



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 11 OF 2018

PMN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence by Senior Resident

Magistrate HON. M. SUDI at Chuka in the Chief Magistrate's Court

Criminal Case No. 261 of 2015 dated 26th April, 2018.)

J U D G M E N T

1. **PMN**, the appellant herein was charged with the offence of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code**. The particulars of the offence were that on the 26th January, 2015 at [particulars withheld] Estate, Tharaka Nithi County he unlawfully assaulted TM thereby occasioning her actual bodily harm. The appellant denied the charge and the prosecution called 4 witnesses in support of its case.

2. In summary, the case presented to the trial court reveals that the appellant and the complainant were initially business partners and also had a relationship which resulted to a child named LN, The relationship however appeared to have gone sour at some stage which resulted into nasty exchanges and involvement of the police.

3. The complainant TMN (PW1) testified and alleged that the appellant assaulted her on 26th January, 2015 at 8 am. The basis of quarrel and the ensuing assault according to her was Kshs.180,000/- which the appellant was supposed to refund and a lorry Registration No.[Particulars withheld] which was in possession of the appellant and which belonged to the complainant. The complainant told the trial court that she was assaulted at her gate and that when she screamed one P and N came but were unable to help her and that it took a male neighbour to repulse the appellant. None of the eye witnesses were available but the prosecution relied on the evidence of unnamed clinical officer who tendered treatment notes P Exhibit 1 a, 1 b and P3 (Exhibit 1(c)).

4. When placed on his defence, the appellant told the trial court that he lived with the complainant as man and wife from 2007 to December 2014 when they separated. He denied committing the offence and blamed his erstwhile partner (complainant) for framing him using some police officers. He tendered a complaint letter (dated 27th February, 2015) he had written to the police complaining about unfair harassment by some police officers at the instigation of the complainant. According to him, he was arrested and charged for assault when he went to follow up the complaint he had made against the police. He also raised a defence of alibi, stating that at the material time and date he was at his home in [particulars withheld] renovating his house and called two "*fundis*" (a mason and a carpenter) to back up his claims.

5. The trial court assessed and evaluated the evidence tendered and found that the appellant had gone to the house of the complainant and assaulted her and that he had purposed to assault her as he had carried a panga in his car. The trial court found that the case against the accused had been proved beyond reasonable doubt and convicted him accordingly.

6. The appellant felt aggrieved and filed this appeal raising the following grounds namely:-

(i) That the magistrate failed to consider the evidence that the accused was nowhere near the scene of incident.

(ii) That the trial court only accepted the evidence given by the complainant and thereby misdirected itself.

(iii) That the learned trial magistrate failed to note that there was no eye witness to the incident.

(iv) That the learned magistrate erred by not considering the defence.

(v) That the learned magistrate erred by failing to note that the evidence tendered by the prosecution was insufficient.

(vi) That the charge sheet was defective as it lacked the information "intention to commit".

(vii) That the trial magistrate failed to note that the complainant conspired to fix the appellant due to sour relationship between him and the complainant.

(viii) That the learned magistrate relied on evidence marred with irregularities, and inconsistencies.

7. The appellant through written submissions reiterated the above grounds and added that during trial the complainant stated that there was a panga in his car but that the same was not tendered in evidence. He has also pointed out that no evidence from CCTV Camera alleged by the complainant to have covered the crime scene was tendered to prove the presence of appellant at the scene and the incident of assault itself. It is the appellant's contention that the complainant's allegations were not corroborated and that it was unsafe for the learned trial magistrate to base conviction on evidence of the complainant and that of the doctor who filled the P3 form.

8. This court has considered this appeal and the grounds upon which it has been brought. For the record, the respondent conceded to this appeal perhaps on good reasons which will come out later in this judgment.

9. Perhaps before I delve into major issues in this appeal, there is a minor issue raised by the appellant that the charge sheet is defective for omitting the words "**intention to commit**". In my view there is no defect as the charge presented to trial court was an assault charge and not defective *per se*.

10. The court finds that the defence put forward by the appellant raised a number of aspects that casted doubts about the prosecution's case. In the first place, the complainant appeared evasive in her evidence in court and did not reveal the kind or nature of relationship she had with the appellant before she was prompted through cross-examination. She conceded that she had a relationship which resulted into the two having a child named LN as illustrated by a birth certificate tendered as D. Exhibit 1 by the appellant.

11. Secondly, the appellant in his defence stated that he had been harassed by the police and backed up the claims with a complaint letter dated 27th February, 2015 which he tendered as D. Exhibit 2. A perusal of the letter reveals that the appellant was a man under siege from his estranged partner who apparently used her connection with certain police officers mentioned in the letter. The trial court seems to have fallen into error by disregarding the weight of that letter especially when taken in the context of the evidence tendered by OGN (PW2) who though mentioned by the complainant that she was present at the crime's scene, denied having been present or having witnessed the incident. Though the witness was declared a hostile witness, the failure by the prosecution to avail the other 3 witnesses mentioned by the complainant reported to have witnessed the incident, casted doubts to the prosecution's case particularly in light of the defence of alibi raised by the appellant. That defence of alibi in my view was not shaken by the prosecution because the appellant called two witnesses who backed his alibi.

12. In the absence of any eye witness the prosecution's case was left with a gap because no reasons were advanced why the mentioned witnesses were not availed unless of course the defence allegations that he was framed up due to a relationship that had gone sour between him and the complainant is anything to go by. Whatever the case, this court finds that as rightly conceded by the Respondent, the threshold required to found a conviction was not met by the prosecution at the trial.

13. Besides the above, the medical evidence tendered by the prosecution in my considered view raised more quarries than answers on the nature of injuries if at all suffered by the complainant. In the first place, the medical expert who testified was not named. The record of proceedings does not reveal who testified as PW3. There is nothing to suggest that he was an expert or qualified to testify as a medical expert. Furthermore the unnamed registered clinical officer conceded that he did not author the treatment notes which inexplicably were photo-copies. The unnamed witness did not reveal clearly if he was the one who authored the P3 but more importantly, the record of proceedings from the trial do not show if the witness took the requisite oath before testifying. The medical evidence tendered to that extent was improper and could not be relied on to found a conviction.

14. This court has also noted that the evidence given by the investigating officer P.C George Rutere was also improperly taken before the requisite oath was taken. Failure by the trial magistrate to administer the oath or record that the 2 crucial witnesses had taken oath prior to giving evidence in my view was erroneous illegal and fatal to the prosecution's case. This failure left only the evidence of the complainant as proper evidence given on oath. The provisions of **Section 151 of Criminal Procedure Code** provides that evidence by witness in criminal trial must be given on oath. The provisions states as follows:

" Every witness in a criminal cause or matter shall be examined on oath and the court which any witness shall appear have full power and authority to administer the usual oath."

The trial court made fell into error in the proceedings at the trial in respect to crucial prosecution witnesses which error was really fatal to the prosecution's case. I have also noted that despite the anomaly of omission to administer the oath to the investigating officer, the same officer testified and gave inconsistent evidence on when the incident took place. According to the investigating officer they received a report regarding assault on the complainant on 16th January, 2015 while the complainant stated that the incident took place on 26th January, 2015. This inconsistency further added doubts about the prosecution's case.

15. In view of the above anomalies noted from proceedings from the trial court, in addition to the fact that the defence offered was not given its due weight by the trial court, this court finds merit in this appeal. The trial court misdirected itself when it failed to consider the defence and the sour relationship between the appellant and the complainant. Had the trial court considered the same perhaps it could have found doubts in the prosecutions and where doubts exist in criminal case, the benefit must always go to the benefit of the accused and not vice versa.

In the premises this court allows this appeal the conviction and sentence is set aside. The fine of Kshs.40,000/- paid by the appellant shall be refunded back to him.

Dated, signed and delivered at Chuka this 28th day of November, 2018.

R. K. LIMO

JUDGE

28/11/2018

Judgment signed, dated and read in the open court in presence of the appellant in person and Machirah for Respondent.

R.K. LIMO

JUDGE

28/11/2018