



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

CRIMINAL APPEAL 131 OF 2007

REPUBLICAPPELLANT

VERSUS

JAMES NZOMO IVATARESPONDENT

(Being an appeal from the original acquittal in Makueni Senior Resident Magistrate's Court Criminal Case number 27/2004 by Hon. S.R. Rotich – SRM on 22/8/2007)

JUDGMENT

The respondent was charged before the Senior Resident Magistrate's, Court at Makueni with two counts. In count one he was charged with malicious damage to property contrary to section 339(1) of the Penal Code whereas in count two he was accused of assault occasioning bodily harm contrary to section 251 of the Penal Code respectively. He denied both charges and was soon tried. He was however acquitted under section 215 of the Criminal Procedure Code. It is against this acquittal that the State as the appellant appeals to this court on points of law as per the petition of appeal dated 17th July, 2007. The appellant has basically raised 3 grounds in its petition of appeal to wit;

- “1. The learned trial magistrate erred in law in acquitting the respondent against the weight of evidence proved beyond reasonable doubt that the respondent had not only assaulted the complainant but also had maliciously damaged the complainant's properties.***
- 2. The learned trial magistrate erred in law in holding that this was a civil suit requiring civil remedy when the prosecution had adduced enough evidence proving that the offence had been committed***
- 3. The learned trial magistrate erred in law in misdirecting himself on the fact that the complainant was armed with arrows when there was clean and un-rebutted evidence to prove that the accused was the aggressor.***

The evidence led at the trial was in brief and was as follows:-

PW1 who was the complainant in his evidence stated that on 2nd January, 2004 while herding his cattle; saw a tractor carrying 2 people. The tractor drove to his farm and started ploughing it. When he tried to stop them the respondent ordered for his arrest. He was then thrown to the ground and the respondent stepped on him and held him by his testicles and boxed him. He screamed for help and his brother, **Timothy Mulili** went to his rescue and the respondent ran away with his arrows.

PW2, **Timothy Mulili** on 2nd January, 2004 while on his way to Nziu Market, heard a person call for help. He went there and found a crowd had gathered. He found his brother, the complainant on the ground and the respondent was beating him. He pulled and pushed the respondent away. The respondent then picked his bows and arrows and left. His brother went and made report to the police and later recorded his statement.

PW3, **Mutiso Kikandu** had sold the land in dispute to **Nzomo Ivata** at Kshs. 36,000/= but his sons opposed the sale and was refunded his money. The land now belonged to the complainant. Later he was told of the fight.

PW4, **Paul Kingola** is the one who filled the P3 upon examining the complainant. He concluded that the injuries sustained were harm.

PW5, **Julius Muema Ngove** visited the scene and assessed the damaged property. He concluded that the complainant lost in pasture valued at Kshs. 3000/=.

PW6, **Mulei Kimeu** on 2nd January, 2004 at 3pm was in the meantime on his way to see councilor **Kitua** at his home when he heard noises from the home of complainant. He went there and found him lying down. He was assisted by his brother and complaint said he was being beaten over land. He saw bows and arrows nearby.

PW7, **P.C Mwanzia Mutua** received the report and issued P3. He recorded statement and later arrested and charged the respondent.

When put on his defence, the respondent denied the charges. He claimed that he had gone to plough his land but later his son told him that the complainant had threatened him with bows and arrows. He went there and complainant was disarmed. They took the bows to the police station. The complainant later colluded with police and had him arrested. He was later asked to pay Kshs. 4000/= which he declined and was then charged. He denied that there was any fight.

DW2, **Mbuvi Kilungu** claimed that it was the complainant who was armed and tried to shoot the driver. He denied there was any fight.

The learned magistrate having considered the evidence tendered came to the conclusion-

“it is quite clear there exists a dispute over land ownership. Though the complainant says the accused beat him, and damaged his grass, it is quite clear this is a case of a land dispute sought to be resolved through the Criminal process. There is clear evidence it is the complainant who was actually armed.

I will give the accused the benefit of doubt and find the prosecution has not proved its case beyond any reasonable doubt and the accused is acquitted of the charges of malicious damage contrary to section 339(1) and assault contrary to section 251 Penal Code.”

When the appeal came up for hearing before me, on 16th February, 2012 **Mrs. Gakobo**, learned Principal State Counsel and the respondent agreed to canvass the same by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them.

In ground one, the appellant contend that the acquittal was against the weight of evidence adduced. I think that this complaint has considerable merits. There is evidence that on 2nd January, 2004 the respondent accosted the complainant on his land and ordered for his arrest. Within no time, the respondent attacked the complainant, threw him to the ground, stepped on him and held his testicles as he boxed him. The complainant, PW1 was treated for the injuries he suffered and his P3 form was filled by PW4 a clinical officer who noted that the complainant’s chest was tender and swollen and he similarly noted the same features on his genitalia. PW4 certified that PW1 was occasioned harm.

PW1's account that he had been assaulted by the respondent was supported by PW2 who responded to his screams for help. PW2 went to the scene, found complainant on the ground and the respondent stepping on his neck and pulling at his testicles.

PW6, **Mulei Kimeu** also testified that he found the complainant on the ground and the respondent lying on him. Respondent then took his bows, arrows and then left for his home.

The respondent was a cousin and a neighbor to PW1. PW2 knew the respondent as a clan member. The offence was committed in broad daylight when circumstances were favourable for positive identification and in this case the witnesses recognized the respondent as the person who assaulted the complainant.

There was therefore overwhelming evidence on record upon which the trial court was obliged to find that the prosecution had discharged its burden of proof.

With respect to count 1, it is clear from the evidence of PW3 that the respondent had been sold the land by PW3 but the purchase price was later refunded to the respondent who consented to the transaction. It is thus apparent that the respondent had no right over the land where he willfully and unlawfully entered on the 2nd January, 2004 and destroyed grass valued at Kshs. 30,000/= belonging to the complainant.

The trial court was of the view that this was a land dispute being resolved through the criminal process. The trial court made an error of law as section 193 of the Criminal Procedure Code envisages that criminal and civil proceedings can proceed concurrently. In this case there were criminal aspects which could not be resolved through the civil process.

Having re-evaluated the evidence I am satisfied that the evidence on record was sufficient to sustain the charges and the trial court erred in acquitting the respondent.

Accordingly, I allow the appeal, set aside the order of acquittal passed in favour of the respondent. I remit the case back for retrial by any other magistrate of competent jurisdiction other than **S.R. Rotich**, SRM who presided over the initial trial. This case shall be mentioned in the Senior Resident Magistrate's Court at Makueni on **13th July, 2012** for the retrial to commence.

JUDGMENT DATED, SIGNED and DELIVERED at MACHAKOS, this 30TH day of JULY, 2012.

ASIKE-MAKHANDIA
JUDGE