



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
CRIMINAL APPEAL 18 OF 2009

JOHN G. WILSON ::: APPELLANT.

VERSUS

REPUBLIC ::: RESPONDENT.

(Being an original conviction and sentence of T.A. Odera – RM in Criminal Case No. 1758 of 2007 delivered on 11th March, 2009 at Kitale.)

J U D G M E N T.

This appeal is by the state against the acquittal of the respondent, **John G. Wilson**, by the Resident Magistrate at Kitale for the offence of assault causing actual bodily harm contrary to section 251 of the penal code in which it was alleged that on the 5th June, 2007 at Milimani Farm in Trans Nzoia District, the respondent unlawfully assaulted **Bright Amayamu Oyier Kandie** thereby occasioning her actual bodily harm.

By the time the substantive hearing of the case commenced on 26th January, 2009, the matter had been delayed unnecessarily due to one or the other reason.

When the hearing commenced, the complainant **Bright Oyier Amayamu Kandie (PW1)** testified and said that she was a self employed Hotelier and that on the material date of the alleged assault she was at her farm when she asked her farm hand (shamba boy) to wait as she went to see the surveyor over beacons which were interfered with by the respondent.

In the process, she saw the respondent spraying chemicals along their common boundary. She told her employees **Paul Omari Barasa** and **Charles Wafula** to be careful as the spray was deadly. At that point, the respondent sprayed the chemical on the complainant while remarking “**You black mad African Prostitute I will kill you.**” He continued to spray the chemical on the complainant and when it was finished, he jumped into her compound and uprooted kales (sukuma wiki). He then hit the complainant on the left eye with a stem of the kale.

The complainant went on to state that the respondent left with the stem while remarking, “**I will bewitch**

you". He had on the previous day raided the complainant's premises and threatened to kill her. She reported the matter to the police at Kitale police station and was given a P3 form which was filled by a doctor.

The complainant said that she had known the respondent since September, 2004 and that her relationship with him was very bad.

After testifying in chief, the complainant was cross-examined by learned counsel, **Mr. Samba**, who was representing the respondent in the matter.

The court record shows that the complainant's cross-examination was never finalized and was put to a halt on that first day of the hearing when the complainant was placed in custody for eight (8) days by the learned trial magistrate pursuant to section 152 1(b) of the Criminal Procedure code for refusing to answer a question put to her.

The complainant was to remain in custody upto the 9th February, 2009 but was produced in court on 30th January, 2009 at the request of the prosecution. She was released from custody on that day after expressing her willingness to answer questions and was given instructions to return on 9th February, 2009 for fixing of a date for further hearing.

In a strange twist of events, on that 9th February, 2009 even though the matter was for mention for fixing of a hearing date, the prosecutor indicated that the matter was for hearing and applied for an adjournment of the same for lack of the police file. The defence counsel (Mr. Samba) seemed also to have been under the impression that the matter was for hearing. He raised an objection to the prosecution's application to have the case adjourned.

The trial court also followed suit by allowing the application and putting blame on the prosecution for the delay in the case. Nonetheless, the adjournment was said to be the final one in favour of the prosecution.

Accordingly the case was adjourned to 20th February, 2009.

On 20th February, 2009, the prosecutor indicated that the matter was coming up for further cross-examination of the complainant but the respondent's advocate had not arrived earlier. The matter was placed aside and mentioned later in the presence of the respondent's advocate. Another advocate, **M/s. Arunga**, also appeared to watch brief for the complainant. However, the prosecutor (**IP Omwanda**) applied to withdraw from further prosecuting the case due to complaints raised against him to his superiors by the complainant.

The said prosecutor was allowed by the court to step-aside and matter was adjourned to 2.00 p.m. for further hearing with an alternative prosecutor. The matter was mentioned at 3.30 p.m. but the prosecutor who had been allowed to step aside appeared and requested for time to secure an alternative prosecutor.

The application was strongly opposed by the respondent's advocate saying ," inter-alia" that the prosecution had already been given a final adjournment. However, the prosecutor indicated that he had already been allowed to withdraw from the case and that he'd rather let a colleague deal with the case.

After considering the objection to adjournment and the sentiments expressed by the prosecutor, the learned trial magistrate disallowed adjournment and order that the case proceeds.

The prosecutor requested for five (5) minutes. The court granted the request and at 3.45 p.m. when the matter resumed, a new prosecutor (**IP Nyakaru**) appeared and requested for time to familiarize himself with the case. The respondent's advocate objected to the request saying that a ruling had already been made by the court which could not organize the prosecution's diary.

The court indicated that it had already made final orders for the case to proceed and was to proceed

immediately.

The prosecutor sought leave to review the orders made and the court remarked that “Review is available as a matter of right.”

The prosecutor then closed the prosecution case. The court fixed the matter for ruling on 6th March, 2009. The ruling was however delivered on 11th March, 2009.

In the ruling, the learned trial magistrate concluded thus:-

“PW1 testified partially as defence was not given a chance to exhaust cross-examination of PW1. No medical evidence was also called to confirm the alleged injuries. It has not been established that accused assaulted PW1 as alleged or at all. The injuries of PW1 have also not been established. The evidence on record is insufficient to place accused on his defence. No reasonable tribunal directing its mind to the law and evidence herein can convict accused even if he opts not to adduce any evidence. In his defence, I find that accused has not (sic) case to answer. I proceed to acquit him under section 210 CPC.”

That is the ruling which is the subject of this appeal by the state. The events leading to the ruling and hence the appeal have been re-visited herein above so that it may be understood where the matter has come from and whether or not this appeal is merited.

The grounds of appeal contained in the petition of appeal dated 13th March, 2009 relate to one broad issue i.e. whether a fair trial was conducted by the court so as to validate the disputed ruling.

A fair trial according to “**Black’s Law Dictionary Vol. 8 at P. 634**” is a trial by an impartial and disinterested Tribunal in accordance with regular procedures, especially, a criminal trial in which the defendant’s constitutional and legal rights are respected.

Article 50 (1) of the Constitution of Kenya (2010) provides that:-

“Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body.”

Fairness is a double edge sword such that a tribunal empowered to resolve disputes between two sides is required to be fair to both sides.

In this case, it is apparent from the ground of appeal that the appellant felt that the trial conducted by the learned trial magistrate was unfair to the prosecution and hence the complainant in that the trial court subjected the complainant to uncalled for harassment and open bias, that the court proceeded to make a ruling under section 210 CPC yet leave to review orders earlier made had already been granted.

The appellant’s contention is that the prosecution’s case was prematurely terminated and/or concluded thereby rendering the acquittal of the respondent under section 210 CPC premature and illegal.

The appellant further contends that there was no trial at all before the learned trial magistrate.

Learned prosecution counsel, **M/s. Bartoo**, argued the appeal on behalf of the appellant while learned counsel, **Mr. Samba**, opposed the same on behalf of the respondent.

Having considered the rival submissions by both sides in the light of what transpired in the trial court on various days from the time the trial effectively commenced on 26th January, 2009, this court would not hesitate to hold that there was no fair trial in this matter.

While it was true that the matter had become protracted due to reasons attributed to the prosecution and/or the complainant, it was unfair to the prosecution for the trial court to put the prosecution in a position where they had nothing to do but close their case without having called essential witnesses other than the complainant who had also not been fully cross-examined and re-examined. Considering the nature of the offence at hand and the evidence required to prove it especially medical evidence it was rather unfortunate and worrying that the trial court allowed the case to be closed so prematurely.

With the premature closure of the case, the ruling of the court became a foregone conclusion. It may be argued that the prosecution heard the option of withdrawing the case on being refused an adjournment but at the end of the day the purpose of the court is to do justice to all by according each party proper and adequate opportunity to be fully heard before a decision is made.

In effect, the ruling by the court was made without all necessary evidence being presented by the prosecution. It was thus a premature ruling intended to achieve a drastic result on the part of the prosecution.

For all the foregoing reasons, this appeal is merited to the extent that the ruling of the learned trial magistrate dated 11th March, 2009 be and is hereby quashed so that acquittal of the respondent must hereby be set-aside. However, in view of the age of this case and the controversial angle that it took, it is doubtful whether justice will be done or be seen to be done to both sides if a re-trial is ordered by this court.

There has been no indication from the appellant or even the respondent whether or not their respective witnesses will be available for a fresh trial. In this court's opinion a re-trial would further complicate this matter and render it impossible for the parties to be guaranteed a fair trial. In the circumstances, interests of justice would mitigate against a re-trial.

[Delivered and signed this 24th day of May, 2012.]

J.R. KARANJA.
JUDGE.