property contrary to section 333(1) of the penal code. In that on the same day they damaged a shirt worth Kshs.400.00 belonging to Benjamin Nzuki Mutuku and in count 3 with the offence of charging persons with witch craft contrary to section 6 of the witch craft Act cap 67 laws of Kenya. They are alleged to have taken him to a witch doctor Willy who cleared him not to be a witch.

They were tried by the lower court found guilty in all the three (3) counts and sentenced to serve three years imprisonment on each of the three (3) counts which sentences were to run concurrently.

The appellant was aggrieved by those orders and he has appealed to this court citing 7 grounds of appeal namely that the learned magistrate erred in law and fact in relying on hearsay medical evidence, erred in law and fact by finding that the complainant's shirt was damaged against the evidence of eye witnesses, erred in law and fact in hearing the appellant in the absence of his counsel who had been in custody of the police after being remanded thereby the same magistrate erred in law and fact in dismissing the appellant's defence and in convicting him against the weight of evidence, erred in law in imposing a harsh sentence on the appellant and in law and fact in refusing the appellants mitigation.

On that basis counsel urged the court to set aside and or quash the conviction, set aside the sentence and grant any other relief that the court may deem fit to grant. In his oral submissions to court

counsel for the appellant reiterated the grounds of appeal and stressed the following points:-

1. That the offence of grevious harm was not proved by medical evidence on record and secondly if indeed the complainant had suffered severe injuries he could not have walked that long distance on his own to go and report to the police post which fact goes to show that if the complainant suffered any injuries then the same was not so serious as to amount to the degree of grevious harm, that medical evidence was inadmissible as the person who filled the P3 relied on notes which had been made by another person and so that was hearsay, by the time the P3 was filled the injuries had healed and so the degree of injury could not be determined from the scars and the document unless the person who saw him first was the one filling the P3, that the fact that complainant was attended by a nurse and no other person followed up the treatment of the nurse it shows further that the injuries were not severe, that even if it can be proved that there was an assault there is nothing to show that the appellant participated in that assault as he appellant and the complainant were the ones who were being taken for witch craft testing and so he could not have assaulted the complainant, that the evidence of PW1 contradicted the finding of the learned trial magistrate and this court should hold that the appellant did not come into contact with the complainant, and he did not touch his clothes as the complainant never said so, by the time PW6 saw the group boarding a matatu it was at 12.00 noon by which time the struggle was over and so he did not witness anything.

PW6 only saw the shirt blood stained and not torn, that the shirt was never taken to the police post immediately and since it was in the custody of the complainant he had every reason to play with it; that by the time the investigating officer gave the defence counsel was not present the learned trial magistrate was aware of this fact and yet ordered the case to go on, that being unrepresented the appellant and his co-accuseds were disadvantaged as they failed to put out the really issues from the central witness and had the defence counsel been around he would have brought out the issue of the damaged shirt, the magician was never called to say the condition of the complainant when he was taken to him, it has not been stated to whom the charge of witch craft was made, that there was a lot of doubt and so the offence was not proved, the mitigating factors were not considered as appellant said he was sickling which fact was not considered, the sentence was harsh and excessive and it should be set aside.

The state on the other hand has opposed the appeal on the following grounds: that there was sufficient evidence to support the conviction on all the three (3) counts as all the ingredients were present, that the complainant was taken away by neighbours and so there would be no mistaken identity, that the wife of the complainant followed and saw the appellant among the group which took the complainant away and she could not have been mistaken as they were neighbours.The P3 produced by PW5 corroborates the injuries sustained and he rightly used the notes prepared by a colleague from the same hospital to fill the P3 and that evidence was properly admitted. PW6 an independent witness as he comes from a different location and he just happened to have boarded the same vehicle with them, the shirt which was damaged was produced by PW7. The evidence was tested but not shaken, the magistrate properly assessed the evidence and the decision arrived at was the correct one as the magistrate properly weighed the evidence before him; the trial magistrate was entitled to reject the defence as it was a mere afterthought. That the issue of representation was not raised at the trial. It is now being raised on appeal for the first time and it should be rejected.

On sentence the state submits that save for the sentence on count 1which appears to be harsh, the rest in safe.

In reply counsel for the appellant stated that the authority relied upon is a court of appeal authority and this court is bound by it. It is their stand that where the count cannot point out the roles of each

assailant in relation to the commission of an offence then there is a doubt which should be exercised in favour of the appellant.

The findings of the learned trial magistrate are that:-

1. There is no doubt that the complainant was taken to a witch doctor called Willy at Machinery market. What is disputed is the harm caused to the complainant and damage to his shirt.

2. From the evidence and material placed before him, he was inclined to believe that the complainant was bodily harmed and by the accused persons. Evidence was given how the four (4) accused persons approached him forcefully attacked him, beat him using sticks and slaps and he was also tied his hands backwards.

3. The incident was witnessed by PW2 a daughter in law to the complainant who witnessed and she saw the accused persons assaulting the complainant and she ran back home to inform her mother in law PW3 who followed the complainant up-to Machinery.

4. PW4 the assistant chief saw the accused escorting the complainant to Machinery and they boarded the same vehicle and he alighted at Emali market and he saw the complainant's hands tied backwards his body was bloody and clothes blood-stained. The witness is a person in authority and he had no reason to doubt him. His demeanor was quit clear.

5. PW5 examined the complainant as to the injuries and he observed a deep cut on the temporal left region, bilateral perforation tympanic membrane and a cut inside the right cheek all classified as grevious harm.

6. The medical evidence corroborated the evidence of the eye witnesses.

7. Although the accuseds have denied the assault they admit that they took the complainant to the witch doctor as he was alleged or suspected to have caused the deaths of several family members.

8. The first accused alleges that he was also taken to the witch doctor. It is appears that he is the person who complained to the clan that sanctioned the taking of the complainant to a witch doctor.

9. The second accused and third accused were the agents of the clan (Ambua) that authorized that complainant be taken to Willy.

10.The fourth accused claims alibi. He claims to have paid a visit to his in law at Kilungu. He opted not to call his in law to confirm what he alleged. He alleges that the complainant is fond of making false allegations against him and what the magistrate has concluded from him is that he has a grudge and vendetta against the complainant. He expressed the same by injuring the complainant in the process of taking him to a witch doctor.

11.That from the above he finds that the accuseds' defences were a mere denial and therefore, asham and on that basis finds them guilty as charged.

This being an appeal the duty of this court is to re evaluate the evidence that was adduced before the lower court and determine if the same is to stand or not. I have re evaluated the same and find that count 1 relates to grevious harm. The key witness who is PW1 says that the four (4) accused persons forcefully took him by force to a witch doector at Machinery market called Willy. He PW1 says that the

four (4) started beating him with sticks and specifically mentions that the 4th accused who was not the appellant hit him with a stick on the head.

2. That they took him to a nearby river where they slapped him in turns until his ears could not hear. From the above it is clear that apart from saying that the four (4) beat him with sticks there is no mention as who hit him where.

PW2 who says that she heard someone and walked to the place and found the four (4) accuseds beating the complainant her father in law with sticks but she does not state who hit where.

PW3 did not witness the beating but she saw her husband bloody all over. When she saw him he had injuries on the head, ears and body was swollen.

PW4 saw him bleeding from the head.

The date of the incident was on 6th January, 99. PW5 saw the complainant on 18th April, 1999 when he filled the P3. By this time the injuries were healed. He was a clinical officer. He filled the P3 using notes made by a nurse at Sultan Hamud dispensary. The name of the nurse is not given and the medical chits used to fill the P3 were not also tendered in evidence.

PW6 noticed blood flowing from the ears. He did not note any other injury anywhere else. PW7 the police officer saw injuries on the right hand, left leg and some bleeding from his ears.

The court's assessment of the evidence before the lower court in so far as it relates to count 1 is that it has two (2) aspects which the learned trial magistrate should have dealt with.

1. The aspect dealing with the gravity of the offence and its proof.

2. The involvement of the appellant in the commission of that offence.

In the first issue of the gravity of the offence, I find that this can only be proved through a medical report. The learned trial magistrate believed the evidence of PW5. It is, however, on record that PW5 did not see the patient with fresh wounds. He saw him four (4) months later when the injuries had healed. He filled the P3 form. The medical chits or cards that the complainant had which had been filled by a nurse at Makindu. I note from the record that in the absence of the evidence of the nurse and failure to produce the card, it leaves a gap in the prosecutions case as to the degree or severity of the injury sustained. It follows that PW5 had no basis upon which he concluded that the injury was grevious harm.

As regards to the evidence of assistant chief, I find that there is evidence from the chief PW6 who saw the complainant injured and I find as the learned trial magistrate found that he had no reason to tell lies. I, therefore, find that the complainant suffered some assault on the material date but the same was not proved to amount to grevious harm and would therefore be classified as common assault.

The last aspect of the appeal to be dealt with is the involvement of the appellant in the assault. Hid defence is that he was also a victim. Indeed coaccuseds testified so. The learned trial magistrate did not revise this in his judgement as to whether the appellant was also a victim or accomplice. This has to be considered in the light of the conduct of the appellant towards the complainant on the material date. This rests in the evidence of PW1 and PW2. PW1 maintains the appellant participated in the assault. PW2 says the four (4) assaulted the complainant but as submitted she did not describe the face of each assailant. The rest of the witnesses did not see appellant do anything to the victim. Once the evidence of

PW2 is removed we are left with the evidence eof PW1 as a single witness as to the assault. This had to be tested with cautious as PW1 was now a single witness and this secondly had to be considered and reasoned in the light of allegation of allegation of disputes existing between the two parties sparing over a period of time. The learned trial magistrate did not resolve this and so the benefit of doubt has to go in favour of the appellant.

This finding will also operate in respect of count 2 where I find that the learned trial magistrate did not resolve the issue of whether the shirt was blood stained or torn as some witnesses said it was torn while others said it was blood stained.

I wish also to add that as submitted by the defence Willy was a crucial witness and he should have been summoned to give evidence as he could have shed light on the condition of the complainant and the state of clothing of the complainant.

As regards count 3, I find that although it is admitted that parties went to Willy and he tested complainant for witch craft, it is admitted by complainant and his wife that appellant also drunk the substance prepared by Willy and they jumped over a pot also. Willy would have explained as to why he made the appellant to take the substance and also to jump over the pot. This action tends to lead credence to what the appellant alleged that he was also being taken for witchcraft testing. It, therefore, follows that his defence was not ousted.

For the reasons given the appeal succeeds. It is allowed in aspect to all three (3) counts, convictions quashed, sentence set aside and appellant ordered to be set at liberty forth with unless otherwise lawfully held.

Read and delivered at Machakos this 20th Day of November 2001.

R. Nambuye

Judge.