



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL APPEAL NO. 163 OF 2011
FRANCIS KIMANI KARANJA.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in criminal case number 1105 of 2010,

R. vs Francia Kimani Karanja at Nyeri, delivered Hon. M. Nyakundi, R.M. on 25.07.2011).

JUDGEMENT

It is settled law that the following principles have to be kept in mind by a first appellate court while dealing with appeals, particularly, against an order of acquittal or conviction:-[\[1\]](#)

- a. There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal or conviction is founded and to come to its own conclusion.
- b. The first appellate court can also review the trial court's conclusion with respect to both facts and law.
- c. It is the duty of a first appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the acquittal or conviction.
- d. When the trial court has ignored the evidence or misread the material evidence or has ignored material documents etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.

In the judgement the subject of this appeal, the learned Magistrate concluded that the prosecution had proved its case beyond reasonable doubt and found the appellant guilty as charged contrary to Section 234 of the Penal Code[\[2\]](#) and sentenced him to a fine of Ksh. 20,000/= in default to serve **3 years imprisonment**.

Subsequently, the lower courts file was placed before the Chief Magistrate for purposes of certification of the proceedings and she noted that that the sentence passed may not be in line with the provisions of Section 28 of the Penal Code[\[3\]](#) and in conformity with the provisions of Section 363 of the Criminal Procedure Code[\[4\]](#) the Chief Magistrate forwarded the file to the High Court for Revision but the file was never placed before a judge for revision and the file contains no explanation for the said failure.

Its trite law that an appeal is an invitation to a higher court to review the decision of a lower court in order to find out whether, on proper consideration of the facts placed before it and the applicable law, the lower court arrived at the right decision.^[5]

In my view, this appeal raises one fundamental issue, namely **(a)** whether the prosecution proved the offence of causing grievous harm to the required standard.

Mr. Wahome Gikonyo, Counsel for the appellant cited major contradictions and inconsistencies in the prosecution evidence particularly the variance at the details in the account offered by each witness especially the manner they narrated the events in question and the variance in the details of the nature of the injuries and the exact part of the body where the injuries were caused and how the injuries were caused. Counsel also highlighted the glaring contradictions in the medical evidence particularly the **P3** form which described the details of the injuries as bruises but the conclusion classified the nature of the injury as "maim" raising queries whether bruises can be categorized as maim. Counsel also submitted that from the evidence, the complainant and the appellant had an existing land dispute hence a possibility that the criminal proceedings were motivated by an existing grudge, thus the prosecution may have been initiated by bad motive.

Counsel for the DPP **Miss Chebet** submitted that the offence was proved to the required standard, that the medical evidence adduced was sufficient and proved the injuries in question, on sentence, counsel pointed out that the Chief Magistrate referred the matter to the High court for revision but this was not done and argued that the sentence was not excessive. Regarding the charge sheet, counsel submitted that it was the discretion of the court to amend or substitute but this was not done because the court found it sufficient.

It is paramount to quote the observations made by the Supreme Court of India in the case of *State of Punjab v. Jagir Singh*^[6]:-

"A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."

It is also trite law that an accused person should only be convicted on the prosecution case and not on the weakness of his defence as it was held in the case of *Sekitoleko vs. Uganda*.^[7]

Regarding the contradictions highlighted by the defence on the prosecution evidence and the medical evidence, guidance can be obtained from the decision by the Uganda Court of Appeal in *Twehangane Alfred vs Uganda*^[8] where it was held that it is not every contradiction that warrants rejection of evidence. As the court put it:-

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

Thus, it is settled law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected.^[9] The question to be addressed is whether the contradictions cited by the appellants counsel are grave and point to deliberate untruthfulness or whether they affect the substance of the charge.

At this juncture, it is important to examine the nature and meaning of the word contradiction. I find myself persuaded to borrow the definition rendered by the Court of Appeal of Nigeria in the case of *David Ojeabuo vs Federal Republic of Nigeria*^[10] where the court stated as follows:-

"Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

In the above cited case it was held that contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial.^[11] It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. Its only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from.^[12]

One fundamental inconsistency highlighted by the appellants counsel and which cannot escape the attention of this court is the details of the site, situation, shape and depth of the injuries allegedly sustained by the complainant captured in Section B in the P3 form produced in court. As for the head and neck, the P3 shows that the injuries were bruises over the wrist due to barbed wire but clearly shows that there were no injuries on the head and neck. There were no findings on the abdomen, on the upper limbs only bruises were noted on the wrist. Also, there were no finding on the lower limb but the major contention was that the Doctor classified the injuries as "maim."

Several inconsistencies were cited by counsel for the appellant regarding this piece of evidence. First, the witnesses were not in agreement as to whether the alleged injuries were on the shoulders or hands or wrist. Even if the court were to regard this as mere discrepancy and not material in nature (which I am reluctant because the witnesses were at the scene at the same time and it is not clear why some could talk of the hand and others the shoulder and also while some talked of fists as having been used, others attributed the injuries to barbed wire and in absence of an explanation for these discrepancies, the court finds that the inconsistencies create some doubt in the mind of the court to the extent that it is unsafe to allow such evidence full of contradictions to form the basis of a conviction.

Another difficulty in appreciating the said evidence is to be found in the assessment of the injury as "maim" in the P3 form. Counsel for the appellant wondered how bruises could lead to "maim" which ordinarily is associated with serious injuries as opposed to bruises.

The Penal Code^[13] defines "Maim" as the destruction or permanent disabling of any external or internal organ, member or sense. The Black's Law Dictionary^[14] defines "Destruction" as the act of destroying or demolishing; the ruining of something. The Free Dictionary^[15] defines maim as to injure, disable, or disfigure, usually by depriving of the use of a limb or other part of the body or to make imperfect or defective.

The Penal Code^[16] defines "grievous harm" as any harm which amounts to maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any extent or internal organ, membrane or sense.

The question that follows is whether the evidence on record disclosed the offence of grievous harm as defined above. Whether or not grievous harm or any other form is disclosed must be a matter for the court to determine from the evidence on record guided by the definition in the Penal Code.^[17] A court is assisted by the medical evidence offered in arriving at the conclusion on the nature and classification of the injuries. In many cases, the courts have accepted and have been guided by the findings and opinions

in the medical evidence. But in appropriate circumstances, the court is at liberty to form its own opinion, having regard to the evidence before it as to the nature and classification of the injury.^[18]

I have considered the medical evidence and the findings enumerated in the P3 form and the evidence tendered in court. I have also considered the definition of grievous harm in the Penal Code^[19] quoted above and the definitions in the P3 form. I'm not satisfied that bruises as described in the evidence and the P3 form could be classified as maim whose definition I have stated above, hence it is totally unlikely such injuries could amount to grievous harm within the above definition. Maim implies permanent injury whereas a bruise implies a laceration which breaks the skin.

However, I am aware that there is a presumption that every harm is unlawful unless it is shown that an accused person acted in self defence.^[20] However, the evidence on the injuries need to be examined together with the rest of the evidence and circumstances of the case and this leads to the next issue, namely, the admitted existence of a grudge or possibility of a grudge caused by the land dispute between the parties. It is not in dispute that the parties had an active and acrimonious land dispute and in fact on the material day they had just returned from the local chiefs office where they had been summoned by the chief in connection with the said dispute. As was held in the case of *DPP Vs Hester*^[21] evidence emanating from a witness who holds a grudge or could potentially hold a grudge against the accused person needs to be treated with care and caution because such persons may have an agenda of their own. A similar position was held in *R vs Knowlden*^[22] where family members tendered evidence implicating one another.

It is a cardinal principle of criminal jurisprudence that *mens rea* of the accused persons is very much essential ingredient to prove the guilty against the accused. Hence from the evidence on record, it is clear the parties had a land dispute, which deteriorated to the fight. Hence, criminal intention to attack and to cause injury to the complainant by the accused was not established.

It is my conclusion that the inconsistencies in the prosecution evidence and the medical evidence referred to earlier in this judgment are both material and substantial in nature to the extent that taken in totality they erode the weight of the evidence tendered rendering it totally unsafe to form the basis of a conviction. Accordingly, I allow this appeal, quash the conviction and aside the sentence and order that the fine paid by the appellant be refunded to him forthwith.

Signed, Delivered and Dated at Nyeri this 27th day of June 2016

John M. Mativo

Judge

^[1] See *Ganpat v. State of Haryana* {2010} 12 SCC 59

^[2] Cap 63, Laws of Kenya

^[3] *Ibid*

^[4] *Supra*

^[5] *Oba vs Egberrogdbe* {1999} 8 NWLR (Pt 685) 485

^[6] {1974} 3 SCC 277

^[7] {1967} EA 531

[8] *Crim. App. No 139 of 2001, [2003] UGCA, 6*

[9] See *Uganda vs Rutaro {1976} HCB; Uganda vs George W. Yiga {1979} HCB 217 & uGANDA VS*

[10]{2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA.

[11] See *Osetola vs State {2012} 17 NWLR (Pt1329) 251*

[12] See *Theophilus vs State {1996} 1 nwlr (Pt.423) 139*

[13] Cap 63, Laws of Kenya

[14] Eight Edition, Bryan A. Garner

[15] www.thefreedictionary.com

[16] *Supra*

[17] *Ibid*

[18] See *John Oketch Abongo vs Republic {2000}eKLR*

[19] *Supra*

[20] See *Lomodo vs Uganda, Criminal App No. 13 of 2013, {2014} UGHCCRD 49 (22 August 2014)*

[21] {1973} AC 296

[22] {1981} 77 Cr app 94