



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HCCRA NO. 152 OF 2017

JOSEPHAT CHESIRE.....1ST APPELLANT

KIPKORIR KIPTUI.....2ND APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 131 of 2016 delivered on the 6th day of April, 2017 by Hon. S.O. Temu, PM]

JUDGMENT

1. This is an appeal from the conviction and sentences of imprisonment for 3 years for the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code and for 10 years for the offence of insulting modesty by forcibly stripping contrary to section 251 of the Penal Code, particulars of which are:

“On 27/6/2015 at about 1 pm at Tenges at Baringo County jointly with others not before Court unlawfully assaulted Sote Seline thereby occasioning her actual bodily harm.”

The particulars of the 2nd count were that the accused had “on 27/6/2015 at Tenges within Baringo County jointly with others not before Court intentionally and unlawfully insulted the modesty of a woman namely Sote Selina by forcibly stripping and forcing her to urinate and drink her urine.”

2. Upon full trial the trial Court in Criminal Case No. 131 of 2016 delivered judgment on 6/4/2017 finding the Appellants guilty as charged:

“I thus find that the accused's actions were unlawful and unacceptable and an outdated practice even if they claimed that they had been wronged. I thus find the accused persons guilty on both counts and convict them for the offence of assault contrary to section 251 of the Penal Code and section 251 A of the Penal Code.”

The appeal

3. The Appellant being aggrieved with the decision of the trial Court filed a Petition of Appeal on 11/4/2017 on the following grounds:

a. That the trial Magistrate erred in law and fact in upholding that the Prosecution had proved their case beyond reasonable doubt and thereby failed to give the benefit of doubt to the Appellants.

b. That the learned trial Magistrate erred in law and fact after having correctly found that the evidence tendered was flawed.

c. That the learned trial Magistrate erred in law and fact in failing that the Appellants did not participate in assaulting the Complainant as appearing in the Charge Sheet were not proved by the Prosecution witnesses.

d. The learned trial Magistrate erred in law and in fact in failing to establish that the Appellants did not assault the Complainant.

e. The conviction and sentence passed upon the Appellants is against the weight of the evidence.

f. That the learned trial Magistrate erred in not evaluating all the circumstances surrounding the case and the evidence before him and the way it was placed before the Court and thus failed to reach a fair conclusion and thus the need to have the conviction and sentence set aside and or quashed.

4. By Amended Grounds of Petition of Appeal dated 8/5/17, the appellant further urged as follows:

a. That the learned trial Magistrate erred in law and fact in failing to hold that the Prosecution did not prove its case beyond reasonable doubt as required by the law established.

b. That the learned trial Magistrate erred in law and fact in failing to find that the Appellant ought to have been given benefit of doubt.

c. That the learned trial Magistrate erred in law and fact in failing to hold that the Prosecution witnesses' testimonies were not candid and that the same could not have been used to secure a safe conviction moreover the Appellants as per the evidence presented did not participate in assaulting the Complainant which was not rebutted by the Prosecution witnesses at trial.

d. That the learned trial Magistrate erred in law and in fact in failing to give sufficient cognizance and recognition of the Appellant's reasonable mitigation and defence at trial.

e. That the learned trial Magistrate erred in law and fact in believing the Prosecution's evidence without a pinch of salt without anyof doubt which is against the weight of evidence.

f. That the learned trial Magistrate erred in law and in fact failing to hold that the charges against the Appellant were not proved beyond reasonable doubt.

g. That the learned trial Magistrate erred in law and in fact failing to evaluate all the circumstances surrounding the case vis-à-vis the evidence present before him and failed to reach a fair conclusion.

Submissions

5. The Appellants filed their Submissions on 20/11/2018 where they urge the Court to subject the evidence on record to fresh and exhaustive re-evaluation as provided for in the case of **Jackson Mamunya Tali v. R**, Nairobi Criminal Appeal No. 173 of 2016. They submit that the evidence of Pw1 (the main witness) was contradictory where on one instance she claimed 1st Appellant hit her on the head using a fist and later that he slapped her on the head using his hands and that he was in possession of sticks and stones. She also claimed 2nd Appellant hit her with a kick to the back and later that he assaulted her using his hands and kicks, thus her testimony left doubts as the issue of number of times hit was not addressed. Further, that the injuries she suffered are not consistent with where she claimed she was hit. The Complainant complained of being hit on the back and head not legs, forehead and chest as the Magistrate relied on evidence of the Clinical Officer. They cited Steven **Charo Mavuo v. R**, Mombasa Criminal Application No. 12 of 2015, (2015) eKLR where it was held:

“It is worth noting that an assault case as the one that the Appellant was charged with it is important to prove the injury sustained, how it was caused or what caused it, where it was caused on the victim and who caused it. In this case it is not clear whether the injury the Complainant alleges to have sustained was caused by being slapped or by her head and other parts of the body being twisted.”

“It is also not clear whether she sustained the injury on the neck, cheek and the chest. The Complainant is the one who suffered the injury but her evidence as to where it was caused is contrary to the findings in the P3 form and the treatment notes which were made when she went for medical examination after the alleged assault. With such evidence, a doubt was clearly created in the evidence of the Prosecution witness whose benefit, I believe should have gone to the Appellant.”

The appellant relied on **Nguku v. R**, Kisumu Criminal Appeal No. 106 of 1983, (1985) KLR 412 the Court of Appeal held:

“Where a party fails to produce certain evidence a presumption arises that the evidence, if produced would be unfavorable to that party.....”

Failure to produce treatment notes is a clear indication that it would have been unfavorable to prosecution case as they are not certain to be those captured in the P3. The P3 form produced indicated the O.B. Number 42 which is at variance with the charge sheet O.B Number 3.

6. On the second count they submit that the key ingredient of section 251 of the Penal Code is “*forcible stripping of a person.*” But during trial the Complainant stated that she was told to remove her clothes or she dies: “*I had removed the clothes..... You had forced me to remove clothes*”, while Pw3 stated that the Complainant had been asked to remove her clothes. The trial Magistrate did not find that the Appellants removed the Complainant's clothes in his judgment. The appellants that they were never charged with the offence of forcing the Complainant to urinate and drink the urine. The Appellants urge that the trial Magistrate ignored the independent evidence for the Appellants who corroborated their testimonies.

In **Dinkerrai Ramkrishan Pandya v. R**, (1957) EA 336, Court of Appeal for Eastern Africa concluded that:

“The Magistrate did form an unbalanced view of the evidence and reached a decision which was insupportable if the defence was

duly taken into account.”

“Accordingly we come to the conclusion that the first Appellate Court erred in law and as a result of its error, affirmed a conviction resting on evidence which, had the Court duly reviewed and weighed it, must have been seen to be so defective as to render the conviction manifestly unsafe.”

They thus submit that the conviction and sentence passed upon the Appellant be set aside and the Appellant be set at liberty.

7. Mr. Esikuri for the appellant urged the submissions highlighting that the offences were not proved and that the trial court had misdirected itself on the evidence; that the evidence of PW1 was contradicted by PW3 and the injuries were not consistent with the manner in which she alleged to have been assaulted.

8. The Ass. Director of Public Prosecution indicated that they did not oppose the appeal.

Issues for Determination

1. Whether the offences of assault causing actual bodily harm and forcible stripping were proved against the appellants; and, if not,
2. Whether the appellants were guilty of other lesser offence for which they may be convicted without having been charged therewith in accordance with the law.

DETERMINATION

Assault causing actual bodily harm

Assault

9. There were contradictions in the Probation evidence as to the injuries on the complainant. In cross-examination by 1st accused, she said she had been injured on the head and ribs using the 1st accused's hand, [although he had stones and sticks he did not use him].

Cross-examination by 2nd accused she said:

“He used upon hands and kicks in assaulting me. Josphat hit me first and upon had kicked me.”

When recalled for cross-examination by Counsel for accused, she said:

“The accused had assaulted me, while he, the 1st accused had slapped me on the head using his hands. Kipkurui had hit me with a kick. There were six persons when the accused came to my home. They assault started at my home and they had led me as having assaulted me to Kipkurui's home.”

I was injured on the ribs and head. I was also injured on my legs. An X-ray was taken on me and it was confirmed that I had been injured on the ribs. The head pains me and the leg. I had gone to Kabarnet Hospital.”

Pw2, the Clinical Officer who examined the complainant said:

“She had scratched bruises on the fore-head. She had tenderness on the chest. X-ray was taken and it informed that she had no fracture. She had tenderness on the thighs of both legs.” The injuries were 2 days old.”

Pw3, the complainant's son testified that:

“On the said date 6 men came home and having started beating the complainant. I knew the said men they were Josphat Chesire, Kipkurui Kiptui, John Ngetich, Ayabei Komen, Tomno Kulei. Josphat and Kipkurui are the ones who are in Court. They had hit my mother on the head and chest. They were using stones which they had in their hands. They also used fists. Josphat had hit the complainant with a kick on the chest and back. The 1st accused Kipkurui had hit the complainant using a stick on the thighs and he hit her using his fists.”

10. The Defence agreed that they had gone to the complainant's home to bring her to the 2nd appellant's sick mother's home with to getting her to cure the said mother who was sick and who had reportedly told them that the complainant had bewitched her. The appellants agreed that they had gone into the house with the complainant but denied having forced her to strip or having been there when the complainant drunk her urine, testifying as DW1 and DW2, respectively, as follows:

“DW1

The sick woman was S S and she was my aunt.

There were many people at her house.

She had sent us to go and bring the complainant. We were about 36 people.

I was one of the people who went to the complainant's to pick her.

She was at her shamba when we met her.

We had informed her that she was required by S S.

She was alone on that day.

The people who entered into the house were Benson Serem, Kipkorir Kiptum, Miriam Kirui, Pius Kirwa and Kipkoskei Kiptum.

I had also entered into the sick woman's house.

The complainant states that she could drink her urine to prove that she had not bewitched the sick woman.

We did not see drink the urine.

She had summoned us back to the house and we asked her how we could know that she had taken urine.

She should have shown us the urine before she drunk the urine.

“The witness refuses to answer what he expects the complainant to do”

We left the complainant because she stated that she did not bewitch the woman.

We had believed that she not a witch.

Pw2 came to the sick woman after we had taken the complainant to the sick woman's house.

We were with Pius when we entered in the sick woman's house.

DW2

It was my mother who sent us to the complainant's home and I was also among the people who went to the complainant home.

We had asked the complainant to come to our home and she came alone.

When she reached our home the complainant stated that she could take her urine so that we could see that she was not a witch.

The complainant was alone in the home with the sick mother when she took the wine.

It was the complainant who showed us to the house she had allegedly drunk the urine.

Pius the complainant son had wrote some note as her mother explained.

did not beat the complainant on her back or anywhere.

We did not force the complainant to remove her clothes not even the elders show the complainant remove her clothes.

The complainant was there when she drunk urine.

We did not assault the complainant when she was coming to our home.

Pius had come to our home after we had gone with her mother.

11. The defence witnesses also confirmed that the appellants were among the people who had gone for the complainant to go and cure the 2nd appellant's sick mother.

12. On weighing the evidence as a whole, while I find the evidence of the appellant's assaulting the complainant contradictory as between the prosecution witnesses, I find it proved and admitted that the appellants had gone to fetch the complainant to come and cure the 2nd

appellant's mother after the latter allegedly told them that the complainant had bewitched her. I believe the version of the events as narrated by the complainant and her son that the appellants had on threats of death forced the complainant to partake of the oath to prove that she had not bewitched the sick mother. I do not believe the improbable defence story that they could have gone to bring the complainant to cure the complainant and then just stand back for the complainant to administer on herself of her own free-will the oath that she had not bewitched the sick mother who had told them that the complainant had bewitched her.

Forcible stripping

13. The evidence of the complainant PW1 was that she was forced by the accused to strip upon death threats. The offence of forcible stripping under section 251A of the Penal Code introduced by a 2003 amendment to the Penal Code is as follows:

14. The evidence does not show **forcible stripping**. The actus reus for the offence is the accused's act of forcibly stripping the complainant. In the circumstances of this case the offence committed is threatening death or intimidating by threats but not forcible stripping, as the accused did not by any forcible act strip the complainant so that the two acts of use of force and stripping are not present.

Other lesser offence

15. Section 179 (2) of the criminal procedure Code permits the conviction of an accused for a proved lesser offence with which he has not been charged as follows:

“Where a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

16. Section 238 (1) and (2) Penal Code provide for the offence of intimidation and molestation as follows, as relevant:

“238(1) Any person who intimidates or molests any other person is guilty of an offence and is liable to imprisonment for a term not exceeding three years.

(2) A person intimidates another person who, with intent to cause alarm or to cause him to do any act which he is not legally bound to do or to omit to do any act which he is legally entitled to do, causes or threatens to cause unlawful injury to the person, reputation or property of that person or anyone in whom that person is interested.”

17. The appellants may also have committed the offence of threatening to kill c/s 223 of the Penal Code. However, with a penalty of imprisonment for 10 years, the offence is not a minor offence within the meaning of section 179 (2) of the Criminal procedure Code, and the appellant cannot in this trial be convicted of the same without charge.

Motive

18. The appellants and other involved in the ordeal may have been executing customary oath-taking rite to establish whether the complainant had bewitched the 2nd appellant's sick mother, and it may have been with good intentions to clear the complainant and/or to heal the sick mother in accordance with customary beliefs. However, in terms of section 9 (3) of the Penal Code, motive is not material to criminal responsibility, and even if the appellants had thought that the complainant had bewitched their mother and would, if suitably threatened, have cured her, their apparent good motive is no defence to the criminal conduct of threatening the complainant to secure her collaboration.

19. Although it is agreed, as submitted by Counsel for the appellants that there was no offence for forcing the complainant to drink her urine, the trial court was understandably abhorred and disgusted by the appellant's alleged conduct in forcing the complainant to undertake the oath. The act is dehumanizing and an affront to the dignity of the person of the complainant and the trial court was properly moved in considering the appropriate sentence; only it was for an offence which had not been charged and proved – evidence showed the complainant was not forcibly stripped or forced to drink her urine - the conviction for which it is the duty of this appellate court to quash.

Orders

20. Accordingly, for the reasons set out above, the court makes the following orders:

1. The conviction and sentences for assault causing actual bodily harm and for forcible stripping contrary respectively to section 251 and 251A of the Penal Code are quashed and set aside.
2. The appellants are each convicted for the offence of intimidation contrary to section 238 of the Penal Code and sentenced to the imprisonment for three (3) years from the **6th April 2017** the date of the conviction and sentence in the trial court.
3. As the appellants have been in custody since **6th April 2017**, they have served in full with remission the sentence of imprisonment for three (3) years. There shall, therefore, be an order directing their release from custody unless they are otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 10TH DAY OF APRIL 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr Esikuri, Advocate for Appellants.

Ms. Macharia, Ass. DPP for the Respondent.