



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL 132 OF 2011

FLORENCE LUNANI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal against both conviction and sentence of the Senior Resident Magistrate's Court at Butali in Criminal Case No. 384 of 2010 [S. N. ABUYA, SRM])

JUDGMENT

The appellant, **FLORENCE LUNANI** was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code.

The particulars of the offence were that on the 17th day of March 2010 at Teresia village, Teresia Sub-location, Shivanga Location in Kakamega North District within the Western Province, unlawfully assaulted WILSON MUTALI thereby occasioning him actual bodily harm.

The appellant pleaded not guilty. After a full trial, the appellant was convicted and sentenced to serve on Community Service Order for six months. The appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-

- The appellant was not informed by the court of her right to choose and be represented by an advocate as enshrined in article 50 (2) (g) of the Constitution of the Republic of Kenya.
- Failure by the trial magistrate to assign an advocate to the appellant at the expense of the State contrary to the provisions of article 50 (2) (h) of the Constitution of the Republic of Kenya.
- The rights of the appellant, as enshrined in article 50 (2) (j) of the Constitution of the Republic of Kenya were not complied with.
- Failure to include in the judgment the points for determination, the decision therein and reasons for the decision as provided for by Section 169 (1) of the Criminal Procedure Code.
- Disregarding the appellant's defence that clearly showed that the appellant had been assaulted.
- Failure by the Investigating Officer to testify.
- Judgment of the trial magistrate is "contradictory".

Mr. Ombaye Advocate appeared for the appellant. His submissions expounded on the grounds of appeal. Mr. Limo for the State relied the record.

This being the first appeal, it is the duty of this court to re-evaluate and to re-consider the evidence adduced before the trial magistrate's court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any determination regarding the demeanour of the witnesses (*see Okeno v Republic [1972] EA 32*).

The prosecution case is that the complainant, PW1 WILSON MUTALI was working in his farm on the material day when at about 5.00 p.m., the appellant went there. The appellant wanted to know if her cows had attacked the complainant's cows. The appellant then attacked the complainant by strangling him and pushing him down and hit him with a stone.

The matter was reported to the village elder. The matter ended up at the police station. The complainant was issued with a P3 form and treated at Malava District Hospital. The appellant was subsequently arrested and charged with the present offence.

In her defence, the appellant stated that at the material time, she met the complainant on the way. The complainant then accused her of having released her cows to attack his cows. That the complainant then held her clothes and tore them up and hit her with a stick on the shoulder. The appellant reported the matter to the village elder who issued her with a letter and referred her for treatment. While the appellant was on treatment she was arrested and charged with the present offence.

The complainant's evidence was corroborated by that of PW2, JACKSON MULANDA who gave a similar account of evidence as the complainant's.

DW2, EVERLYNE ISULU and DW3, KAKA also gave evidence that corroborated that of the appellant.

The complainant produced a P3 form that reflects that he suffered harm. The appellant produced treatment notes and a letter from the Chief that showed she had also been assaulted. The appellant also produced her torn dress as an exhibit.

The trial magistrate believed that prosecution case. The trial magistrate found the defence unbelievable because the treatment notes produced by the appellant had some alterations on the date. Having accepted the production of the treatment notes without the maker of the same being called, the trial court could not turn around and use any cancellations or alterations in the treatment notes against the appellant. The treatment notes ought to have been produced by the maker for the same to be challenged through cross-examination. The trial magistrate argued that the first person to make a report to the authorities was the one assaulted. This in my view cannot be true in all cases.

The defence raised by the appellant was plausible. The same raised doubts on the prosecution case. The appellant ought to have been given the benefit of doubt.

Failure by the Investigation Officer to testify is not always fatal to the prosecution case. Each case must be considered in the light of its own circumstances. The Investigation Officer could have however shed light in the instant case as to what the investigations revealed regarding the accusations and counter accusations of the assault.

On the Provisions of article 50 (2) (g) of the Constitution of Kenya regarding the right to representation by an advocate, and to be so informed, the court cannot be faulted for not having provided that which is not available. The State is yet to make arrangements for such representation in all categories of cases. In any case, the appellant could have appointed her own advocate. No application was made for the defence to be supplied with statements.

All in all, the conviction was not based on sound evidence. Consequently, the conviction is quashed and the sentence set aside. The appellant is at liberty unless otherwise lawfully held.

Dated, delivered and signed at Kakamega this 31st day of July, 2012

B. THURANIRA JADEN
J U D G E