



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.131 OF 2014**

**(From SPM's Kimilili Cr.No. 1765 'B' of 2014 by: Hon. M.A. Nazushi (Ag.SRM))**

**REPUBLIC.....APPELLANT**

**- V E R S U S -**

**SHARRIF WANJALA NENGURUTA.....RESPONDENT**

**JUDGMENT**

Sharrif Wanjala Nenguruta was charged with the offence of assault causing actual bodily harm Contrary to Section 251 of the Penal Code.

The particulars were that on 20/11/2012 at Kamasielo Market in Kamukuywa Location, Bungoma County, assaulted Gladys Mukite Wambani thereby occasioning her actual bodily harm.

After a full trial, Hon. Nanzushi, Ag.SRM acquitted the accused. The State was aggrieved by the acquittal and filed this appeal dated 24/10/2014 based on the following grounds:

1. That learned trial magistrate erred in law and in evidence by attributing evidence to DW.II which the latter had not testified during the hearing;
2. The learned trial magistrate erred in law in acquitting the respondent/accused person against the weight of prosecution's evidence;
3. The learned trial magistrate erred in reasoning when she held that the prosecution witnesses contradicted each other in regard to their testimony about the scene of the crime whereas the contradictions did not vitiate the charge nor the fact of assault;
4. The learned trial magistrate erred in law when she held that the defence witnesses corroborated each other whereas they were inconsistent and did not corroborate each other;
5. The learned trial magistrate erred in law in not holding the defence tendered by the respondent/accused at the hearing was a mere denial.

The State therefore prays that the appeal be allowed and acquittal be substituted with a conviction for the offence of assault. This is a first appeal and the duty of this court is to assess all the evidence tendered in the trial court afresh, evaluate it and make its own findings. See **Kiilu v Republic (2005) KLR 175.**

Before the trial court, the prosecution called a total of five witnesses. The complainant, **Gladys Mukite Wambani** recalled 20/11/2012 about 11.00 a.m. while at Kamasielo Market, went to buy airtime in a shop. Before she left the shop, as she scratched the card, the shop keeper who had sold to her the card went and held her by the neck and started to strangle her. She screamed and struggled and people in the barber shop heard and came to her aid; that he struck her on the neck and pushed her as he called her a prostitute. A person by name Boniface took her to the assistant chief's office to report. She was referred to Hospital where she was treated and P3 form filled. PW1 denied that she owed the accused any money and had no idea why he assaulted her.

**PW2 Boniface Wakhungu Musambi** recalled that on that day he had gone to pick a phone from a barber's shop and saw the accused holding the complainant by the neck at the counter of the shop. PW2 intervened and took PW1 to the assistant chief's office. PW2 said he saw the accused boxing PW1.

**PW3 Metrine Rajula** a clinical officer at Kimilili District Hospital examined PW1 on 23/11/2012; that she complained of headache, neck pains, back ache, upper and lower limbs and approximate age of injury was two days. She assessed degree of injury as harm and injuries of soft tissue.

**PW4, Peter Masibo** was at the same market on 20/11/2012 when he spotted the accused assaulting the complainant outside a shop and by the time he reached there, PW2 had separated them, PW2 had separated them and the accused continued abusing PW1 asking her if she would accept him or not.

**PW5 PC (W) Susan Misoi** of Kimilili Police Station issued a P3 form to the complainant on 23/11/2012 and she directed that the accused be arrested.

The accused (DW1) testified on oath that he works in a shop where some people used to take goods on credit including PW1 who would take goods and pay later; that PW1 took some goods but disappeared for two months. When she went to the shop to buy credit, he asked her to pay but she started quarrelling and saying she had no money. They both went to the Assistant Chief's office to report. Later that evening, her brother and husband went to threaten him. He reported to Assistant Chief but was referred to the police.

**DW1 Cosmas Simiyu Pugusia** a village elder said that on 20/11/2012, he was outside the Assistant Chief's office when he saw PW1 and accused quarreling; that they went to Assistant Chief's office as accused was demanding Kshs.1,465/= and he told them to come back when the Assistant Chief was there.

**DWII Hilder Wanyonyi** also testified that on 20/11/2012 while at Kamasielo market, she had left accused's shop when she heard noise behind and on going back, found accused demanding money from a lady whom they continued to quarrel with and a village elder took them to the Chief's Office.

**Ms. Njeru**, Learned Counsel for the State submitted that the court erred in evaluating the evidence on record; that the prosecution evidence tallied and carried more weight than the defence; that two witnesses saw the accused assault PW1 while the defence witnesses only saw accused and complainant quarrel.

**Ms. Nanzushi**, Counsel for the accused, opposed the appeal because the prosecution evidence was contradictory as to how accused assaulted the complainant; that the witnesses also contradicted each other on what accused said to PW1; that the defence evidence was more consistent and that the case was not proved beyond reasonable doubt.

I have considered the evidence tendered in the lower court, the grounds of appeal and submissions by counsel.

The offence was allegedly committed during the day. According to PW1, she was attacked for no apparent reason. PW2 seemed to insinuate that the accused wanted a friendship with the complainant.

However, PW4 said that the accused was telling the complainant '*utanikubali au hutanikubali?*' meaning will you accept me or not. If indeed the accused had wanted a friendship with the complainant and she had declined, why would it have been hard for the complainant to tell the court why she was attacked? I doubt that the accused would, for no apparent reason, after selling credit to the complainant attack her and start strangling her.

I believe that the complainant was not forthright. She did not tell the court the whole truth.

PW1 told the court that the offence took place in the shop at the counter and PW2 said the same. However, PW4 said that he saw the accused assaulting PW1 outside the shop. One wonders whether PW4 saw anything.

Coming to the nature of the assault, PW1 said that at first, the accused started strangling her, struck her on the neck and pushed her. PW2 saw accused boxing the complainant while still at the counter. However PW4 only talked of an assault but did not tell the court what he saw the accused do – 'assault' is a general legal term that does not explain what the accused actually did to the complainant.

Whereas PW1 said that the accused was abusing PW1 calling her a prostitute, PW4 said that the accused was asking complainant whether or not she will accept him. PW2 seems not to have heard any of these words allegedly uttered by the accused.

Then coming to the injuries allegedly suffered by the complainant, they do not tally with her narration of where she was injured. PW1 said that the accused held her by the neck, started to strangle her, struck her on the neck then pushed her. However, when she went to the doctor, PW3, she complained of headache, neck pains back pain, upper and lower limbs. There were no visible injuries but how did the pain in the upper and lower limbs come about?

The accused mentioned in cross examination of PW1 that she owed him some money having taken goods on credit. He maintained the same in his defence and DWII and DWIII who claim to have been present heard the allegations of an existing debt.

In my view, the defence did raise a doubt in the prosecution case as to what actually transpired between accused and PW1.

PW1's testimony is not convincing. It is the duty of the prosecution to prove its case to the required standard i.e. beyond reasonable doubt and if there is any doubt, it must be resolved in favour of the accused.

I believe the trial court also found doubts in the prosecution case that led the magistrate to acquit the accused. I am of the view that the trial

court arrived at the correct decision in acquitting the accused. I find no merit in the appeal by the State and it is hereby dismissed.

**Signed and Dated at BUNGOMA this 23<sup>rd</sup> day of November, 2018.**

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**R.P.V. Wendoh**

**JUDGE**

**Coram:**

Court Assistant: Gladys

Court Prosecutor: Mr. Akello

Appellant: Present

Ms. Nanzushi: For appellant