



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

CRMINSAL APPEAL NO 7 OF 2020

JOYCE NJERI MUCHIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against both Conviction and Sentence

of Hon M. Wachira in Muranga CM C Criminal Case NO 1673 of 2018)

JUDGEMENT

1. The appellant was charged, tried and convicted and sentenced to three years' imprisonment without an option of a fine for the offence of assault causing actual bodily harm contrary to section 251 of the penal code, the particulars of which were that on the 14th day of October 2018, at around 7 pm at Kimathi location within Murang'a County, unlawfully and wilfully assaulted KELVIN GAKURU MURINDE.
2. Being dissatisfied with the said conviction and sentence, he filed this appeal and raised the following grounds of appeal
 - A) There was no proof that the assault was both unlawful and wilful
 - B) The evidence on record showed that an offence of a fray was proved
 - C) The court failed to note that the complainant was the aggressor, having unlawfully and without justification confronted the appellant in her home
 - D) The appellant defence and evidence in support thereof was not taken into account
 - E) The sentence imposed was severe and harsh as the appellant was a first offender.
3. When the appeal came up for hearing before me, both Mr. Kirubi and Ms Otieno for the appellant and respondent respectively made oral submissions. It was submitted on behalf of the appellant that the trial court noted that there was a bad blood between the families of the appellant and the complainant and that it was the complainant who confronted the appellant at her own house and that the evidence by the prosecution witnesses confirmed that there was a struggle between the two over a jembe before they were separated.
4. It was submitted further that the alleged injuries sustained by the complainant were not proved and that the only offence proved was a fray as both the complainant and the appellant were injured.
5. It was submitted that there were two sets of evidence and that the court dismissed the appellants defence without giving reason thereon and further that the sentence was severe taking into account the fact that the appellant was a first offender.
6. On behalf of the prosecution, it was submitted that the case was proved beyond reasonable doubt through the complainant's evidence as corroborated by the P3 form and that since the fight was not in a public place, the offence of assault was proved as the complainant had a justifiable reason to go to the appellant's home.
7. It was contended that the appellants defence was considered and dismissed as an afterthought and that the sentence provided for is five (5) years, whereas the appellant was sentenced to only three (3) years and therefore the same cannot be said to be harsh.
8. This being a first appeal, the court is under a duty to re – evaluate the evidence tendered before the trial court to come to its own conclusion, while giving an allowance to the fact that unlike the trial court, it did not have the advantage of seeing and hearing witnesses.

9. PW1. Testified that she informed the complaint that there had earlier been an argument between her and the appellant and that at 7 pm while she was cutting banana, while in the company of the complainant at the boundary between her farm and the appellant, an argument and shooting arose between the appellant and the complainant, she rushed to where they were and separated them. The complainant then went to the police station and made a report, in cross examination, she denied sending the complainant to the house of the appellant to kill her.

10. PW2 STEPHEN IRUNGU MWANGI stated that he had gone to the home of PW1 to pick bananas when he saw the complainant and the appellant struggle over a jembe stick and that he went to the appellant's home and separated them and that the complainant told him that the appellant had assaulted her. It was his evidence that the appellant and the complainant lived in the same homestead. In cross examination, he stated that he did not know who between the appellant and the complainant, was screaming.

11. PW3 KELVIN GAKURU MULINGE, the complainants evidence was that on the material day, he had gone to see his mother, who told him that there was a disagreement between her and the appellant and he promised her to talk to the same. At 7.00 pm he went to talk to the appellant and to ask her the cause of the disagreement, to which she reported that he was not his mother, whereupon she went into her house and came back with a jembe stick, which she hit his private parts with, before he managed to get hold of the same, while she was shouting "thief thief" which attracted people including his mother and PW2.

12. He then proceeded to Kabuta Police Post where he reported, before being referred to Muranga Police station for a P3 form but the police declined to take any action. On 3/11/2018 he was arrested, charged and released on bond, he then lodged a complaint to the police that he the one who had been assaulted upon which the appellant was arrested and charged. In cross examination he stated that the appellant was married to his brother, and denied that the appellant had made a complaint against him to the chief, he further denied having threatened to kill the appellant and her children

13. PW4 LINUS MUTURI KABURU produced a P3 form he filed in respect of the complaint and noted that the same had suffered tender autenicluer wall, tender swollen upper limb and metacarpol region and posterior aspect of the finger and swollen right thigh, with the degree of injury classified as harm, caused by a blunt object.

14. PW5 PC MICHAEL WARKASHA, testified that on 13/11/2018, he found the complainant in the OCS office with a P3 form filed on 16/10/2018 and learned that the same had earlier been arrested, he then opened a case file and arrested the appellant and through his investigations established that the jembe stick which was allegedly used to assault the complainant had disappeared from the chiefs office and that the appellant was setting up her children to abuse the complainants mother who was also her mother in law.

15. When put on her defence, the appellant gave sworn statement and stated that on 14/ 10/2018 the complainant went to her house and said that he was going to kill someone, which she recorded on phone. The complainant then proceeded to hit her phone with a piece of iron bar, and hit her with the same causing her to lose consciousness. When she gained consciousness, she found her money which was on the table missing, she was then taken to the hospital after reporting to the police station where she was issued with a P3 form.

16. In cross examination she stated that the complainant went to her house armed with an iron bar and hit her mobile phone which she had used to record his threats. She stated that she had suffered injuries but produced no medical report in support thereof.

17. DW2 EMG a minor aged 11years stated that the complainant who was her uncle went to their house and threatened to kill them, before hitting her with an iron bar, he then went away with the jembe stick saying that he will take over the family.

In cross amination he stated that the complainant had been stopped by the Assistant Chief from visiting their home, he confirmed that there was an enmity between them and the complainants mother and that he was able to see the complainant because there was solar lighting inside the house.

18. DW3 CM a minor aged 9years corroborated the defence and stated that the complainant hit their mother with an iron bar and that the appellant reported the matter to Kibes home, he stated that he saw the complainant carrying the iron bar in his pocket.

19. Having taken into account the proceedings and submissions herein, the only issue for determination in this appeal is whether the prosecution case against the appellant was proved beyond reasonable doubt and whether the appellants defence was considered.

20. In convicting the appellant, the trial court had this to say ***"the defence of the accused that the complainant went inside the accused house and got the jembe stick outside the house cannot stand firstly for the reason that the accused did not challenge the evidence of pw2 and secondly for reason that the defence of the accused and her children that the complainant picked the jembe stick from outside the house was an afterthought for the basis of the defence was not laid during cross examination of pw2or pw3 and moreover the evidence of the accused was contradicted by her children The accused defence that she was the one who was assaulted cannot stand for the reason firstly that she did not lay such basis while cross examining pw1 and 2"***.

21. It is clear that the trial court shifted the burden of proof upon the appellant and this being a criminal trial where the burden of proof never shifts to an accused person, the trial court fell into error and therefore on that basis alone the conviction herein was not safe. It is further clear that the trial court did not take into account the fact that the complainant had been arrested and charged on the basis of the same facts and therefore the appellant submission that the appellant and the complaint should have been charged with affray has merit.

22. It is further clear that the trial court did not take into account the act that it is the complaint who went to the home of the appellant and should have weighed the appellants evidence against the complainant and gave reason for rejecting the same not casually as she did as "not credible, believable or reliable as it is contradicted and is an afterthought".

23. Having evaluated the evidence tendered it follows that the appellant's conviction was not safe and therefore allow the appeal herein, set aside the conviction and quash the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 21ST DAY OF APRIL, 2022

J. WAKIAGA

JUDGE

In the presence of; -