



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 24 OF 2019

DAVID GITONGA MWAMBA.....1ST APPELLANT

ASHFORD RUGENDO MWANIKI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

((Being an Appeal from the Judgment of the Senior Resident Magistrate at Chuka (HON N. KAHARA NYAGA - SRM) delivered on 16/9/2019 Chuka in the Chief Magistrate's Court Criminal Case No. 409 of 2017).))

J U D G E M E N T

1. **DAVID GITONGA MWAMBA** and **ASHFORD RUGENDO MWANIKI** the first and 2nd Appellants respectively were both charged and convicted of the offence of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code**. The particulars of the charge were that on 25th March 2017 at Ndiruni Market in Magumoni Tharaka Nithi County, they jointly and unlawfully assaulted **ROYFORD MWITI MICHENI**, the complainant.

2. A brief summary of the prosecution's case against the Appellants herein shows that there was a dispute over a construction site that had been set aside to house the Chief's Camp that included a Chief's office and Administration Police Line. The dispute appears to have escalated to court where some residents sued the Government and there were allegations that the civil court had issued injunctive orders. There was however no evidence tendered regarding the alleged court order but what is apparent is that the appellant appears to have been irked by the complainant who was seen taking photographs of the construction going on. The uncontroverted facts indicates that the 1st appellant tried to forcefully stop the complainant and in the ensuing confrontation that saw the 2nd Appellant also at the site joining in the fray, the complainant's video camera was snatched away and he got injuries which were classified by Joseph Mwenda Mirebu (PW4), a clinical officer who examined the complainant as "**harm**".

3. When placed on their defence the Appellants' defence centred on existence of a grudge and a civil dispute pending in court.

4. The trial court upon assessment of evidence tendered found that the prosecution's witnesses (PW1, PW2 and PW3) gave a consistent account of what transpired and found that the prosecution's case had been proved sufficient enough to sustain conviction. The Appellant were then sentenced to a fine of Ksh.25,000/- or 12 months in jail in default of the fine.

5. The Appellant felt aggrieved and preferred this appeal raising the following grounds namely:

(i) That the learned trial magistrate erred in law and fact by holding that the Appellant had assaulted the complainant on his hand when all the evidence indicated the Appellant assaulted the complainant on the chest and right thigh.

(ii) That the learned trial magistrate erred in law and fact by failing to consider the initial report by the complainant (the investigation diary) that did not disclose any of the Appellant's as the person who assaulted the complainant.

(iii) That the learned trial magistrate erred in law and fact by failing to find out the many contradictions in the prosecution's evidence that was brought about during cross-examination.

(iv) That the learned trial magistrate erred in law and fact by failing to note that the complainant failed to mention the injuries he suffered in the OB.

(v) That the learned trial magistrate erred by failing to consider the defence.

(vi) That the trial magistrate erred by over relying on the evidence of PW1 and PW2 who were colleagues at Hakim Agencies.

(vii) That the trial magistrate erred by holding that PW2 had vitiated the defence by testifying that the complainant fell down while the Appellant testified that the complainant did not fall down.

(viii) That the learned trial magistrate failed to note that there was on subsisting grudge between the complainant and Appellants.

(ix) That the Office of Director of Public Prosecution did not establish the motive of the Appellant's attack.

(x) That the Judgment was against the evidence tendered.

(xi) That the learned trial magistrate erred by holding that the first Appellant snatched the camera when the evidence indicated that the camera fell down.

6. In his written submissions through learned counsel IC Mugo and Co. Advocate, the Appellant's submit that the complainant's evidence was an afterthought because his initial report as per the OB did not mention injuries on the hand either on the left or the right and the only injuries recorded were chest and right thigh. They submit that the injuries noted by the clinical officer in the P3 could have been sustained or inflicted on another day by a different person because the complainant could not have forgotten about the injuries.

7. The Appellants submits that the discrepancy between the nature of injuries suffered as per the O.B. and the evidence tendered shows that the evidence was fabricated against the Appellants.

8. The Appellants further submit that the initial report did not implicate them and that the trial magistrate should have considered that fact. They contend that the complainant simply picked them out because the 1st Appellant was the Area Chief, while the 2nd Appellant was the chairman of the building committee charged with constructing the Chief's Office that had stirred controversy. They submit that there were many people at the construction site and that they were simply picked out because of their official duties.

9. The Appellants further submit that the prosecution's case was not water tight and that there were contradictions which created doubts. They point out that the complainant stated he got injuries when he fell down and at the same time stated that the 1st Appellant hit him on the right hand with a stick. They also point out that PW2 testified that the 1st Appellant assaulted the complainant using a fist. They submit that PW3 stated that complainant was injured on his left hand and that he further stated that the 1st Appellant did not assault the complainant.

10. According to the Appellants the discrepancies and contradictions in the evidence tendered by the prosecution showed that the witnesses were not reading from the same script. They contend that PW2 was not pleased with 1st Appellant because he was engaged in eliminating local brew and that PW2 was engaged brewing business at his home next to Ndiruni market where the assault took place and where the Chief's Office was being constructed.

11. The Appellants submit that the injuries suffered by the complainant were inflicted when the complainant fell down fighting over the video camera as the 1st Appellant tried to stop him taking photographs. They submit that they did not attack the complainant.

12. The Appellants have faulted the trial court for failing to note that PW2 and PW3 were colleagues at PW1's brewery plant and could have colluded to implicate the 1st Appellant.

13. They contend that the motive of the attack was not established. It is their submissions that they were protecting government installations from being photographed and that they only snatched a video camera from the complainant. They maintain that the injuries suffered by the complainant were not caused by any of them.

14. The Appellant further faults the trial magistrate from dismissing what they consider as strong defence stating that they explained graphically what happened on 25th March 2017. It is their contention that none of the Appellants knowingly and willfully assaulted the complainant. They aver that the prosecution's case against them failed to reach the threshold and the trial court should have given them the benefit of doubt.

15. The Respondent on the other hand has opposed this appeal through the written submissions dated 29th July 2020 by the Office of Director of Public Prosecution.

16. On contradictions pointed out by the Appellants, the Respondent opines that the injuries suffered by the complainant was bruises on the arm and chest pains. The State further insists that the evidence tendered by PW1 in so far as the injuries sustained are concerned, was corroborated by the evidence of PW2, PW3 and PW4. It adds that the trial court correctly captured the injuries suffered in its finding.

17. The Respondent further submits that the allegations regarding initial reports were not proven as the initial report/investigation diary was not tendered in evidence. The Respondent also submits that there is no requirement that the initial report should contain the nature of injuries suffered and the names of accused persons. It maintains that the complainant knew the persons who attacked him and the Appellants were identified and named by the Respondent adding that the incident occurred in broad daylight.

18. The Respondent contends that it proved its case against the Appellant to the required standard adding that the evidence tendered were overwhelming.

19. It further submits that contrary to the Appellants' contention, it established the motive of the attack. It contends that the Appellants were displeased with the filming of a government project and as a result attacked the complainant and confiscated the video camera.

20. This court has considered this appeal and the response made. This being an appellate court, my duty is to re-evaluate or re-assess the evidence tendered with a view to coming up with own conclusion having in mind that unlike the trial court. This court does not have the advantage of having seeing the witnesses one on one as they testified.

21. The Appellants have faulted the trial court for not finding that there were inconsistencies in the injuries stated by the complainant and the injuries noted in the P3. The complainant (PW1) stated in his evidence in chief that he was injured on the chest, leg and hands. He added that the bruises on his hands were due to the impact on landing to the ground. He told the trial court that the 1st Appellant grabbed his video camera and pushed him and in the process he fell down.

22. The clinical officer (PW4) noted in his evidence that the complainant did suffer "tenderness and slight bruises on the right forearm. The injuries on the chest and the leg were not indicated in the P3 form tendered as P. Exhibit 2.

23. This court notes that it is true there were discrepancies on the nature of injuries described by the complainant and the ones noted by the medical officer in the P3. The discrepancies are however minor and could not have altered the classification of injuries suffered which were classified as harm.

24. The Appellants have faulted the trial court for failing to note that the initial report made to the police did not mention the names of the Appellants. However this court agrees with the Respondent, that the said initial report (investigation diary) was never tendered in evidence during trial. The Appellants should have produced the report if they intended to rely on it in their defence. They cannot fault the trial court for not considering what was not laid before it. Furthermore, this court finds that an investigation diary is just a report made that guides investigation officers in the area they required to investigate. They are not and cannot be evidence in court on their own because the details that come out from the investigation is what is eventually tendered in court whether the evidence is oral or documentary. The defence cannot therefore rely on the information in the investigation diary to weigh the prosecution's case against him or her. The trial court is also ordinary more interested in the outcome of the investigation and the evidence tendered before it because that is material in determining whether there is sufficient evidence either to place an accused person his defence or to sustain a conviction.

25. I have looked at the evidence tendered by the Appellants and noted that they do not deny that they had a confrontation with the complainant on the material date. As a matter of fact even in their written submissions before me, they have repeated that there was an altercation between the complainant and the 1st Appellant. They claim that they acted to protect a government building from being photographed by unauthorized person. The question posed however is why did the Chief find it fit to wrestle the complainant and confiscate his video camera instead of either arresting him or reporting him at the nearest police station? The Appellants in my re-evaluation were unhappy that they had been caught on camera over a construction that clearly had generated some heat and escalated to civil court. Contrary to the Appellants' contention that the prosecution never established the motive of the attack, the motive of the attack is so glaring in the evidence tendered before the trial court. The 1st Appellant during his defence gave reasons why he acted the way he did. This is what he stated in part:

" I did not find it good for photographs of the area to be taken due to security reasons (sic) – I saw it fit to instruct PW1 to stop taking photographs.....PW1 continued taking photographs. I snatched the video camera from him. In the process PW1 pulled away and the camera fell down. Since it had rained I also fell down....."

The Appellants have submitted that they did not willfully and knowingly assaulted the complainant but it is obvious from the evidence tendered that the engagement between the Appellants and the complainant was not peaceful. It was violent and the result was that the complainant camera was unlawfully confiscated and the complainant suffered minor injuries which were classified as '**harm**' in the process, I do not find any evidence that the Appellants were framed notwithstanding the Appellant feuds over the construction of the Chief's Office in the site and place it was constructed.

This court upon re-assessment of evidence finds that the trial court duly considered the defence put forward and gave it its due weight. As I have observed above, the Appellants conceded that there was a confrontation on the material date at the material place. They further stated that they also later went to the police to report about the incident but found out that the complainant had already booked the report and hence the investigation carried out and their eventual arraignment. The evidence tendered against the Appellant was sufficient in my view to found a conviction and the trial court was in order to return a verdict of guilty against the Appellants.

In the end this court finds no merit in this appeal. The same is for the aforesaid reasons disallowed.

Dated and signed by;

HON. JUSTICE R. K. LIMO.

SIGNDATED 14TH SEPTEMBER 2020

Dated, signed and delivered in the open court on 28TH day of SEPTEMBER 2020 .

By:

HON. LADY JUSTICE L.W. GITARI