



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL 38 OF 2011

RAPHAEL MWENJE 1ST APPELLANT

PROTUS RABARI MWENJE 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal arising from the Senior Resident Magistrate's court at Mumias in Criminal Case No. 912 of 2009 [G. O. OYUGI, RM])

JUDGMENT

The first Appellant, **RAPHAEL MWENJE** and the 2nd Appellant **PROTUS RABARI MWENJE** were charged and convicted of 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 6th day of September, 2009 at Mumias District within Western Province, unlawfully assaulted **ABDIRAHAMAN TONGOLA MAKKA** thereby occasioning him actual bodily harm.

The 1st appellant was also charged and convicted of the offence of malicious damage to property contrary to Section 339 (1) of the Penal Code.

The particulars of the offence were that on the 6th day of September, 2009 at Imanga Police Patrol Base, Masinjira Sub-location, Etenje Location in Mumias District, within Western Province willfully and unlawfully damaged one T-shirt valued at Kshs.500/= by tearing it the property of No.70044 PC. **SAMAON RUTTO**.

The Appellants pleaded not guilty before the lower court. After a full trial, the appellants were found guilty and convicted of the aforesaid offences and sentenced to serve 12 months imprisonment each for the offence of assault and six months imprisonment for the 1st appellant for the offence of malicious damage to property. The two sentences in respect of the 1st appellant ran concurrently.

The 1st and 2nd appellants faced two other counts of malicious damage to property and incitement to violence but they were acquitted and the same are not the subject of this appeal.

Aggrieved by the conviction and sentence, the 1st and 2nd appellants appealed to this court. The 1st and 2nd appellants appeals No. 38 of 2011 and No. 39 of 2011 respectively were consolidated and heard

together. This judgment is therefore in respect of both appeals.

The grounds of appeal can be summarized as follows:-

- The ingredients of the charge of assault were not disclosed and proved.
- There was no credible and admissible medical evidence to prove the charge of assault.
- There were contradictions in the prosecution case.
- The ingredients of the offence of malicious damage to property were not proved.
- There was no proof of ownership of the damaged property.
- The trial magistrate failed to analyse and consider the defence case.
- The judgment of the trial magistrate did not contain the issues for determination for the reasons for the decisions.
- The trial magistrate ignored the mitigation by the appellants and meted out a harsh sentence.

Mr. Akwala advocate appeared for both appellants. Mr. Akwala put in written submissions and highlighted the same in court. The submissions expounded on the grounds of appeal.

Mr. Limo appeared for the State. He did not oppose the appeal. He stated that the evidence of PW1 and PW2 was contradictory and that there was no valuation of the damaged property.

I have considered the submissions by both counsels.

The case for the prosecution was that the complainant in the charge of assault, PW1, **ABIRAHAMAN TONGOLA MAKAU** was on 6.9.09 at about 9.00 a.m. tending to his sugarcane farm. He then heard a movement within the cane and looked up. He saw the 1st and 2nd appellants who had a panga. The appellants cut him on the head, on the left hand and finger.

The complainant (PW1) raised an alarm and his wife PW2 **ANYANGO TONGOLA** came to his rescue. Other people arrived at the scene. The complainant was escorted to the police post and reported the matter. He was issued with a P3 form and treated at ITENJE Hospital and discharged. Police Officers visited the scene but a rowdy mob with the 1st appellant among them gathered. The police officers were intimidated and left the scene with the crowd following them shouting with some armed with pangas and others throwing stones at the police officers. After reaching the Police Station the police officers received a further report that the mob had damaged property at the complainant's homestead.

Shortly thereafter, a mob of about 200 people among them the 1st appellant arrived at the police post. The police officers arrested the 1st appellant and placed him in the cells. The 1st appellant then grabbed PW3, P.C. SAMSON RUTTO by the T-shirt at the collar and threatened to fight him. PW3's T-shirt was torn. PW3 then handcuffed the 1st appellant. The 2nd appellant was arrested later. After investigations the appellants were charged.

The 1st appellant in his defence stated that the 2nd appellant is his brother and was in Nairobi. He accused the complainant (PW1) of having an affair with the 2nd appellant's wife. The 1st appellant warned the said complainant. The matter was also reported to the village elder by the 1st appellant. That the said complainant made a report to the assistant chief that the 1st appellant was threatening him but the 1st appellant told the Chief the truth. That the complainant (PW1) continued with the relationship with the 2nd appellant's wife and even had a cow and a calf removed from the homestead of the 2nd appellant.

On 6.9.09 (material date) the 1st appellant heard that the 2nd appellant and the complainant (PW1) had fought. When the 1st appellant followed up the matter at the police post he was arrested. The 1st appellant denied the offences.

The 2nd appellant in his defence stated that before the month of September 2009, he was in Nairobi. His brother, the 1st appellant telephoned him and summoned him back home to take care of his children and property as his wife had ran away. When the 2nd appellant returned home, he found his children were suffering and one cow and three sacks of maize were missing. That after about three days he found the complainant (PW1) cutting grass in his shamba. That the complainant (PW1) had also given his children Kshs.100/= to give to his (2nd appellant's) wife. The 2nd appellant then questioned the complainant (PW1) about his relationship with the 2nd appellant's wife. The complainant (PW1) then accused the 2nd appellant of defaming him. The complainant (PW1) then held the 2nd appellant by the neck and threw him down. The complainant then cut the 2nd appellant with a panga.

The 2nd appellant reported the matter to the village elder but before any investigations were carried out the 2nd appellant was arrested by police officers on allegations of having assaulted the complainant (PW1). The 2nd appellant accused the complainant (PW1) of taking away his wife and marrying her.

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*).

PW1, the complainant in the assault case testified that he was assaulted by both the 1st and 2nd appellants with a panga. During cross-examination, the said complainant stated ***“Both accuseds (sic) assaulted me with their panga. I sustained 3 injuries on my head and 2 on my hand (left).”***

PW2, the wife to the complainant (PW1) has given evidence that shows she found the 2nd appellant bending over the complainant (PW1) with the panga and the 1st appellant ran away. During cross-examination, PW2 stated - ***“I found both accused assaulting my husband.”*** PW2 stated that her husband was injured on the head, and left hand. The evidence of PW1 and PW2 is corroborative. I have not found any material contradictions in their evidence.

PW4, YUSUF OKONGO a “boda boda” operator testified that on the material day, he found the 1st and 2nd appellants at the road with a blood stained panga and that the victim who had been cut on the head was given first aid. Although it does not come out clearly from the evidence of this witness (PW4) whether there were two pangas or one panga it is quite clear that the evidence of PW1, PW2 and PW4 that the complainant was assaulted with a panga.

The medical evidence produced by PW6, RAPHAEL ODUOR, the Clinical Officer confirms that the complainant (PW1) had 3 cut wounds on the scalp, cut wound on loin and back and cut wound on left palm and index finger. The P3 form was produced as an exhibit together with the treatment notes. According to the Clinical Officer, he is the one who treated the complainant and filled the P3 form with a nurse assisting him in writing the treatment notes. The evidence of the Clinical Officer can therefore not be termed as hearsay evidence as stated by the defence counsel. The evidence of the Clinical Officer is more detailed on the injuries he found on the complainant. His evidence is that the injuries were probably caused by a sharp object.

The medical evidence corroborates the evidence of the complainant (PW1). Having a more detailed report of the injuries cannot be termed as contradiction. The injuries sustained by the complainant are also incorporated in the Clinical Officer's evidence.

The evidence of the Police Officer who visited the scene, together with other officers, PW3, MR. SAMSON RUTO shows that they found the 1st appellant there with a mob that intimidated the police officers who made a retreat. The evidence of the said police officer is that the 1st appellant grabbed him by the T-shirt at the collar and the T-shirt got torn. The torn T-shirt was produced in court as an exhibit. The value of the T-shirt was stated in the charge sheet as Kshs.500/=. The panga and the complainant's (PW1) blood stained clothes were also produced as exhibits.

The 1st appellant in his defence denied having assaulted the complainant (PW1). The 1st appellant accused the complainant (PW1) of having a love affair with the brother's (2nd appellant) wife. According to the 1st appellant, he was away at a funeral and only returned home on the material day at about 1.00 p.m. when he was informed of the fight between the complainant (PW1) and the 2nd appellant. Although the 1st appellant has denied having assaulted the complainant (PW1) and blames the complainant of a frame up because of the alleged love affair, there is no reason why PW2 the complainant's wife and PW4 the boda boda operator who is an independent witness would also frame him up. The evidence of the arresting officer (PW3) also shows the participation by the 1st appellant at the scene. The alibi defence raised by the 1st appellant did not displace the overwhelming prosecution evidence.

The 2nd appellant has also blamed the alleged love affair between his wife and the complainant (PW1) for the incident. According to the 2nd appellant, it was the complainant (PW1) who assaulted him. The 2nd Appellant stated that the complainant (PW1) held the panga that was in the hands of the daughter of the 2nd appellant and in the process the complainant (PW1) was cut by the panga. This scenario does not explain the cuts on the said complainant's head.

The evidence of the defence witness, OMBUMBA ODONGO points to his having been sent by the complainant (PW1) to ferry three bags of maize from the home of the 2nd appellant. Although this could be a pointer to some connection between the complainant (PW1) and the home of the 2nd appellant, it is not evidence of any affair. The evidence of PW5, CPL. BENJAMIN CHELANGA, the investigation Officer is that the appellant's alleged that the complainant (PW1) was having an affair with the 2nd appellant's wife. If one was to presume that indeed such an affair existed, then the attack on the complainant (PW1) was not carried out on the spur of the moment. The attack took place in a sugarcane farm and the wife to the 2nd appellant was not at the scene. Attacking a police officer and tearing his clothes and marching to the police station with a mob was also an overreaction.

After carefully re-evaluating and re-considering the evidence on record, I am satisfied that the charges the appellants faced was proved beyond reasonable doubts. The convictions were based on sound evidence. I uphold the conviction and sentence of the trial court.

In total each of the appellants was to serve one year imprisonment with effect from 8.3.11. For the 1st Appellant, RAPHAEL MWENJE, the prison term was interrupted on 18.4.11 when the 1st Appellant was admitted to bail.

The 2nd appellant, PROTUS RABARI MWENJE he was admitted to bail on 31.5.11. Their prison terms should therefore be adjusted accordingly.

R/A explained.

Delivered, dated and signed at Kakamega in open court this 31st day of July, 2012

B. THURANIRA JADEN
J U D G E