**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 8 OF 2015**

**ALEX GICHIRA MWATHA…….APPELLANT**

**VERSUS**

**REPUBLIC…….....…….…….....RESPONDENT**

*(An appeal from the conviction and sentence of the Chief Magistrate's Court ((P. T. Nditika) at Kerugoya, Criminal*

*Case No. 756 of 2007 delivered on 15th May, 2008)*

**JUDGMENT**

1. The appellant **Alex Gichira Mwatha** was charged with assault causing actual bodily harm contrary to **Section 251** of the **Penal Code** before the Senior Resident Magistrate's Court Kerugoya Criminal Case No. 756 of 2007. After a full trial the appellant was found guilty, convicted and sentenced to pay a fine of kshs.10,000/- or in default serve nine months imprisonment. The appellant was dissatisfied with the finding of the trial court and filed this appeal. He filed a memorandum of appeal raising twelve grounds. His prayer is that judgment be entered for the appellant as prayed for in the trial proceedings. Refund of fine Ksh.10,000/= in the judgment of the trial magistrate. Costs of the Kerugoya Law Court suit and costs of this appeal to be provided for.

2. The appellant relied on the following grounds:-

***i. That the learned Senior Magistrate erred in law and in fact by failing to make a finding on key ingredients of evidence in that the P.3 form the Kenya Police Medical Examination Report O.B. 21/06/2005 was executed at MOH Karatina District Hospital by one VIRGINIA WAMBUI MWATHA and presented to Baricho, Officer Commanding Station 6/5/2005.***

***ii. That the learned Senior Magistrate erred in law and in fact by failing to recognize that on the same day 6/05/2005 a second P3 form Examination Report Kerugoya District Hospital was executed and presented to the OCS Baricho by one SALOME MIRIGO KABUTHI alleging assault aimed to derail and delay justice.***

***iii. That the learned Senior Magistrate erred in law and in fact by failing to notice that on 26th December, 2005 the Arresting Officer erroneously and conveniently chose to protect the actual culprit by arresting the appellant herein pursuant to P3 form Police Medical Examination Report from SALOME MIRIGO KABUTHI instead VIRGINIA WAMBUI MWATHA as in the AFFRAY.***

***iv. That the learned Senior Resident Magistrate erred in law and fact that he failed, ignored and or refused to recognize and consider the accused documentary evidence before the Hon. Court and further failed to discover that the entire prosecution evidence deduced in Court was rehearsed, couched and could not be relied upon in the determination of the case in the interest of justice.***

***v. That the learned Senior Resident Magistrate erred in law and fact in that he failed to discover that Complainant PW1 did assault the Accused wife who reported the assault at OCS Baricho O.B. 07/08/05 and recorded statement and that the accused wife presented Police Medical P3 form supported by Medical Doctor's evidence in chief-all of which was considered irrelevant in the matter.***

***vi. That the Learned Senior Resident Magistrate erred in law and fact in that he deliberately allowed totally irrelevant information on the interdiction case No. TSC 1089/08/05 of the Accused as motive of the assault which truth was that the Accused never assaulted the Complainant and that indeed the prosecution did not prove case beyond reasonable doubt as law require not even in the balance of probability.***

***vii.That the learned Senior Resident Magistrate erred in law and fact in that he failed, refused or neglected to recognize that prosecution evidence was fabricated by evidently hired witness who were not in the scene of crime at the time of the alleged assault but rather were coached to derail and delay justice.***

***viii. That the learned Senior Resident magistrate erred in law and fact in that he failed to recognize that PW1, 2 and 3 lied in court in their attempt to punish the Accused of a crime that was never committed, SAVE the affray between the accused wife and the Complainant culminating to defamation suit RMCC No. 25 of 2005 and MILIMANI HCCA No. 696 of 2007 in court to deny the accused justice.***

***ix. That the learned Senior Resident Magistrate erred in law and fact in that he failed to consider that the Arresting Officer (for obvious reasons under suspicious circumstances) decided to arrest the Accused on 26th December 2005 for the alleged crime of 5th August 2005 and instead of the said affray only that the accused ignored and or refused to compromise all the concerned parties as was the case for the prosecution.***

***x. That the learned Senior Resident Magistrate erred in law and fact in that he failed to note that the Complainant assaulted the Accused wife, insulted her hence the defamation appeal suit filed in court now pending at MILIMANI HCCA No. 696 of 2007.***

***xi. That the said suit was marked as ABATED pursuant to provisions of order 24 rule 3 (2) and 9 the civil procedure rule 2010 upon the complainant sought the local church leader to indulge her as an arbitrator to settle the matter out of court vide letters dated 02/07/2012 and 05/10/2012.***

***Xii. That the appellant was granted leave to file this appeal out of time at Kerugoya on 9th February, 2015 pursuant to Section 27 limitation of Action Act order 37 Rule 6 (2) of the Civil Procedure rules in miscellaneous application No. 4 of 2013 dated 29th April 2013.***

I have considered the grounds. This Court has a duty to analyse the evidence and come up with its own finding but keeping in mind that it did not have the advantage to see the witnesses and give allowance for that. This as held in the case of **Okeno -V- Republic**.

4. The grounds in support of the appeal can be summarized under three grounds:

I. Credibility of the prosecution's evidence.

II. Failure to consider the defence evidence.

III. Failing to consider that the appellant's wife was assaulted and that there was affray.

5. The evidence was adduced by the complainant Salome Mirigu Kabuthe (P.W. 1) that:

> ***"P.W. 1 was coming from a harambee while in the company of PW 2 and PW3 when the appellant and DW 2 emerged from a path. DW 2 informed them that they could not attend the harambee since they had been removed from the payroll therefore they did not have money and their children would stop learning. DW 2 pointed at PW 1 and abused her but she never responded and the appellant together DW 2 left.***
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> ***When the appellant and DW 2 reached the gate to their home, the appellant stood at the middle of the road leading towards PW 1's home with DW 2 following behind. DW 2 snatched PW 1's handbag and called her a pig while the appellant slapped her on the cheek accusing her of engineering his interdiction. PW 3 held him before he could further assault PW 1 while PW 2 held DW 2. Appellant kicked PW 1 on her buttock whereupon she almost fell.***
>
> ***PW 1 screamed for help and Bilha Muthoni Gatuhi was the first to the scene and found the appellant being held by PW 3. She took PW 1 home and then reported to the Police.***
>
> ***PW 4 recorded witness statements, investigated the matter and arrested the appellant. He was not aware whether or not DW 2 had been assaulted. Upon investigations he found that there was a case ongoing between DW 2 and PW 1.***
>
> ***PW 5 did not treat PW 1 but filled her P3 form.***
>
> ***The appellant's defence was that it was PW 1, PW 2 and PW 3 who assaulted his wife DW 2. DW 2 reported the matter to the police under O.B. 21.6.08.05 and was issued with a P3 form dated 06/08/2005. That DW 2 filed a defamation case Baricho Civil Case No. 25 of 2005. The police informed them the matter was affray and the matter was settled at home between PW 1 and DW 2.***
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> ***DW 3 produced the P3 form for DW 2 which proved that she had been assaulted on 06/08/2005, the clothing was dirty and stained with blood.***

6. In my view the evidence by defence was not cogent. The defence raised new matters which were not put to the prosecution witnesses when they testified. Such evidence is an afterthought and not credible. P.W. 4 the investigating officer testified that he was not aware that D. W. 2 assaulted. D. W. 2 did not pursue a criminal case. She filed a civil case of defamation Civil Case No. 25 of 2005 seeking damages for an alleged libel defamation. The proceedings in the civil case were produced as defence exhibit D1. The D. W. 2 did not claim general damages for assault. This shows that the defence is not credible. The case No. 25 of 2005 which was against the complainant was dismissed. Though the appellant states that the case was settled through arbitration, the document annexed at page 83 of the record does not proof that the matter was settled on arbitration. The criminal case was between the complainant and the appellant. The evidence by the complainant was corroborated by the testimony of P.W. 2 and P.W. 3 who were eye witnesses. They confirmed the facts as testified by P.W. 1. Their evidence confirmed the evidence adduced by P.W. 1.

7. This is not so with the defence case. The evidence by D. W. 1 and D.W. 2 was contradictory. Whereas D.W. 2 stated that there was no fight, the appellant stated that there was a fight between P.W.1 and D. W. 2. It is out of this that the appellant was charged. The appellant's additional submissions, explanation number one (1) the issue before court was whether the appellant assaulted the complainant. The Court found that the appellant had assaulted the complainant. I find that the trial magistrate was right to find the appellant guilty as the evidence of the complainant was corroborated by independent eye witnesses P.W. 2 and P.W. 3 and medical evidence as adduced by P.W. 5 – who produced the P3 form. The trial Court duly considered the defence and confirmed that the appellant assaulted the complainant. The trial magistrate rightly found the defence case was contradictory. The Court disregarded the P.3 form of D.

W. 2 and rightly so because the complainant was not charged in the case and by her (D.W.2) own conduct of filing a case of libel defamation and not a claim for general damages for assault cast doubt on her testimony as to whether she was injured. She filed the civil case before the conclusion of the assault case. This shows clearly she could not have been assaulted. The conduct of the appellant also raises doubts as to whether he was aggrieved by the judgment. The appeal was filed seven (7) years later. I am of the view it was not because the trial magistrate was wrong in convicting him but because he wanted to obtain a certificate of good conduct from the Police, wants to enroll for a law degree (LLB), to apply for a job with KNEC and registration as a process server. This emerges clearly as the reason why he filed the appeal seven years later having paid fine and left the matter to rest. As submitted by the State, the appellant is a litigious person and that is the reason why he complained to the vetting board instead of following the due process by filing appeal within the prescribed time.

8. I am of the view that the appeal is an afterthought. The Court of Appeal in the case of **John Okech Abongo -V- Republic (2000) eKLR** stated as follows:

> ***"The duty of a first appellate court in regard to the evidence and facts is now settled in law. It is required to subject the evidence to fresh and independent analysis and, in appropriate circumstances, even to make its own independent findings and conclusions. In doing so however, the first appellate court must bear in mind that it has only the record and has not enjoyed the advantage of seeing and observing witnesses under testimony……***
>
> ***We must take the evidence on record in its entirety. The evidence of the prosecution witnesses must be taken together with the evidence of the appellant. We are satisfied that, the entire evidence on record left no doubt, as the subordinate court found, that the appellant assaulted the complainant in the manner described by the complainant and supported by other witnesses".***

Further in the case of **James Muriithi Njoroge -V- Republic (2016) eKLR** the Court in holding that the prosecution had proved its case beyond any reasonable doubts had this to say:

> ***"What is reasonable doubt? Denning J in the case of MILLIER -v- MINISTER OF PENSIONS [1947] explained what reasonable doubt is. He stated:***
>
> ***"It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable." The case is proved beyond reasonable doubt, but nothing short of that will suffice."***
>
> ***Lord Diplock in the case of Walter -V- Republic [1969] explained reasonable doubt as that quality and kind of doubt which when you are dealing with matters of importance in your own affair, you may allow to influence you one way or the other. It also can be said that it is a doubt that can be given or assign reason as opposed to speculation.***

9. The trial magistrate found that the charge was proved beyond any reasonable doubts. He had the chance to see the witnesses and assess their demeanor. After considering the evidence adduced before the trial court, I am of the view that it left no doubt, as the trial court found that the appellant assaulted the complainant in the manner described by the witnesses. The trial magistrate considered all the aspects that were before it and in doing so came to a proper and inevitable conclusion. The appellant had a motive to assault the complainant which is clear from the proceedings. As he assaulted the complainant he shouted:

> *"why did you engineer my interdiction."*

This shows that the appellant had malice aforethought. The guilt of the appellant was proved beyond any reasonable doubts by the complainant's evidence which was corroborated by eye witnesses. The trial magistrate gave reasons why he could not believe the appellant and his witness. The finding was reasonable in view of the evidence tendered. I find no reason to interfere with decision of the trial magistrate. The appellant applied for extension of time to file appeal. He gave reasons that he failed to appeal due to general phobia as at the time in the court's justice would not prevail due to hostile atmosphere in the Judiciary. That by then it was easier to buy a judicial officer than hiring an advocate. This application was brought under **Section 27 (1)** of **Limitation of Actions Act** and **Order 37 rule 6 (2)** of the **Civil Procedure Rules**. I find that **Section 27 (1)** of the **Limitation of Actions Act** does not apply to extension of time to file an appeal. The marginal notes states that the provision applies to extension of Limitation period in case of ignorance of material facts in actions for negligence etc. The same goes for **Order 37 rule 6 (2),** it is not applicable to criminal proceedings. The applicable provision is **Section 349** of the **Criminal Procedure Code Cap 75 Laws of Kenya** which provides:

> ***"An appeal shall be entered within 14 days of the date of the order or sentence appealed against. Provided that the Court to which the appeal is made may for good cause admit an appeal after the period of 14 days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter an appeal within the period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against and a copy of the record within a reasonable time of applying to the court therefore."***

10. The appellant did not approach the Court under the right provision and the affidavit raised extraneous matters other than those provided in the above provision. That is why I have stated that this appeal was not out of a conviction that the charge against him was not proved beyond any reasonable doubts but because he could not obtain documents which he has mentioned in his submissions which he could not due to the conviction and sentence for a criminal offence. This clearly emerges from his submissions. The appellant approached Court under wrong provisions and time was extended. Had he come under the correct provisions in the **Criminal Procedure Code**, I doubt whether the Court would have extended the time because there was clearly an inordinate delay which was not by failure on the side of the Court. The appellant was charged with assault causing actual bodily harm as stated above. The offence is a misdemeanor and attracts a sentence of five years. He was fined Ksh.10,000/= in default nine months imprisonment. The sentence is fair and there would have been no good reason to interfere with the sentence.

All in all I find that the appeal has no merits and so I dismiss it.

***Dated and delivered at Kerugoya this 28th day of July, 2017.***

**L. W. GITARI**

**JUDGE**

28.7.2017

Judgment read out in open court in the presence of the appellant, Mr. Omayo State Counsel for the State and Martin Mbogo Court Assistant

**L. W. GITARI**

**JUDGE**

28.7.2017