



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 63 OF 2018

MARTIN NYAMONGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. E.K. Makori, Chief Magistrate,

delivered on 5th July 2018 in Mombasa Chief Magistrate's Court

Criminal Case No. 14 of 2016).

J U D G M E N T

1. The Appellant was an accused in Mombasa Chief Magistrates Court CR. Case No. 14 of 2016 where he was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the penal code.
2. The particulars were that Martin Nyamongo on the 7th day of December 2015 at Railways area in Mombasa township within Mombasa County willfully and unlawfully assaulted Florence Wanjiku Wangeci thereby occasioning her actual bodily harm.
3. The Complainant testified how she sustained injuries inflicted by the appellant. PW 2 the Officer who investigated the Complainant of assault confirmed that Complainant had injuries when she went to report and that appellant was still very violent when he went to report station on being summoned and he was arrested and charged.
4. PW 3 Doctor who examined Complainant and filled P3 form confirmed injuries on the Complainant. Appellant was placed on his defence and he said the Complainant who was his wife had been away for one week with their child and when she returned on 7/12/2016 at around lunchtime he tried to ask what happened but he learnt police were looking for him in the evening.
5. He said he didn't know about the assault. He said he was arrested and taken to Makupa Police Station and placed in cells without communication. That when he was released he went back to his place of residence and found complainant had carried everything and house was empty with a few clothes left.
6. He said that there is a lady student known as Lewa who recorded a statement. Appellant testified that he didn't take complainants P3 form from the bag. He said he was aware complainant had an extra marital affair and charge herein was a plan to fix her. That when he tried look upon the issue he was re-arrested and taken to CID headquarters that he was trailing the complainant without intentions.
7. He said he filed a matter at Tononoka Children's Court. He said complainant was doing a very expensive house and vehicle. He said the complainant was cohabiting with a businessman called Francis. The trial Magistrate convicted the appellant based on the prosecution evidence on record for reason he had no lawful excuse as to why he assaulted the complainant.
8. After undertaking sentencing procedure appellate was fined Kshs.50,000/= in default to serve 12 months imprisonment. The appellant was aggrieved by the conviction and sentence and preferred the petition of appeal on the following grounds:-

i. The Applicant was charged in the subordinate court with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. He was sentenced to a term of 12 months imprisonment or to a fine of Kshs.50,000/= hence the present appeal.

ii. In his defence at the trial the Appellant denied ever assaulting the complainant and advanced a defence theory that he was being framed up by the complainant.

iii. It emerged during the evidence of PW 3 Dr. Upah Hemed that there could have been a problem with the records of the O.P. Book which showed a different patient from the complainant who was believed to have been treated by PW 3 or whose P3 form was filled by PW3.

iv. PW 3 was categorical that he had never seen the complainant.

v. PW 3 evidence was crucial and in its absence the Appellant would not have been convicted of the offence.

vi. Given the material contradictions in the evidence of PW 3 it was incumbent on the trial court to exercise its jurisdiction and powers under Section 146 of the Evidence Act or Section 150 of the Criminal Procedure Code and require that the records officer, Coast General Hospital being a crucial witness be summoned to testify in the matter for the justice of the case.

vii. The failure by the prosecution to call the records officer shifted the burden of proof to the Appellant thereby depriving him of his constitutional right to remain silent and was also contrary to the law of evidence.

viii. The Appellant strongly believes that the complainant's narrative of assault was untruthful and he is also reliably and confidentially informed that the OP number above-stated is in respect of another patient and not the complainant.

ix. The Appellant is also reliably and confidentially informed that the filling of a P3 form must be noted and kept in the above-stated hospital's system and that no such record appears for the complainant.

x. The Appellant was confidentially informed that the above-stated records could not be supplied to the Appellant except under a court order.

xi. An appeal is a continuation of a trial and the Appellant is entitled to a fair hearing by providing him with such information which he intends to advance in his defence/appeal.

xii. The Appellant being a Kenyan citizen is entitled to be provided by the State or the hospital information held by them, and also to information which is required by the appellant for his defence.

xiii. The hospital cannot hide under confidentiality or privilege clauses in view of the provisions of Articles 35 of the Constitution on information from or relating to a private person and which is required for the defence of the Appellant and Article 50 of the Constitution.

xiv. It was due to mistake of counsel that the Appellant did not call the records officer to testify on his behalf.

xv. Some of the above facts and circumstances obtaining were not within the knowledge of the Appellant who has just learnt of them recently also stated in ground 6 of the petition of appeal.

xvi. This Honourable Court has jurisdiction to direct for sufficient reasons to be recorded that additional evidence be taken either by this Court or by a subordinate court and such evidence be used in determining the appeal.

xvii. It is meet and just that the Application be granted.

9. This appeal was canvassed by way of written submissions. The appellant's counsel submitted that there was no evidence to support the court's finding that appellant assaulted the Complainant and that injuries on complainant were self-sustained. It was submitted that there may have been a quarrel and parties pushing each other but there was no clear and cogent evidence on record that appellant was the one who inflicted the injuries on PW 1.

10. It was also submitted that prosecution's case had contradictions and inconsistencies as to what point complainant was injured. It was argued that the inconsistencies and contradictions cast serious doubts on the prosecution's case and same should be resolved in favour of the appellant. It was also argued that P3 form produced by PW 3 didn't relate to PW 1 as it was not in her name as the treatment notes were not produced.

11. It was further submitted that appellants defence was the one that was truthful compared to PW 1's evidence and that he was fabricated. It was further argued that failure to call records officer at Coast General Hospital cast doubt as to whether PW 1 went to hospital and whether she was examined by the PW 3.

12. According to appellant evidence taken post-conviction by Hon. Makori following orders issued on 15th January 2019 by Hon. Njoki Mwangi J confirmed that the patient No. 484817 was for Francis Avis and not the complainant herein.

13. The appellant further argued that had the evidence of Health Records Officer been taken the trial court would not have convicted the appellant as the prosecution's evidence presented glaring gaps and PW 3's untruthful narrative which completely weakened the prosecution case.

14. The appellant argued that the Complainant wanted to use criminal proceedings to bar him from having, accessing and exercising parental love and care of his child.

15. The Respondent's submissions were that there were no inconsistencies in the evidence of PW 1 & PW 3 and the trial Magistrate agreed with the prosecution case that the complainant was assaulted by the appellant. It was submitted that injuries suffered by the complainant's head and elbows were observed by the doctor who said she had multiple scratches. The complainant explained how the appellant confronted her wanting to know where she had been for 2 weeks and began to hit her and at the same point held her down on the ground.

16. The prosecution submitted that the Complainant was not treated at Coast General Hospital as an outpatient and her name could not have been in the inpatient register produced in additional evidence taken by the trial court upon order made by Hon. Lady Justice Njoki J.

17. In consideration of the records of the lower court and in consideration of the trial court's judgment and coupled with grounds of appeal and submissions and having re-evaluated and re-analyzed the lower court records and judgment, I do find and agree with the Respondent that the Inpatient Records for Coast General Hospital was not applicable for reasons that the Complainant was treated as an outpatient at Tudor Health Clinic and not at Coast General Hospital and that it is only the P3 form which was duly filled by PW 3 at Coast General Hospital upon referring to treatment notes 4 days after the Complainant was treated at Tudor Health Clinic.

18. The appellant did admit that a misunderstanding arose between him and the Complainant and she left and stayed away but on 7/12/2015 he picked her and brought her back to the house.

19. The injuries sustained by the Complainant following the confrontation by the appellant were observed by Investigating Officer – PW 2 who said the appellant was violent when he went to police station. This court finds that the conclusion by the trial Magistrate was proper that those injuries were inflicted by the appellant and thereby the finding of guilt is upheld as the appellant had no lawful excuse to assault the Complainant.

20. The appeal herein therefore lacks merit and is dismissed. Orders accordingly.

Right of Appeal – 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 23RD DAY OF JULY, 2021.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ms. Memia Advocate hold brief for Wamotsa Advocate for Appellant

Ms. Karanja for Respondent

Ogwel – Court assistant

HON. LADY JUSTICE A. ONG'INJO

JUDGE

MS. MEMIA

I seek certified copy of judgment.

ORDER

Copying charges to be paid for copying & certification.

HON. LADY JUSTICE A. ONG'INJO

JUDGE