



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CRIMINAL APPEALS NO.90 AND 91 OF 2010 (CONSOLIDATED)

(Appeal from Resident Magistrate Hon. B. Ombewa in Webuye Court in Cr. Case no.1938 of 2009)

FRANCIS SIMIYU WESAKHANIA.....1ST APPELLANT

PIUS WAFULA LUSIMBO.....2ND APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants were jointly convicted of assault causing actual bodily harm contrary to section 251 of the Penal Code whose particulars were that on 17th November 2009 at Mbakalo market in Mbakalo location in Bungoma North District of the Western Province they had unlawfully assaulted E.W.S (PW1) and occasioned her actual bodily harm. They were asked to each serve one year in jail. In the second count the 1st Appellant was convicted of indecent assault contrary to section 11 (1) of the Sexual Offences Act no.3 of 2006 whose particulars were that during the incident he touched the breasts of PW1. He was sentenced to serve 3 years in jail. This appeal is against these convictions and sentences. Mr. Situma represented the Appellants. The appeal was opposed by Mrs Leting for the State.

It would appear not to be in dispute that the incident was at a bar at Mbakalo market. According to the prosecution PW1, a teacher at (*particulars withheld*) Primary School, came to the bar/butchery to seek payment from the owner who had not paid her for the pig she had sold him. She was asked to wait. While waiting the 1st Appellant came and greeted her by asking her “*How are you chief?*” She had unsuccessfully applied to be chief of the area. He asked her why she wanted to be chief and yet she was not married. He began to caress her breasts saying he wanted to marry her so that she could qualify to be chief. She pushed him. He slapped her. At that point the 2nd Appellant, who is 1st Appellant’s nephew, jumped on the table and began to hit her on the head using fists. The owner of the bar came and rescued her. She went to police and reported and next day she went to be treated at Naitiri Health Centre. P3 (exhibit 2) was completed at Webuye District Hospital and showed she suffered swelling and tenderness on the right side of the head with marked tenderness at the right ear and associated with reduced range of movement of the right jaw. She also suffered cut wound on the proximal part of the foot. She had been injured using blunt and sharp objects and the degree of injury was “*harm*”.

Each Appellant gave unsworn statement in defence. They called three witnesses who were at the bar

during the incident. They were Benard Wanyama Wanjala (DW3) who works at the bar, Everlyne Nabwoba Longilu (DW4) who is the owner of the bar and Zacharia Waningo (DW5) who was a patron at the bar. The Appellants denied assaulting PW1, and the 1st Appellant denied touching her breast. The Appellants stated that they came to the bar and found PW1 drinking with other patrons. They joined them and there was a discussion over her transfer from (*particulars withheld*) Primary School to (*particulars withheld*) Primary School, a transfer she did not like. The 1st Appellant was a Board Member and chairman of (*particulars withheld*) Primary School. PW1 did not like her new school. She was swearing that if she became chief men in Mbakalo would know who she is. She appeared drunk. She went at the door and took a paraffin container. When the 1st Appellant wanted to pass to go out to check on his motorbike she hit him on the head with the container. She took a beer bottle wanting to hit him with it. The bar owner restrained her. The 1st Appellant stated that he did not complain to police about the assault because he thought PW1 was drunk and he had decided to forgive her. The 2nd Appellant stated that PW1 had a grudge against him because her former husband was his friend. The Appellants had a packet of wheat flour and sugar which she took and this forced him to buy her a packet of wheat flour to get his items back. He stated that it was PW1 who attacked the 1st Appellant. DW3, DW4 and DW5 said they saw PW1 attack the 1st Appellant with the container. DW3 stated that trouble begun when the 1st Appellant told PW1 that she wanted to be chief and yet she did not have a husband. DW4 saw PW1 and the 1st appellant discussing at the table before PW1 begun shouting and she hit the 1st Appellant with the container. He fell down. She helped separate the two. She removed PW1 from the bar.

The trial magistrate considered the prosecution and the defence evidence. He believed the prosecution evidence and convicted the Appellants. It is the duty of this court to subject the entire evidence to fresh and exhaustive consideration and evaluation to be able to determine whether the conviction was properly reached. (**Okeno v. Republic [1972] EA 32**). It will be considered that the trial court had the advantage of seeing the and hearing the witnesses.

The Appellants complained that their defence was not considered, the prosecution evidence was contradictory and the grudge between PW1 and the Appellants was not considered. I have considered the entire evidence and the submissions by counsel during the appeal.

Once again, the incident was at the bar. There was the evidence of PW1 and PW2 on one side and that of the Appellants and DW3, DW4 and DW5 on the other side. DW4 was the owner of the bar and DW3 worked here. The prosecution side states the Appellants assaulted PW1 when the defence side said it was PW1 who assaulted the 1st Appellant. PW1 did not give any reason why DW3, DW4 and DW5 gave evidence that exonerated the Appellants. The fact that PW1 came to the bar meant she had no problem with either the owner or the patronage. DW4 was cross-examined about the incident. She was not asked about any debt that she owed PW1. It would appear PW1 came here to drink. That was the evidence of DW3, DW4 and DW5.

The trial court did indicate in the judgment that the Appellants were complaining that there was a grudge between them and her. For the 1st Appellant, he was chairman of the Board of the school from which PW1 had been transferred to a school she did not like. For the 2nd Appellant, he was the best friend of PW1's husband who had chased her. The court, however, failed to consider the alleged grudge, and also the rest of the evidence, including the evidence of DW3, DW4 and DW5 that PW1 was the attacker. Further, PW1 was found with a cut on her foot. She did not explain where it came from, now that she did not attribute it to the Appellants. This is material now that the court held against the 1st Appellant because he had not reported his alleged assault to police. It should be remembered, however, that an accused is convicted on the strength of the prosecution case and not on the weakness of the

defence case. In all, I find, the court did not give sufficient reasons why it chose to disbelieve the apparently cogent and consistent testimonies of DW3, DW4 and DW5 which showed that PW1 was the assailant. These are the reasons why I find the conviction was not satisfactorily reached. It is consequently quashed. The sentence is set aside and the Appellants ordered to be released forthwith unless there are other reasons why they are being detained.

Dated, signed and delivered at Bungoma this 22nd day of March, 2012.

A. O. MUCHELULE

JUDGE