



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUSIA

H.C.C.R.A. NO. 86 OF 2013

REPUBLIC.....APPLICANT

VERSUS

HUMPHREY MAKACHA.....1ST RESPONDENT

HUMPHREY ODONGO.....2ND RESPONDENT

ALBERT NAMBAI.....3RD RESPONDENT

(Appeal against Judgment and conviction by Hon. I.T. Maisiba PM delivered at Busia

on 29th October 2013 in Chief Magistrate's Criminal Case No. 1793 of 2012)

JUDGMENT

1. Humphrey Makacha (R1), Humphrey Odongo(R2) and Albert Nambai(R3) were, in Busia CMCC Criminal Case No. 1973 of 2012, acquitted of the offence of Assault Causing Actual Bodily harm contrary to Section 251 of the Penal Code. In acquitting the three, the Learned Trial Magistrate remarked;

All in all, in the absence of Mens-Rea, contradictory evidence of witnesses and failure to call the investigating officer in this case makes the court to draw its conclusion in this case that the case was not proved beyond reasonable doubt. I proceed to acquit the accused persons under section 215 of the Criminal Procedure Code.

2. The Particulars of the offence that the trio faced was that:- **On the 11th day of September 2012 in Township Location, Nambale District within Busia County, jointly unlawfully assaulted JOSEPHINE ROSELINE MWANDA thereby occasioning her actual bodily harm.**

For purpose this Appeal, parties and the witnesses are referred to as they were in the Lower Court proceedings.

3. The Complainant, Alice Mbone Wafula (PW4) and Lucy Mildred Onyango (PW5) were on 11th September 2012 at about 10.30 in the office of the Town Clerk, Nambale Town Council. The Complainant is the Secretary to the Town Clerk. The evidence of the three is that some five councilors who included the three Accused Persons came into the office. They ordered PW4 and PW5 to leave the room and demanded their way into the office of the Clerk. That when she did not heed to their demands, she was attacked by the visitors. Whether or not she was attacked by all the five or only the three

Accused Persons attracted the attention of the Trial Magistrate's Decision.

4. It was the testimony of the Complainant that the attack left her with injuries for which she sought treatment at Nambale Health Centre. She was later issued with a P3 form. On the same day the victim lodged a complaint with Nambale Patrol Base. PC Collins Omondi (PW2) received the complainant and issued the P3 form to her. Later he arrested all Accused Persons when they visited the police station after they had been summoned by the Officer in Charge of the Station. PW2 was to later charge them.

5. In their defence, the three confirmed being present at the offices of the Nambale Town Clerk at the material time. They expected to attend a meeting to be held at that office but found it locked. That the Complainant refused to open the door for them. That the Complainant was rude to a Melenia Nasimiyu (DW4), The Chairlady Nambale Town Council and when it was apparent that she would not cooperate, they peacefully left the office.

6. It is the State challenging the Decision of the Trial Court and have raised the following 4 grounds in the Petition of Appeal dated 12th November 2013.

1. THAT the learned trial magistrate in law by holding that the Investigating officer was not called to testify

2. THAT the learned trial magistrate failed to appreciate and uphold the evidence of eye witnesses which was sufficiently corroborated

3. THAT the learned trial magistrate erred in law by holding that the Respondents did not have *mensrea* while committing the offence of assault.

4. THAT the learned trial magistrate erred in law by acquitting the Respondents when the evidence adduced by the Prosecutions was sufficient to convict them for the offence of assault.

7. These grounds of Appeal shall be considered as I re-evaluate the entire evidence placed before court. This is because as a first Appellant Court, I am under duty to evaluate that entire evidence with a view of drawing my own conclusion. Minded however that unlike the trial court this Court does not have the advantage of seeing or hearing the witnesses testify firsthand(see Okeno v Republic (1973) EA 32).

8. Let me recall the remarks of the learned magistrate in respect to the Investigating Officer. He stated

In this case the prosecution closed their case without calling the investigating officer who would have helped the court to know what investigations if any were done and to confirm what the witness were saying. Failure to call the Investigating Officer is another shortcoming that also create doubts about the complainant's case.

The Trial Magistrate was mistaken when he held that the investigating Officer did not testify. PC Collins Omondi was the Investigating Officer. He testified as PW2 on 1st November 2012. At any rate, a Prosecution in a Criminal Trial ought not to collapse solely because the Police Officer who investigated the crime fails to testify. Listen to the Court of Appeal in PM & 2 others v Republic (2014) eKLR.

Failure to call a witness can only be construed against the prosecution if it can be demonstrated that had such a witness been called, his/her evidence would have been against the prosecution. The question that ponders our mind is whether the evidence of the investigating officer would be prejudicial to the appellants. We think not, the investigating officer would collect, collate and repeat what PW1, PW2, PW3 and PW4, PW5 and PW6 as well as other prosecution witnesses stated. We are of the considered view that failure to call the investigation officer and other witnesses was not fatal to the prosecution case. In all cases, the investigating officer is not an eye witness and in the instant case, the testimonies of the eye witnesses was sufficient to convict the appellants.

9. Turning to the evidence, this court notes the following-

- a. 3 persons are said to have witnessed the attack and assault.
- b. The attack and assault took place in broad daylight
- c. The attackers were person known to all the 3 witnesses.

In these circumstances the three (3) persons who witnessed the attack would be expected to give a similar account of what happened.

10. In her initial evidence tendered on 1st September 2012, PW1 described the attack as follows:-

Lucy and Alice left. Melenia Ochlo asked me for the key to the clerk's office. I took the key in my hands accused 1 and accused 2 held my hand wanting to snatch the key from me. They twisted my hand accused 2 held my wrist and also held my right wrist. I tried to resist. Accused 2 also held my wrist hand at the biceps. I felt pain. I let go of the key after they twisted my hand. Accused 3 held my chain and pulled it I stood up he took my purse and threw it away towards the door. Accused 2 pushed the table away all of them threw me outside.

Later on cross-examination, upon her recall on 14th January 2013 she said-

The disagreement was out of a scuffle. If I gave the key I wouldn't have been injured. 3 people injured me.

Accused 1 was pressing my fingers

Accused 2 held me my wrist

Accused turned by shoulder.

The contradiction I see here is that in her earlier evidence she said that A3 held her chain, she did not give the impression that he "turned" her shoulder.

11. The Learned trial Magistrate also commented on another aspect of the Prosecution case. Were the assailants 3 or 5 in number? In her statement to the police she indicated that 5 people well known to her had attacked her. According to PW4

"The Chairman of the Council was present all 5 attacked PW1 in the office"

As for PW5 she gave evidence of an attack by the three Accused Persons. So the learned Magistrate cannot be faulted for holding that there was contradiction on the number of assailants.

12. The evidence of PW5 on the attack was;

I am Community Development Officer Nambale Town Council. On 11.9.2012 at 10.30 a.m I was with PW3 and PW1 at the clerk's office 5 commuters (sic) came there they ordered and P3 to leave I left for my office after a while I heard the parties quarreling. I stood up. Though (sic) the window I saw 3 councilors holding the complainant's hand A1 held the biceps. A2 held the mid hand A3 held shoulder they twisted her and she dropped the key. Melania Ochllo and Benson Mutuko stood guard at the door. The three pushed the complainant and locked the door. I advised her to report to police. Josephine went to hospital. I recorded a statement with police on 13.9.2013. The people who assaulted the complainant are the ones in the dock.

This discords the evidence of PW1. PW1 stated that A1 pressed her fingers. Fingers are not biceps. And on A2's attack, the wrist is not part of the mid-hand.

13. The Evidence of PW4 was more general. She said ;

I was ordered out with Lucy Onyango they closed the door a commotion started from the window I could see councilor Makacha holding Josephine hand he was assisted by Odongo and Nambia they twisted Josephine's hand she dropped the key and she screamed . She fell down they threw away her bag. I went to inform other staff member they threw Josephine out and locked the door I recorded the statement with the police. Accused 1 held the hands of Josephine. Accused 2 held her hand as accused 3 her right shoulder.

14. Just like the Trial Magistrate, I find that the evidence of the key witnesses contradicted one another. The inconsistencies could have been excused had it not been that the witnesses were telling a story of a simple assault that happened in broad daylight and within their unhindered view. There is no reason for this court to reach a different decision from that of the Trial Court. The Appeal is dismissed.

15. As explained to the Parties this Decision could only be delivered on Notice to them as I was proceedings for my Annual Leave and thereafter for August vacation. That explains the apparent delay.

Dated, signed and Delivered at Busia this 22nd day of September 2015

F. TUIYOTT

J U D G E

In the presence of:

.....Court Clerk

..... For Appellant

..... For Respondents