



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 76 OF 2019

REPUBLICAPPELLANT

VERSUS

MWALIMU CHARO MWADUMARESPONDENT

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Respondent in person

J U D G M E N T

The respondent was charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence are that on the 13th of February 2019 at Miyani village, Kinagoni Location, Kaloleni Sub-County in Kilifi Country within Coast Region, unlawfully assaulted **Dzendore Kadhengi** thereby causing her actual bodily harm. The trial court found the evidence tendered by the prosecution to have failed to meet the threshold of proof beyond reasonable doubt. He was therefore acquitted of the charges leveled against him.

The state was dissatisfied by the learned trial magistrate's decision of acquitting the Respondent and preferred to appeal on the following ground:

- (1) THAT, the learned trial magistrate erred in law and in fact acquitting the accused person when there was overwhelming evidence against the accused person.***
- (2) THAT, the learned trial magistrate erred in law and in fact in her evaluation of the evidence and arrived at a wrong decision.***
- (3) THAT, the learned trial magistrate erred in law and in fact by considering matters which facts were never placed before her during prosecution's case and which facts were indeed irrelevant to the case.***
- (4) THAT, the learned trial magistrate erred in law and in fact in disregarding crucial prosecution evidence thereby arriving at a wrong conclusion.***
- (5) THAT, the learned trial magistrate erred in law and in fact in fact by making a finding that the case was not proved against the accused person beyond any reasonable doubt.***

Facts

(PW1); Dzendore Kadhengi, stated that on the material date, she was inquiring from her daughter regarding where she had gone since she had left the house earlier in the morning. She asked if she had been with her boyfriend, the respondent. The respondent's mother while passing by, heard her son's name being mentioned and decided to establish why. The two started quarrelling and that when the respondent came and assaulted the complainant. She reported the matter at Gotani Police Station and she was treated at Mariakani Hospital. Upon cross-examination, she affirmed that she was having a conversation with the appellant's smother when the respondent's showed up.

(PW2); Sabina Kadhengi's testimony was basically similar to that of her mother apart from the fact that the matter had failed to be settled out of court as the Respondent had failed to compensate **(PW1)**. She also lamented that the Respondent had first been arrested and taken to Gotani Police Station and released then arrested again and taken to Kizurini.

(PW3); **Mwagolo Chigulu**, a Clinical Officer at Mariakani Sub-County Hospital produced a P3 form in respect of (PW1) which was marked as PExh 2. He stated that (PW1) visited the hospital alleging that she had been injured by someone known to her. The injuries noted had been painful swollen left forehead, painful left shoulder, thoracic vertebrae and chest. He also produced (PW1's) treatment notes which were marked as PEXH1.

(PW4) **Gosi Ephantus**, the investigating officer in this matter testified that on the 13/02/2019, (PW1) reported an alleged assault on her person at around noon. He carried out investigations, taken witness statements, visited the scene of crime and issued (PW1) with a P3 form, apprehended the respondent and charged him. Upon cross-examination, he denied having tried to reconcile the respondent and complainant. He stated that their houses are about 50 meters away from each other. He admitted that he did not inquire into the relationship between the complainant and the respondent. He had no idea as regards how the respondent came to be in the complainant's compound. He only knew that (PW1) had inquired about the whereabouts of her daughter and before she could answer, the accused came and assaulted (PW1).

At the close of the prosecution case, the court found that the prosecution had been established against the accused and being found with a case to answer warranting the accused's response.

The defence was anchored on a single witness, the respondent. He stated that he was at home sleeping when he heard (PW1) abusing her daughter and adding that she had been at the respondent's house. She threatened to deal with him. His mother while on her way to fetch water overheard her son's name being mentioned in the conversation. That the respondent's sister in law had come and called (DW1) who then rushed to (PW1's) homestead and found her quarrelling with his mother. He pulled his mother away and left.

On 17/02/2019 he was arrested and taken to Gotani Police Station where (PW1) had merely pushed her but not assaulted her. He had been let go at about 1500hrs after she had agreed to forgive him after talking it out. Later at 2:00am in the night he had been arrested by a police officer from Kizurini police station after being roused from sleep. He did not understand why he had been arrested.

He further testified that the allegations were untrue and based on hatred between the two families. He testified that an incident had happened in December of 2018 where (PW1) had reported to the sub-chief that the accused had been with her daughter. The matter had been investigated and found to be untrue. His view was that (PW1) should have taken her daughter to the hospital if she suspected that he had been with her to prove the allegations. He denied having assaulted her.

On cross-examination, he confirmed having been present and having cross examined all witnesses who testified in the matter. He stated that the issue of the grudge had not come up during his cross-examination of PW1 and PW2.

Submission on Appeal.

The appellant in tendered submissions in support of its grounds of appeal. The prosecution argued that it proved its case beyond reasonable doubt. That all the elements of the offence of assault causing grievous harm were present as far as the evidence adduced before the trial court is concerned. In support of its position, the prosecution cited the following cases:

(i) Alex Kinyua Murakaru v Republic (2015) eKLR;

(ii) Peter Miringu Mbaire v Republic (2018) eKLR.

The Learned Counsel for the prosecution **Mr. Kennedy Kirui Kariuki** therefore prayed that the court holds that the charge of was proved beyond reasonable doubt and the judgement of the lower court be quashed and set aside. Further that the respondent be convicted and sentenced.

On the other hand, the respondent opposed the appeal against his acquittal. He argued that the instant appeal is not properly before court. Further that the prosecution failed to prove its case beyond reasonable doubt. He cited the following cases in support of his case:

(i) R.T Bhatt vs Republic (1957) EA 332-335.

(ii) Miller vs Minister of Pensions (1947 ALL 372-373)

He therefore argued that the trial court cannot be faulted for arriving at a reasoned judgement. He prays that the appeal be dismissed for the lack of merit.

Before I proceed to consider the appeal before me, I remind myself the duty of the first appellate court. It is to re-appraise the evidence afresh and reach an independent decision as to whether to uphold the conviction. I must bear in mind that I neither heard or saw the witnesses testify (see *Okeno v Republic [1972] EA 32*). In dealing with this task I shall outline the evidence before the trial court.

Findings and Determination

The issue for my determination is whether the learned trial Magistrate properly acquitted the accused for the lack of sufficient evidence to support a conviction. In doing so I shall test the evidence on record as to whether the prosecution proved the elements of the offence of assault defined in terms of Section 251 to the required standard of proof, i.e. proof beyond reasonable doubt.

In the first place, the appellant complained that the learned trial Magistrate ought not have acquitted the respondent as there is sufficient proof adduced by the prosecution witnesses to warrant a conviction. The Counsel for the state, **Mr. Kennedy Kariuki** is adamant that the

prosecution proved its case beyond reasonable doubt. The Respondent on the other hand opposed the appeal pointing out that the evidence of adduced by the prosecution before the trial court was wanting.

The prosecution has the burden of proving its case against the accused beyond reasonable doubt. The burden does not shift to the accused and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence. By his plea of not guilty, the appellant put in issue each and every essential ingredient of the offences with which he was charged and the prosecution had the onus to prove all the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused are innocent, (see **Miller v. Minister of Pensions [1947] 2 ALL ER 372**).

In the instant matter, the prosecution was required to prove in addition that;

(a) there was an unlawful assault of the complainant,

(b) as a result of which the complainant sustained bodily injury.

As regards evidence in support of the fact that there was an unlawful assault of PW1, the beating of another person with such a degree of violence that the infliction of bodily harm is a probable is unlawful and if such an act is proved then assault would have been proved. In the instant case, it was PW1's evidence that the Respondent assaulted by slapping her. The respondent to the contrary averred that he only pushed her and that he did not assault her.

The P3 form, filled in support of the assault allegations suggests that the complainant sustained some injuries including; painful swollen left side of the forehead, painful left shoulder, painful thoracic vertebrae and painful left side of the chest. The injuries were held to have been about a day old. The injuries which are alleged to have been sustained by the complainant do not corroborate with the medical evidence adduced before the trial court. If the complainant was assaulted by way of a slap on the cheek and head, there should be an explanation as regards where the other injuries on the chest, shoulder and other body parts came from. In my view there is gap that is not filled in the prosecution evidence as far as the element of assault is concerned.

The identity of the respondent having been on the scene of crime is not question. There was no doubt that a quarrel ensued between the respondent's mother and the complainant regarding the mention of the respondent's name in a conversation between the complainant and her daughter. This led to a clear confrontation between (PW1) and the respondent's mother. The evidence seems to suggest that the complainant was not for the idea that the appellant was having a love affair with the Respondent. The Respondent's defence is that he only visited the scene were the incident for the purpose of stopping the quarrel and pulled his mother away and that he pushed the complainant in the process.

In my view, I do find the trial court to have misdirected itself in considering not to consider the possibility that there was an existing grudge which fueled the quarrel as well the charge itself. This also raise doubt in the credibility of the medical evidence on record as the injuries alleged to have been sustained by the complainant do not correlate with having assaulted on the cheek and head by a slap. This suggests that the medical evidence might have been choreographed for purposes of the charges before the trial. It is also noteworthy that the findings of the trial court cannot be easily disturbed since she had the advantage of seeing the demeanor of witnesses while giving evidence on trial. It seems that she did not fully believe the evidence of (PW1).

It is therefore demonstrated from the evidence of the prosecution that the prosecution had not satisfactorily proved the case beyond reasonable doubt and therefore conviction cannot be sustained in the circumstances. The presence of a grudge between the complainant and the Respondent may have been the motive behind the charge. The complainant did not want the respondent to have a love affair with her 19 years old daughter. If at all the respondent assaulted her, the possibility is that the complainant was the aggressor and author of her own misfortune.

The complainant's claim for assault was further shaken by the failure by the prosecution witnesses to elaborate on how the complainant find herself with chest and shoulder injuries when the alleged assault was done by way of slapping on the cheek and blows in the heard. Thus, there were doubts created in the case and which must be resolved in favor of the respondent in any event.

The upshot is that the appeal by the appellant is without merit. The acquittal of the respondent stands.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF OCTOBER 2021

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R. NYAKUNDI

JUDGE