REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT Garissa

CRIMINAL APPEAL 39 OF 2014 AND 40 OF 2014 (CONSOLIDATED)

(From original conviction and sentence in Criminal Case No. 176 of 2013 of Principal Magistrate's Court at Kyuso.E.M.Mutunga – RM)

1. ANGELINA KALUNDI

2. GRACE NZAMBI ……..…….. APPELLANTS

V E R S U S

REPUBLIC …….. STATE COUNSEL

JUDGMENT

The two appeals herein No. 39 of 2014 and 40 of 2014 were consolidated and heard together as they arose from the same Criminal Trial.

The Appellants Grace Nzambi Mutua (1st Appellant) and Angeline Kalundi Mutua (2nd Appellant) were jointly charged with two (2) counts of assault causing actual bodily harm contrary to Section 251 of the Penal Code.

The particulars of Count 1 were that on 11th August 2012 at Kangilu Village, Kangao Sublocation, Kyuso District within Kitui County jointly with others not before court assaulted Musyimi Kusikira thereby occasioning him actual bodily harm. The particulars on Count II on the other hand, were that on the same day and place jointly with others not before the court assaulted Simon Mutuli Kanze thereby occasioning him actual bodily harm.

They denied both charges. After a full trial, they were acquitted of Count 1. They were however convicted on Count II and each sentenced to pay a fine of Kshs 15,000/= and in default to serve six (6) months imprisonment. Dissatisfied with the decision of the trial court, they have now come to this court on appeal through their counsel Mulinga Mbaluka & Company, on the following grounds:-

1. The learned trial magistrate erred in law and fact in failing to acknowledge that the appellants did not commit the offence of assault causing actual bodily harm contrary to section 234 (should be 251) of the Penal Code.

2. The learned magistrate erred in fact and law by failing to appreciate the appellants defence.

3. The learned trial magistrate erred in fact and law when he failed to appreciate the appellants evidence at the trial and that the same was strong to counter the prosecution.

4. The learned trial magistrate erred in fact and law when he failed to make a finding that the prosecution evidence was contradictory and could not have sustained the charge against the appellants.

5. The decision of the learned trial magistrate was against the weight of the evidence.

6. The learned trial magistrate erred in law and fact when he considered extraneous matters in evidence to sentence the appellant.

7. The learned trial magistrate erred in law and fact when he failed to find that the appellants were provoked by the complainants acts.

8. The learned trial magistrate erred in law and fact by failing to see that the evidence is supporting the charge of affray as opposed to assault.

9. The sentence metted on the appellants was harsh and excessive.

Before the hearing of the appeal, the appellant's counsel filed written submissions. At the hearing of the appeal however, Mr. Mbaluka for the appellants made oral submissions.

Counsel submitted that the prosecution evidence in the case was full of contradictions, in that there were inconsistencies between the evidence of the complainants and the medical reports. In counsel's view, the court failed to analyse the evidence thus failing to conclude that the case was a fabrication due to an existing land dispute. Counsel submitted that the actual attackers were not arraigned in court.

Counsel emphasized that the appellant tendered strong sworn defences and called witnesses.

Counsel also submitted that though the court found that the issue arose from provocation due to a land dispute, it did not appropriately react to that finding. The appellants were assaulted, but the court did not take that into account. In counsel's view, there was bias on the part of the trial court.

On sentence, the counsel submitted that the trial court failed to refer the matter the Probation Officer to give his report, which would have assisted the court in sentencing.

In response, learned Prosecuting Counsel Mr. Wanyonyi opposed the appeal, counsel submitted that the trial court's judgment was well reasoned. In counsel's view the prosecution evidence was consistent and corroborative. It was the defence evidence that had inconsistent regarding the dates.

Counsel submitted further that the complainant was hit by the 2nd appellant. PW4 who filled the P3 form confirmed the injuries and documented the same. According to counsel, it was also clear from the evidence of PWI that they met the appellants both at the police station and hospital, and that the appellants came running together with others to commit the assault. Counsel emphasized that both appellants carried clubs as was clear from the evidence of PWI and PW2 which was supported by PW3. Counsel submitted that the complainants had no weapons and merely shielded themselves when they were attacked.

On provocation, counsel submitted that mere presence of the complainants on the disputed land did not amount to provocation. Counsel submitted that the case of ***Republic –vs- Simon Muli Ngumu (2012)eKLR*** on provocation relied upon by the appellants at the trial was not applicable to the facts of the present case. Counsel submitted that in that case, the complainant was the first to cut the appellant with a hoe. In counsel's view therefore there was no provocation in the present case.

On the written submissions that there was a case of affray counsel submitted that the incident did not occur in a public place. It was on private land and therefore the incident could not amount to an affray.

In counsel's view the investigating officer charged the correct people. Counsel pointed out that DW2 the

Settlement Officer confirmed the existence of the land dispute which was the genesis of the assault by the appellants on the complainants, especially the 1st appellant.

With regard to sentence, counsel argued that the learned magistrate considered the mitigating factors and the injuries suffered in sentencing. In counsel's view the fine of Kshs 15,000/= and in default 6 months imprisonment was justified, as the maximum sentence for the offence of assault was 5 years imprisonment.

At the trial, the prosecution called five(5) witnesses. PWI was Simon Mutuli Kange the complainant in count II. It was his evidence that on 11/8/2012 between 10 – 11.00 am he was with Musyimi the complainant in Count 1 to check on his farm. They also invited another person to come with them. At the boundary of the farm, they met Nzambi Mutua and Kolunda Mutua the appellants who attacked them. The attackers were with others totaling about 6 people. Nzambi hit him with a big stick and the child of Nzambi also hit him. He observed that one of the attackers had stones. Musyimi, the complainant in Count II was also hit.

After the attack, they reported the incident to the police and were referred to hospital for treatment. He identified the two appellants as some of the attackers.

In cross-examination he stated that there was an existing land dispute between him and 1st appellant over land adjudication and grazing. He said that the land was sold to him by Mulandi, Mutemi and Mwendwa Mutisya. He confirmed that the 1st appellant had tied her hand with a cloth after the incident.

PW2 was Musyimi Kusikira the complainant in Count I. It was his evidence that he owned a neighbouring piece of land to PWI. That on 11/8/2012 he visited the land with PWI around 11.00 am and met about 6 people. As they crossed the fence into the land Kolundi and Nzambi – the appellants came running Kolundi hit him on the leg and left hand with a tree branch Mungaa also hit him on the check and he lost 2 teeth. Ndungi also hit him on the left wrist and palm. After the incident they informed the police.

In cross-examination he stated that he was hit by four people three girls and one boy and he became unconscious.

PW3 was Joseph Mutiso. It was his evidence that on 11/8/2012 at 10.00 am he was with PWI. They walked together to the farm. He witnessed the 1st appellant hit PWI on the head. Children also hit PWI. Musyimi (PW2) was also hit on the head and cheek.

In cross-examination he stated that PWI struggled with the 1st appellant to save himself from the attack. He also stated that Musyimi (complainant in Count 1) hit the 2nd appellant with a stick on the head. He stated further that 1st appellant started the assault which degenerated into a fight as the complainants tried to shield themselves.

PW4 was Francis Saku a Clinical Officer at Kyuso District Hospital. It was his evidence that he medically examined the complainant in Count II. The patient had blood stained clothes, two deep cut wounds on the head, swellings on the left ankle and jaw, bruises on the fingers and swellings on the back. He classified the injury as harm. He filled and signed the P3 form.

He also medically examined Musyimi Kusikira the complainant in Count I. His clothes were soaked in blood and had multiple deep cuts on the head, and six deep cuts one penetrating the cheek to the mouth with a missing tooth. He assessed the degree of injury as "maim". He fiiled and signed the P3 form he produced the P3 forms, as exhibits.

In cross – examination he stated that the patients were treated on 11/8/2012.

PW5 was Cpl. Shem Kiptoo of Kyuso Police Station. It was his evidence that on 12/8/2012 at 10.50

hours the complainants made a report of assault at the police station. The report was entered in the OB. He visited the scene on 13/8/2012 and drew a sketch, and also saw documents regarding land parcels 24 and 25. He stated that the appellants had also earlier made a report to the police, but failed to avail witnesses to support their claim of ownership to the land. He took possession of sticks and clothes, which he produced as exhibits.

In cross-examination he stated that there was a pending land dispute between the complainants and the 1st appellant. He admitted that the Director of Public Prosecutions had written a letter on a complaint regarding the way investigations were conducted in this case. He confirmed that the complainants did not come from Kimangao the area, where the land in question was situated. He said he was not aware of a complaint of land grabbing. He admitted that the sketch he drew was not signed. He confirmed being aware of a court criminal case between PWI and the 1st appellant which was filed at Kyuso court.

That was the evidence for the Prosecution.

When put on his defence, the appellants tendered sworn defences. They also called witnesses. The 1st appellant stated that Musyimi was her uncle, and that on the material day he came to the farm with two people. Then Kange Muturi the complainant in count II entered the land with a club and hit her on the head. He also held her by the neck and strangled her. According to her, the 2nd appellant then came and held Kange and pulled him away, by which time her hand had been broken. She testified that she then ran to Kyuso Police station and reported the incident and proceeded to hospital. She complained in her evidence that though she made a report to the police they arrested and charged her. She stated that there was a pending land dispute with the Ministry, and added that court case between PWI and herself had been concluded at Kyuso court. She stated that the land in question was hers and that she had not sold it to PWI.

In cross examination, she stated that she did not know if the complainants were injured.

In re-examination, she stated that documents showed that the subject land belonged to her.

DW2 was Kennedy Onsare the District Land Adjudication Officer. He testified that the 1st appellant had filed a land dispute in 2009 against PWI. The land was initially awarded to her but the Arbitration Board awarded it to PWI. The 1st appellant then filed an appeal which was still pending in the Ministry of Lands. He stated that he she had advised the 1st appellant not to interfere with the land pending determination of the appeal.

In cross-examination he stated that the complainants ought to be on the land.

DW3 was Grace Nzambi Mutua the 2nd appellant. It was her defence that on 11/8/2012 she received a report and proceeded to the subject land and found PWI on top of her mother (1st appellant) while Musyimi (PW2) was hitting her with sticks. She then helped to free her mother. In the process PWI hit PW2 and her with a stick. She noted that her mother's right hand was broken. They then ran to Kyuso Police Station and reported the incident. They also proceeded to hospital for treatment but the police refused to take their exhibits. They thus made a complaint. She stated that the subject land belonged to her mother. She denied hitting PWI and PW2.

In cross examination she stated that she saw both PWI and PW2 at the hospital.

DW4 was Muthange Nzambe a minor said to be aged 15. He was sworn and testified on oath without being examined on his intelligence.

It was his evidence that on the material day, he was with his grandmother (1st appellant) cutting grass when Musyimi, Kange and another arrived. Musyimi who was a relative entered the farm through a broken place in the fence. According to him each of Musyimi and Kange had a stick while the 3rd person

had a panga. Then Kange suddenly hit the 1st appellant with a stick on the head and the witness screamed and called the mother who came and freed the 1st appellant from the grip of Kanga (PWI). In the process PWI hit Musyimi (PW2) on the head.

It was his evidence that his grandmother and mother (appellant)then ran to the police. According to him the land belonged to his grandmother.

In cross examination he said that he did not know how the medical report showed that Musyimi had deep cuts.

In re-examination he stated that he did not know why Kange and Musyimi came to the farm.

DW5 was Cl. Joseph Mugo of Kyuso Police Station. It was his evidence that there was an OB entry No. 8/8/2012 wherein two women reported an assault on 11/8/2012. There was also an OB entry No. 9/8/2012 wherein an 80 year old man went to the station with another and reported an assault by Angeline and Nzambi. All reportees were referred to hospital.

In cross-examination, he stated that OB 8/8/2012 was on a report made by the appellants. Since they brought no witnesses, they were charged with the offences.

DW6 was Francis Saku a Clinical Officer at Kyuso District Hospital. It was his evidence that on 11/8/2012 he medically examined Angeline (1st appellant) and Grace (2nd appellant)and filled and signed respective P3 forms. They had blood stained clothes. Angeline had a swollen right hand. Grace had cuts on the left side of the head. He produced the respective P3 forms.

In cross-examination he stated that the appellants came to hospital before the complainants. He stated that the old man Musyimi was more seriously injured.

DW7 was Lydia Wanjiku the Executive Officer at Mwingi Law Courts. She produced record of Criminal Case No. 1090 of 2008 wherein the 1st appellant was charged with malicious damage and was later acquitted.

This being a first appeal, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences – see the case of ***Okeno –vs- Republic (1972)EA 32.***

I have re-evaluated the evidence on record. I observe that both the prosecution and defence evidence is that the incident occurred during broad day light. There is no denial that all the appellants and the complainants were at the scene. There is no allegation of mistaken identity.

The trial court acquitted the two appellants on Count I, but convicted them on count II. In my view the issue at the trial and on appeal turns on the credibility of the evidence of the prosecution against that of the defence. The defence was on oath and the defence called several witnesses.

Though there was a reference by the defence to a complaint made to the Director of Public Prosecution on the investigation of the case, no officer from that office came to court to testify and explain to how that complaint arose and what action was taken by the Director of Public Prosecutions (DPP). The evidence on that complaint is thus secondary, and is my view the learned trial magistrate was right is not putting weight on that complaint.

Ultimately, the prosecution or the DPP has an obligation to decide whom to charge in court. They also have an obligation to prove the criminal case beyond reasonable doubt. If the DPP thought that someone else should have been charged, he should have done so. It is not a function of the court, to be involved in whom the charge, otherwise the court will be accused of bias or having an interest in the matter.

Having re-evaluated the evidence on record it is clear that both the complainants and the appellants were

injured. Though there is an argument that the incident is an affray, in my view it was not. The appellants and four others, on the one hand and the two complainants and another on the other hand, did not constitute the public. The place or farms was also not a public place. I dismiss the contention that the evidence disclosed an offence of affray.

The magistrate believed the evidence of PWI and 2 regarding the incident. In my view he was right. This is because the two complainants had visited the land in which there was a pending land dispute in the Ministry of Lands, and the 1st appellant though having been advised against it by the Adjudication Officer, had decided to use that land. She was adamant in court that the land was hers. She though had a good reason to attack the complainants, two old men, whom she thought were intruders. She was certainly also energetic as she managed to get to the police station and to the hospital earlier than the complainants. The court also notes that both the complainants suffered more severe injuries than the 1st appellant. In my view, had the two just decended on the 1st appellant the way the defence story was, she would have suffered more severe injuries than either of the appellants. In my view, the 2nd appellant was an accomplice and principal offender. Both appellants were thus rightly found to have committed the assault.

Admittedly, there was a struggle and that's why both sides suffered injuries. However, there is no evidence of provocation on the part of the complainants. The mere fact of going to view land which one believes to belong to him or her does not amount to provocation. There is nothing to show that the two complainants did or said anything to the 1st appellant which would give rise to sudden anger and reaction, amounting to provocation. I thus do not find the case of ***Republic –vs- Simon Muli Ngumu (2012) eKLR*** applicable in this case. The only possible defence for the appellants herein would be self defence which they did not raise, and I do not want to speculate on the same.

In my view therefore, the injuries suffered by the appellants was merely a mitigation, not a defence. I agree with the trial court on its findings on conviction. I will thus uphold the conviction of the trial court.

On sentence, there is no mandatory rule of law or practice that a Probation report should be availed before sentence. In my view counsel is not right in contending that the trial court should have called for a probation report before sentencing. In any case, the appellants were represented by counsel during trial and there is no record that counsel asked for a probation report and that same was denied Since the maximum sentence for the offence of

assault under Section 251 of the Penal Code is 5 years imprisonment, in my view, the fine and default prison sentence imposed herein by the trial court, was neither harsh nor excessive. I will thus uphold the sentence.

In the result, I find no merits in the appeals and dismiss both appeals and uphold the conviction and sentence of the trial court.

Dated and delivered at Garissa this 21st day of September 2015.

GEORGE DULU

JUDGE