



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT VOI**

**CRIMINAL APPEAL NO 72 OF 2017**

**AUGUSTINE JOSEPH NYANGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 85 of 2017 in the Senior Principal Magistrate's court in Wundanyi delivered by Hon N.N. Njagi (SPM) on 24<sup>th</sup> August 2017)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein, Augustine Joseph Nyange alias "Kulio" was charged on three (3) Counts.
2. On Count I, he was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the charge were that on the 14<sup>th</sup> day of February 2017 at around 9.00 am at Laminyi Village in Mwatate location within Taita Taveta County, he wilfully and unlawfully did assaulted Driscillah Wanjala Mwanjala (hereinafter referred to as "PW 1").
3. In Count II, he was charged with the offence of malicious damage to property contrary to section 339(1) of the Penal Code. The particulars were that on the aforementioned date, time and place, he willfully and unlawfully damaged PW 1's lesso valued at Kshs 500/=.
4. In Count III, he was charged with the offence of threatening to kill contrary to Section 5 (1) as read with Section 5 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that at the aforementioned date, time and place, wilfully without lawful excuse while armed with a knife uttered words "Leo nitakumaliza" translation in English, "Today I will finish you" threatening to kill PW 1.
5. The Learned Trial Magistrate Hon N.N. Njagi, Senior Principal Magistrate acquitted him on Count II and Count III on the ground that the evidence was wanting and that there was no other witness to corroborate PW 1's assertions that the Appellant had uttered the aforesaid words. However, he convicted the Appellant on Count 1 and sentenced him to serve three (3) years imprisonment.
6. Being dissatisfied with the said judgment, on 11<sup>th</sup> September 2017, the Appellant filed a Notice of Motion application seeking to have his Appeal heard out of time, which application was allowed and his Appeal deemed to have been duly filed and served. He relied on four(4) Grounds of Appeal.
7. He filed his initial Written Submissions on 1<sup>st</sup> November 2017 and his response to the State's Written Submissions dated 4<sup>th</sup> December 2017 and filed on 5<sup>th</sup> December 2017 on 19<sup>th</sup> December 2017.
8. When the matter came up in court on 11<sup>th</sup> October 2017, the Appellant and counsel for the State informed this court that they would rely entirely on their respective Written Submissions. The Judgment herein is therefore based on the said Written Submissions. the State informed this court that it would not be filing its Written Submissions as it was conceding to the Appeal herein.

**LEGAL ANALYSIS**

9. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

**"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the**

witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

10. It appeared to this court that the only issue that had really been placed before it for determination was whether or not the Prosecution had proven its case beyond reasonable doubt. The court therefore dealt with the same under the following head.

#### **I. PROOF OF THE PROSECUTION'S CASE**

11. The Appellant submitted that the evidence that was adduced before the Trial Court was malicious and intended to fix him which was evidenced by the fact that the Learned Trial Magistrate acquitted him on Counts II and III.

12. He also argued that the evidence that was adduced by the Prosecution witnesses was contradictory. He pointed out that in one instance, PW 1 stated that she had been married to him for two (2) years while at in another instance, she said that they had been married for four (4) years. He averred that she had also stated that she was naked when he assault her and also said that he had torn her dress.

13. He asserted that she was not truthful because if she had screamed as she had contended and members of public came to her rescue, then those witnesses ought to have been called as witnesses in the case herein. He added that it was not possible for him to have hit her with a kick, kicked her with a panga and hit her with a fist.

14. He added that PW 4 also contradicted PW 1's evidence that she screamed because PW 4 had testified that she could not scream because he (the Appellant herein) had grabbed her neck.

15. He was emphatic that PW 1 did not sustain any injuries as both the Clinical Officer at Mwatate Sub-County Hospital, Ruth Nzale (hereinafter referred to as "PW 2") and No 88391 PC David Masinde (hereinafter referred to as "PW 3") had told the Trial Court that she did not have any visible injuries. He asserted that if he assaulted PW 1 at 9.00am as she had contended, then the age of injuries could not have been five (5) hours by the time PW 2 examined her.

16. On its part, the State referred this court to the definition of assault as given in the Black's Law Dictionary 9<sup>th</sup> Edition at page 130 which is:-

**“the threat or use of force in another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear or apprehension of an imminent battery by means of an act amounting to an attempt or attempt to commit a battery.”**

17. It added that the same Black's Law Dictionary at page 173 defines battery as:-

**“The use of force against another, resulting in harmful or offensive contact.”**

18. It argued that the Prosecution proved its case beyond reasonable doubt because the P3 Form did in fact confirm that PW 1 sustained injuries and that because the incident occurred in the morning, there was no question of mistaken identity of the Appellant having been PW 1's assailant at the material time.

19. It pointed out that the contradictions in the evidence of the Prosecution witnesses was minor and did not affect the weight of its case. It averred that the Appellant never denied that PW 1 was his wife and that the lessor she was referring to was adduced as evidence before the Trial Court and that PW 2 gave the approximate time of the injury from her observation and not what PW 1 told her.

20. It was its further submission that Section 143 of the Evidence Act Cap 80 (Laws of Kenya) gives the Prosecution the discretion to decide the number of witnesses it will call to prove a fact. It stated that in any event, the neighbours never saw the Appellant actually assault PW 1. It averred that the Appellant did not demonstrate any malice by the Prosecution witnesses.

21. Notably, inconsistencies and/or contradictions in testimonies in a trial are expected because each witness will normally testify as to what he perceived and/or observed at any given time. However, these inconsistencies and/or contradictions must not be so glaring as to lead a trial court to entertain doubt as to what really transpired at any given time. The version of unfolding events must more or else be similar so as to render the inconsistencies and/or contradictions immaterial and irrelevant.

22. Although there were no visible injuries, it was clear from the P3 Form that was adduced by PW 2 that there was tenderness over the PW 1's right side of the neck. This corroborated PW 1's evidence that the Appellant had assaulted her. As none of the neighbours witnessed him beat PW 1, there was no need to have called them as witnesses in the case. As the State rightly pointed out, Section 143 of the Evidence Act gives the Prosecution to decide the number of witnesses to prove a particular fact. His sworn evidence did not displace that of the Prosecution in respect of Count 1.

23. This court wholly agreed with the Appellant that there were several contradictions in the Prosecution's case. In this particular case, this court found and held that the inconsistencies and contradictions that were relied upon by the Appellant were irrelevant and immaterial. As the State rightly pointed out, the said contradictions and inconsistencies were so minor as not have dented the Prosecution's case. In addition, his arguments relating to the torn Lessor were rendered moot when he was acquitted of the offence of malicious damage.

24. Accordingly, this court found and held that the Prosecution proved its case in respect of Count I beyond reasonable doubt and that the Learned Trial Magistrate arrived at the correct conclusion regarding the Counts in the manner that he did.

25. In the premises foregoing, this court found the Appellant's Grounds of Appeal Nos 2, 3, 4 and 5 not to have been merited and the same are hereby dismissed.

## **II. SENTENCING**

26. The State was categorical that the sentence of three (3) years imprisonment that was meted upon the Appellant was fair and within the discretion of the Learned Trial Magistrate because under Section 251 of the Penal Code, the maximum sentence he could mete out to him was five (5) years. However, it was of the view that since the Appellant was a first offender, he ought to have benefitted from a lower sentence.

27. It referred this court to the case of **Shadrack Kipchoge Kogo vs Republic, Eldoret Criminal Appeal No253 of 2003 (quoted in Arthur Muya Muriuki vs Republic (2015) eKLR)** where the Court of Appeal stated the following on principles of sentencing:-

***“Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred.”***

28. Section 251 of the Penal Code provides as follows:-

***“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.”***

29. This court therefore came to the firm conclusion that in view of the fact that the Appellant had a knife at the material time, a penalty of three (3) years that had been meted upon them were fair and reasonable in the circumstances of the case. This court was not persuaded to interfere with the said sentence as the same was not severe, harsh or manifestly excessive.

## **DISPOSITION**

30. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 4<sup>th</sup> May 2017 was not merited and the same is hereby dismissed. The conviction and sentence are hereby upheld as the same were lawful and fitting.

31. For the avoidance of doubt, the computation of the sentence will run from 6<sup>th</sup> March 2017 as the Appellant's entire trial proceeded while he was in custody.

32. It is so ordered.

**DATED and DELIVERED at VOI this 20<sup>th</sup> day of April 2018**

**J. KAMAU**

**JUDGE**

In the presence of:-

Augustine Joseph Nyange-Appellant

Miss Anyumba for State

Josephat Mavu- Court Clerk