REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 43 OF 2014

REPUBLIC.....APPELLANT

VERSUS

JOHN WANDINA WAMBUGU.....RESPONDENT

(Appeal against acquittal in the Chief Magistrates' Court Criminal Case No. 3 of 2014 (Hon. Catherine Mburu, SRM) on 10th June, 2014)

JUDGMENT

The respondent was charged with the offence of grievous harm contrary to **section 234** of the **Penal Code, cap 63** the particulars being that on the 20th day of December 2013 at Riamukurwe area in Nyeri County within the Republic of Kenya he unlawfully did grievous harm to Solomon Wachira Wambugu.

The learned magistrate held that no case had been made out against him as to require him to defend himself; she accordingly acquitted him under **section 210** of the **Criminal Procedure Code**. The state was dissatisfied with this acquittal and therefore appealed against it raising the following grounds of appeal:

1. The learned trial magistrate misdirected herself in law in acquitting the respondent despite the overwhelming evidence against him;

2. The learned trial magistrate misdirected herself in making a decision that was clearly against the weight of evidence;

3. The learned trial magistrate misdirected herself in law in basing her decision on extraneous matters contrary to the law; and,

4. The learned magistrate misdirected herself in law in misapprehending and misapplying the law applicable in a criminal trial, contrary to the principles of criminal justice.

The learned counsel for the state submitted that there was sufficient evidence to put the respondent on his defence; in particular, she urged that according to the medical evidence, there was sufficient proof that the complainant had lost six teeth. Counsel also submitted that the decision of the learned magistrate was based on the fact that the prosecution did not file written submissions which, in the counsel's view, was a mere technicality.

Counsel submitted further that the learned magistrate paid undue regard to extraneous matters in making her decision, to wit, the previous conviction of the complainant in the case of malicious damage to

property and the failure of the complainant to inform any of his family members of his duel with the appellant and the injury he is alleged to have sustained in the process.

The learned counsel for the respondent opposed the appeal and submitted that there was no evidence that the complainant was injured since the P3 form which the prosecution relied upon was contradictory in its material respects. As far as the issue of conviction of the respondent for the offence of malicious damage to property is concerned, counsel submitted that the issue arose out of the cross examination of the complainant and therefore it was an issue before court and upon which the court could properly comment on in its decision; contrary to the learned counsel for the state's argument, it was not an extraneous matter.

Counsel also submitted that it has not been demonstrated that the court misdirected itself either on evidence or on the law.

The record from the trial court shows that the state called four witnesses the first of whom was the complainant himself. It was his evidence that on 22nd December, 2013 between 10:30 AM and 11 AM he enquired of the respondent who it was that was destroying his (the complainant's) trees. Rather than answer, the respondent pounced on him and hit him on the mouth and on the left side of his face. He lost two upper tooth in the process; one came out immediately while he removed the other one since it was loose. Besides the two teeth, four others on the lower jaw were also removed when he went for treatment at Tumutumu hospital because they were loosened apparently by the blow he received from the respondent. He took all these teeth to the police but they told him to keep them.

The complainant's wife **Charity Mbinda Wachira (PW2)** testified that she found the respondent on top of the complainant at the material time; she had apparently responded to the complainant's screams when the respondent attacked him. The respondent ran away after she shoved him from the complainant. The latter spat blood and a tooth on the grass. The complainant himself removed another tooth that was loose.

Dr Njao Karange (PW3) from Nyeri provincial general hospital filled the complainant's P3 form. He said that according to the information provided by the police in the P3 form, the complaint of assault was reported to them on 20th December 2013 at 11:30 AM but the alleged offences was stated to have occurred at 12 noon on the same day. The doctor admitted that he did not indicate the date of the assault and when the complainant received treatment. He also admitted that although the complainant was treated at Tumutumu hospital the P3 form was filled at Nyeri provincial general hospital. The P3 form did not indicate the number of missing teeth or the teeth that were removed. He admitted that he did not note any injury on the complainant's lips.

The investigations officer police Constable **Christine Chimwalo (PW4)** testified that she received the complainant's report on 20th February, 2014; she corrected this date to be 20th December, 2013. According to her the motive behind the altercation between the complainant and the respondent was a land dispute. She also established that the two were brothers and contrary to what the complainant himself and his wife told the court, they were never in good terms. It was also her testimony that the complainant lost 6 teeth from the upper jaw and four teeth from the lower jaw; the latter set of teeth were removed at the hospital.

According to the investigations officer's evidence she recorded her own statement on 17th February 2014 yet the assault was reported on 20 February, 2014. She admitted that nowhere in her statement was it indicated that the complaint was reported on 20th of December 2013. She also admitted that two P3 forms were issued; in the 1st form the injury was assessed as "harm" while in the 2nd form the extent of the injury was revised to read "grievous harm". The officer testified that she altered the form on the advice of the prosecutor. She lamented further that the prosecutor had interfered with the case. Though the complainant is said to have been treated at Tumutumu hospital, the investigations officer did not get any treatment notes from that hospital in the course of her investigations.

The gaps, contradictions and inconsistencies in the prosecution case were too obvious for the learned

magistrate to ignore them. First, it is not clear how many teeth the complainant lost, if any, and at what point in time he lost them. The complainant himself testified that he carried the teeth to the police but they declined to take them.

The evidence that would probably have cleared the air was the medical evidence but as was clear from the doctor who purportedly filled the P3 form and the investigations officer herself, the credibility of that evidence was cast in doubt and was therefore unreliable.

On the face of it, the P3 form showed that the offence was reported even before it was committed; no explanation was given for this discrepancy if one was to regard it as so. Secondly, although the doctor admitted that the P3 form was filled at Nyeri Provincial hospital the complainant is alleged to have been treated at Tumutumu hospital. It is presumed that he relied on the medical records from the latter hospital to fill the P3 form; however, there was no evidence whatsoever that the complainant was ever treated at Tumutumu hospital.

More critically, the investigations officer testified that the P3 form produced in court was altered at the whims of the prosecutor; apparently, in an earlier P3 form, the degree of the injury had been assessed as "harm" but for some unexplained reason, the prosecutor who is obviously not a medical expert directed that it should be altered to read "grievous harm". It is for this reason that the investigations officer herself must have admitted in her evidence that the prosecutor had interfered with the case against the respondent.

There is no doubt that in an offence relating to endangering of life and health such as grievous bodily harm, medical evidence is central. It follows that if the medical evidence is shrouded in doubt and not creditworthy, the prosecution case is unfounded. In such circumstances, the trial court would be justified not to put the respondent on his defence because it is not up to the accused person to fill the gaps or make up for the inadequacies in the prosecution case. I am persuaded that the learned magistrate correctly applied her mind to the law and acquitted the respondent. **Section 210** of the **Criminal Procedure Code** under which the respondent was acquitted provides as follows:-

> ***If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.***

The learned magistrate relied **Ramanlal T. Bhatt versus Republic (1957) EA 332,** amongst other decisions, on what amounts to a prima facie case; in this case which is normally cited as the leading decision on this question, the Court of Appeal held as follows: -

> ***Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out of it if, at the close of the prosecution, the case is merely one 'which on full consideration might possibly be thought sufficient to sustain a conviction'. This is perilously near suggesting that the court will not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.***
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> ***Nor can we agree that the question whether there is a case to answer depends only on whether there is 'some evidence, irrespective of its credibility, or weight, sufficient to put the accused on his defence.' A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as Wilson, J. said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a 'prima facie case', but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.***

I recently followed this decision in **Nyeri High Court Criminal Case No. 42 of 2010, Republic versus John Mutugi Rwanda** where I held that the thrust of that decision is that an accused cannot be put on his defence merely because the prosecution's case could possibly sustain a conviction; it is not for the court to speculate that if the accused is put on his defence, his evidence may tie up the loose ends in the prosecution case if such loose ends or gaps manifest themselves. It is imperative that before the accused is put on his defence, due regard must be given to, among other things, the weight of the prosecution evidence. The evidence against the respondent was, in my view, a combination of what the court referred to as scintilla of evidence and discredited evidence both of which were properly found by the trial court to be worthless.

In the ultimate, I agree with the learned counsel for the respondent that the state's appeal has no merit and it is hereby dismissed.

Signed, dated and delivered in open court this 30th day of January, 2017

Ngaah Jairus

JUDGE