



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 77 OF 13

LESIT, J

NGUGI GITAU.....1ST APPELLANT
LYDIA NKIROTE.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant Ngugi Gitau herein after the 1st Appellant and Lydia Nkirote the 2nd Appellant were the 1st and 2nd accused in the trial before the lower court. They filed one Appeal through counsel Mbaabu M'Inoti and Co Advocate. That was a mistake and would render the appeal void. However pursuant to Article 159(2) of the Constitution I decided to entertain the appeal as filed in order to give substantive justice.
2. The two Appellants were faced with one count of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence was on the 4th day of May 2012 at Ntumburi Village, Ntumburi Location, Buuri District, Meru County jointly with others not before the court unlawfully assaulted David Murugu thereby occasioning him actual bodily harm.
3. The Appellants were both found guilty of the charge and sentenced to a fine of 10,000/- each and in default to 4 months imprisonment each.
4. They were aggrieved by the conviction and sentence and therefore filed this appeal. They raised five grounds:
 - a. **That the learned trial magistrate erred in law by shifting the burden of proof on the Appellants whereas the same is always on the part of the Respondent.**
 - b. **That the learned trial magistrate erred in law and fact in failing to properly consider and analyze all the evidence adduced thereby convicting the Appellants against the weight of evidence.**
 - c. **That the learned trial magistrate erred in fact and misdirected himself in his finding that the Appellants had gone on an attachment mission in the home of the complainant whereas there was clear evidence that the attachment was being done by Employees of Faulu (K) Limited.**
 - d. **That the learned trial magistrate did not in his Judgment fairly consider the evidence and**

submissions of both Appellants and largely relied on the perception of the evidence of the single witness of the Appellants and did not take into account the inconsistencies of the Prosecution Witnesses.

e. That the learned Trial Magistrate findings on the issue of whether the complainant had identified the Appellants as his assailants was a clear misdirection and not supported by the evidence on record.

5. The Appellants were represented by Mr. Kiambi, advocate, while the prosecution counsel representing the state was Mr. Moses Mungai. I have considered the submissions made by both counsel and the issues raised in this appeal.

I am a first appellate court. I have subjected the evidence adduced before the trial court to a fresh analyses and evaluation and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses and have given due allowance.

6. I am guided by the Court of Appeal case of **OKENO V. REPUBLIC [1972] EA 32**. The role of a first appellate Court is given as follows:

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

7. The brief facts of the prosecution case was that a group of ten (10) people went to the complainant’s house (PW1). They then attacked the complainant and forcefully took a motor bike attached over an alleged debt to Faulu (k) Ltd. The complainant reported the attack following which the two Appellants, a man and his wife were charged with assault hence this appeal.

8. The Appellants denied the charges in their defence. They also called one witness. The defence case was that the complainant was chairman of Macadamia Self Help Group with among them 10 members who took individual loans from Faulu (Kenya) Ltd. The other members paid except PW1 and 2 who owned 13,000/- and 19,000/- respectively as of 24th February 2011. They were given more time but did not pay. Both Appellants stated that they took DW3 and officials of Faulu (K) Ltd to show them the complainant’s house.

9. DW3 Geoffrey Nyaga of Faulu (K) escorted by both Appellants and with five other officers visited the complainants’ home. Since the complainant had no money, the security he had offered, a motor bike, was attached. Defence case was that the complainant armed himself with a crow bar and tried to resist the attachment but they disarmed. The Assistant Chief went to the scene after hearing commotion. The Appellants denied that complainant was ever assaulted.

10. Mr. Kiambi for the Appellants submitted that the learned trial magistrate misapprehended the evidence by lumping the Appellants among officials from Faulu (K) Ltd who had gone to attach the complainant’s property. Counsel urged that Appellants were merely neighbours and had gone to show officials of Faulu (K) the complainant’s home. Mr. Kiambi urged that the learned trial magistrate’s conclusion that when the complainant resisted the attachment, the Appellants were not amused and therefore used excessive force to effect the attachment was without basis. Counsel also raised issue with the failure to call the Area Assistant Chief who went to the scene during the incident.

11. Mr. Moses Mungai opposed the appeal. Counsel submitted that the Appellants visited complainants’ home in company with others to attach the complainants’ property and that in the

- process unreasonable force was used. Mr. Mungai urged that Appellants abused due process to recover the motor cycle and in process assaulted the complainant.
12. I have considered submissions by both counsels. There were facts in the case which were not in issue. There was no dispute that the complainant PW1, his wife PW2, the Appellants and others were members of Macadamia Self Help Group. There was no dispute that Complainant was its Chairman. There is no dispute that the members of the group took individual loans from Faulu(K) Ltd and that all members except the Chairman, PW1 and his wife PW2 repaid their loans. There is no dispute that DW3, Geoffrey led the officials of Faulu (K) Ltd to the complainant's house where they attached the motor cycle which was security for the loans taken by PW1 and 2, after the complainant said he had no money to repay the outstanding loan balances.
 13. The contentious issues are whether the complainant was assaulted and whether unreasonable force as Mr. Mungai urged, excessive force as learned trial magistrate observed or excessive force as Mr. Kiambi urged was used.
 14. The issue whether the complainant was assaulted is best considered alongside the other issue raised, of inconsistencies in the prosecution case. Mr. Kiambi submitted that the complainant's evidence was that he did not know who assaulted him. Counsel urged that PW1 and 2 contradicted each other on the number of people who went to their home.
 15. On the issue of discrepancies it pays to analyse the evidence adduced by the prosecution. The complainant evidence was that when the Appellant Geoffrey Nyaga (DW3) and others went to his house, they took his motor bike. He said he held the motor bike and that one of them held his right hand while another his right thumb, then others held him and held him up with ropes. That is when the 1st Appellant and Ngugi held his leg and he fell down. Then another he could not tell hit him on the chest.
 16. PW2 witnessed the entire episode. Her account of the incident of attack is short. She testified that when her husband held his motor bike, Nyaga hit the complainant using a metal bar while Ngugi hit him on the hand using metal bar and 1st Appellant held the complainant's legs and he fell down. It was then, according to PW2 that the group took the motor bike and left the scene.
 17. PW3 was clearly not present at the time of attachment. He went to the scene after the event.
 18. Considering the evidence adduced by PW1 and 2 it is clear that the complainant did not name those who inflicted injuries on him. He said he did not know them. What the complainant attributed to the Appellants was fact they held his legs as a result of which he fell down. PW2 on the other hand accused the 1st Appellant of hitting the complainant with a metal rod while the 2nd Appellant held complainant's legs and he fell down.
 19. The burden lay on the prosecution to prove their case against the Appellants beyond any reasonable doubt. Question is whether at the time the alleged attack occurred the Appellants had formed an intention to assault or cause actual bodily harm on the complainant.
 20. The Complainant's evidence is very clear that when he was asked to either pay back loan balances due or surrender the security he had given, he did not do either. He told DW3 he had no money. He then held onto the motor bike. The actions the complainant describes in his evidence depicts a very clear picture of the complainant resisting people taking away the motor bike from him. The complainant clearly said he held onto the bike before one held the right hand, the other the left hand, then two held his legs and when he fell down they took the motor bike and left the complainant's home with it.
 21. What motivated the action complained of by the complainant was not assault but an attempt to wrest the Motor bike from the complainant.
 22. The Prosecution did not establish that the Appellants and the others with them had formed an intention to assault the complainant. Their intention was not to assault the complainant but to wrest the motor bike from him.
 23. The complainant suffered some injuries classified as harm. They were bruises. There was no evidence of excessive or unreasonable force used by the group which visited the complainant's home on the material day. The group was justified to take away the motor bike since it was the security the complainant had given for the loan taken. The complainant on the other hand was not justified to resist the attachment as he admitted he owed money to Faulu (K) Ltd, which the complainant admitted was representing by DW3 Geoffrey on the day of the alleged assault.
 24. The last matter I wish to deal with is the issue of written submissions. Mr. Kiambi for the Appellants submitted that despite filling written submissions the learned trial magistrate made no

reference to them in his judgment. That is correct. Written submissions should be frowned at in a trial especially in a criminal case. The submissions should be given orally eye ball to eye ball, in open court. That way the trial court will record them and will have no excuse for failing to make reference to them. Most importantly at the time of recording the submissions, the court could have an opportunity to clarify any matter it may require to clarify.

25. Having considered this appeal I find that indeed the Appellants were at the complainant's house rightfully being members of Macadamia Self Help Group to which the complainant was Chairman. The group was owed by the complainant. There was no ill motive for Appellants presence at the scene.

26. The prosecution did not prove the offence charged. The prosecution did not establish on required standard of proof of beyond reasonable doubt, that the Appellants formed an intention to assault the complainant and cause him actual bodily harm contrary to section 251 of the Penal Code, at the time of the incident. The only independent witness, the Area Assistant Chief was not called to the prosecution. That raises eye brows given the fact all prosecution witnesses were relatives.

27. I find merit in Appellants appeal and allow it. The conviction is consequently quashed and the sentence set aside. If fine was paid same should be refunded to the Appellants.

DATED SIGNED AND DELIVERED THIS 29TH DAY OF MAY 2014

LESIIT J

JUDGE