REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO.213 OF 2009

BETWEEN

JOHN WACHIRA MANYEKI …..... APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Being an appeal from the original conviction and sentence in criminal Case No.1051 of 2007

in Nanyuki SPM's court dated 27th October, 2009 – Hon. Ndungu H.N. (Miss) SPM)

JUDGMENT

1. The appellant was charged with the offence of Grievous Harm contrary to **Section 234** of the **Penal Code**, the particulars of which were that on the 2nd day of June 2007 at Nanyuki Township in Laikipia District within Rift Valley Province unlawfully and grievous harm to MECHELIN GATHIGIA.

2. He pleaded not guilty to the charges, was tried, convicted and sentenced to a fine of Kshs.20,000/= in default six months imprisonment. Being aggrieved by the said conviction and sentence he filed this appeal and set up the following grounds of appeal:-

1) *The learned magistrate erred in failing to take all the circumstances and evidence into account which would have led her to doubt the credibility and veracity of the prosecution evidence and thus give the benefit of doubt to the appellant.*

2) *The learned magistrate erred in failing to give credence to the testimony of the defence witnesses.*

3) *The conviction was against the weight of evidence.*

1. At the hearing of the appeal herein, Mr. Kariuki appeared for the appellant while Mr. Nyamache appeared for the State and opposed the appeal.

2. Submissions

3. It was submitted on behalf of the appellant that there was no proof that it is the appellant who had committed the crime as PW1, PW2 and PW3 stated that he was a person by the

name Waflora and there was no attempt to show that the appellant was the said Waflora. It was submitted that there was no dock identification of the appellant.

4. It was submitted that the prosecution evidence was full of contradiction and inconsistency and in particular the evidence of PW1 and PW2 which contradicted that of PW3. It was further submitted that it was not clear whether PW4 testified in his capacity as the investigating officer or as a person who arrested the appellant. It was further submitted that PW5 the clinical officer testified that PW1 was not drank against the evidence of all prosecution witnesses.

5. It was submitted that the defence case went unchallenged.

6. Mr. Nyamache for the State submitted that the appellant was commonly known as Waflora and was positively identified as such by the complainant to PW4. Further that the evidence of PW2 and PW3 were corroborated by the evidence of the complainant and that the demeanour of the said witnesses were established to be truthful by the trial magistrate.

7. This being a first appeal, the court is required to reassess the evidence tendered before the trial court though taking into account that the appellate court will not normally interfere with the finding of facts made by the trial court unless they are based on no evidence or are based on misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did as was stated in **Chamagong -vs- R.[1984] KLR 611**.

8. The prosecution case was that PW1 MICHELIN GATHIGIA an askari with Nanyuki Municipal Council was on 2nd June 2007 at about 9.00 p.m. at Take One Bar in the company of one Kimiu when the appellant popularly known as Waflora joined them. As the PW1 was telling the group how they normally arrest matatus, the appellant stated that she was lying and that she had made the police **"eat"** his Kshs.10,000/=. In the process the appellant moved over and pushed her backwards from the high bar stool she was sitting on. It was PW1's evidence that she fell down and sustained a fracture on the left arm.

9. Under cross examination, she stated that the appellant joined them in a friendly manner and that he did not insult the complainant. She admitted that she had said that the appellant had hijacked one of the council askaris. She further stated that she had sat at the corner while the appellant was standing drinking.

10. DW2 John Lenges testified that he was a watchman at the complainant's plot. On 2nd June 2007 at 9.00 he heard noise inside the bar and when he went to check he found the appellant pushing the complainant. He stated that the complainant was standing but fell down on being pushed. Under cross examination, he testified that he was in a bar taking soda while waiting for food to get ready. He did not know the complainant before. He further stated that he came to know both the appellant and complainant on the same day. He further stated that he had not known the complainant before and denied that she was his girlfriend. He stated that he did not know what caused the complainant to fall down.

11. PW4 Cpl. Peter Simiyu in his evidence in chief stated that the complainant reported having been assaulted by one Waflora. From his investigation he learnt that the appellant had pushed complainant from high stool. The complainant pointed out the appellant to him whom he arrested and charged. Under cross examination he stated that the report was made to another person and that one of the witnesses he interviewed was JOHN NDIRANGU WANJIRU but did not record any statement. He further stated that the appellant was identified by name.

12. PW5 RICHARD KATEIYA produced P3 form on behalf of GEORGE ONSERIO and stated that the complainant was not under the influence of alcohol during the examination. X-rays taken revealed a fracture of the left forearm and degree of injury classified as Grievous Harm.

13. When put on his defence, the appellant gave sworn testimony and stated that the complainant was his customer and on 2nd June 2007 with some matatu drivers ate meat at his butchery before going to Take One Bar. When he followed them later he found the complainant seated on a high stool. He heard her telling them how she had assisted him when he was arrested to which he replied that she had not assisted him. She then started abusing him calling him **"Kihii"** and **"umbwa"**. When the appellant was leaving the bar PW1 extended her hand to hold him from the trousers when she fell down since she was drunk.

14. DW1 PETER EKIRU LOUREN stated that he was at Take One Bar waiting for the appellant and was sitting next to the complainant when the complainant held appellant at the back calling him **"Uka Kihii ya Mundu"**. The stool slide and the complainant fell down. Under cross examination he confirmed that the complainant pulled the appellant and she fell down.

15. In convicting the appellant, the trial court pronounced herself as follows:-

> 1. **".... both the complainant and the accused were drinking at the bar spoken of. It is apparent that they argued and had some exchange of words. The complainant apparently boasted that she had assisted the accused earlier when he was arrested by municipal council officials. The accused negated that it would appear he was bitter and had some hidden malice against the complainant whom he accused of having accused his Kshs.10,000/= to be what he calls eaten by the police. …. This is clearly why he got angry and pushed the complainant off the stool she was sitting on. She fell fracturing her hand. It may be she had drank some beer or may be she had not.... I believe the evidence offered by the prosecution witnesses whom I found honest and truthful. ….. I have considered his defence to the effect that he was leaving the bar when the complainant extended her hand to hold him back and she fell and dismiss it as a mere afterthought....."**

16. From the proceedings and submissions herein, the issue for determination is whether the prosecution case against the appellant was proved beyond reasonable doubt and whether his conviction was safe. It is clear from the evidence tendered that there were two versions on how the complainant fell down. It was the complainant's evidence that the appellant pushed her backwards and she fell onto the counter and fell down together with the stool. PW2 JOHN LENGES stated that he was a watchman at a plot of one Michael whereas the complainant said he was a watchman at the bar.

17. The evidence tendered by PW1 was that when he entered the bar he found the appellant pushing the complainant who was standing. PW3 stated that the complainant was sitting on a 3ft high stool facing them when the appellant came and they began to abuse each other and he saw the appellant push her down. It was his evidence that he did not know what caused the complainant to fall down.

18. I would therefore agree with the submissions by the appellant that the prosecution evidence was full of doubt, the benefits of which should have been given to the appellant. It is further clear that in convicting the appellant the trial court relied upon an hypothesis that was not supported by evidence tendered. There was no evidence tendered to show that the appellant got angry with the complainant neither was any hidden malice against the same supported by the prosecution.

19. It is also clear that vital witnesses were not called by the prosecution including KIMIU and who the matatu drivers were in the company of the complainant and therefore the only inference which this court makes is that his evidence might have been adverse to the prosecution case.

20. It is therefore clear that the conviction of the appellant was not safe and would allow the appeal herein, quash the conviction and set aside the sentence. The appellant should be set

free forthwith unless otherwise lawfully held and any sums of money paid by way of fine be refunded to the same.

Signed and dated day of 2014

J. WAKIAGA

JUDGE

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this 25th day of November 2014

J. NGAAH

JUDGE.

In the presence of:-

---------- for Appellant

---------- for Respondent