NO. 336

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 7 OF 2010

REPUBLIC..APPELLANT

-VERSUS-

DANIEL JOHN)

SANDO JOHN)

JOHN MWITA)..RESPONDENTS

MWITA JOHN)

JUDGMENT

(From original conviction and sentence by the Senior Resident Magistrate's court at Kehancha criminal case no. 1050 by J.R.NDURURI 2008 (RM)

This is an appeal by the state against the acquittal of the four respondents by the Senior Resident Magistrate's court at Kehancha Law courts, **Daniel John** (1st respondent) **Sando John** (2nd respondent), **John Mwita** (3rd respondent) and **Mwita John** (4th respondent) were jointly charged with the offence of assault causing actual bodily harm contrary to section 251 of the **Penal Code.** The particulars of the offence given were that on 16th November, 2008 at Nyanchabo village of Kuria West District, the respondents jointly and unlawfully assaulted the complainant **Murimi Wilson Mukama** is the 3rd occasioning him actual bodily harm. It is instructive to note that 1st, 2nd and 4th respondents are the sons of the 3rd respondent whereas **Murimi Wilson Mukama** is the 3rd respondent's brother's son. Thus the 1st, 2nd and 4th respondents are cousins to the complainant whereas the complainant is a nephew to the 3rd respondent.

The respondents entered pleas of not guilty to the charge and were subsequently tried. The complainant testified that on the material day he was grazing his father's cattle on their land when the respondents confronted him. The 3rd respondent ordered the other respondents to assault him. The respondents had a rungu each and a walking stick. Pursuant to the instructions, the 1st respondent hit him with a rungu on the chest and he fell down. The 2nd respondent then hit him on the back with a rungu while the 4th respondent hit him with a club on the left side of the head. The 3rd respondent hit him on the back with a rungu. The complainant raised an alarm and one **Kennedy Chacha Otaigo** (PW2) came to the scene. Subsequent thereto neighbours came to the scene as well and he was rescued. The complainant was taken to Masaba Health Centre for treatment, and later reported the matter to Kehancha police station where he was issued with a P3 form. The P3 form was completed at Kuria District Hospital by PW4, **Nyatera Edwin**.

Kennedy Chacha Otaigo is the complainant's nephew. On the material day, he heard the complainant screaming and rushed to the scene. He found the respondents assaulting the complainant. He also screamed and other people joined him at the scene. They managed to rescue the complainant. He helped to take the complainant to Masaba Health Centre for treatment. He saw each of the respondents armed with a panga and a rungu. Besides **Kennedy**, **Joseph Mwikabe** (PW2) a brother to the complainant, also heard the complainant screaming and went to the scene. He found the complainant and **Kennedy** who informed him that the respondents had assaulted the complainant.

On his part he saw the respondents walking away at about 200 metres from the scene. He too helped the complainant to Masaba Health Centre for treatment.

Nyatera Edwin (PW4) a registered clinical officer at Kuria District hospital examined the complainant on 17th November,2008 and found that he had swollen cheeks, and pain on both shoulders. He assessed the age of injuries to be two days old and the probable type of weapon used was blunt. He classified the injuries as harm.

CPL Willy Kiema (PW5) of Kehancha police station investigated the case and preferred the charge against the respondents.

In the petition of appeal dated 26th January,2010 and filed in court on the same day, the state complained that the trial magistrate's acquittal of the respondents was against the weight of evidence on record which was overwhelmingly in favour of a conviction, that the trial magistrate erred in law and fact by failing to give sufficient and proper consideration of the evidence in his judgment thereby arriving at a wrong

finding unsupported by the evidence on record and finally, that the decision of the trial magistrate was against the interest of justice and fairness.

When the appeal came up for hearing before me on 23rd November, 2010 the state was represented by **Mr. Mutuku,** learned Senior Principal State counsel whereas **Mr. Oguttu** learned counsel appeared for all the respondents.

Mr. Mutuku, submitted that during the trial in the subordinate court, the prosecution discharged its burden of proof as per the law. In the premises the acquittal of the respondents was unlawful. There was evidence of the clinical officer. Though the respondents were put as their defences, the trial court failed to consider the same. The contradictions that formed the basis for the acquittal were minor and immaterial.

In opposing the appeal, **Mr.Oguttu** submitted that the trial magistrate properly evaluated the evidence tendered given the parties involved who had close ties and relationship. The contradictions in the testimonies of the prosecution witnesses were neither minor nor immaterial given the family animosity based on a long running land dispute between the families. To **Mr. Oguttu** therefore the judgment and acquittal of the respondents was well founded and should be vindicated by this court.

I have analysed the evidence that was adduced in the trial court and evaluated it independently as I must do, this being a first appeal-See the case of **Okeno.v. Republic (1972) E.A.32.**

It is common ground that the respondents and the complainant have close family ties. Indeed the 1st, 2nd and 4th respondents and the complainant are cousins. On the other hand the complainant is a nephew of the 3rd respondent. It is also common ground that there is a very long running land dispute between the family of the 3rd respondents which includes the 1st, 2nd and 4th respondents and that of the brother of the 3rd respondent and father of the complainant. This being the scenario it hehoved the learned magistrate to approach the evidence tendered in support of and in defence of the case with greater circumspection. Indeed the learned magistrate was alive to this fact when he stated in his judgment thus ***"……There emerged evidence that the 3rd respondent has a land dispute with the father to the complainant, who is his brother. The complainant and all the respondents are closely related. These two issues demand very careful consideration of the evidence on record, to rule out any possibility that this case was activated by a family feud …….".*** This approach was necessary to avoid a situation where a party invokes the criminal justice system as a means of settling family scores. It is in these regard that the contradictions and in consistencies in the prosecution case becomes paramount and or pertinent. Given the close ties and relationship between the families involved and the ensuing animosity,

it was incumbent upon the learned magistrate to evaluate the evidence and circumstances with exceptional circumspection as already stated. Accordingly any contradictions in the evidence of the prosecution witnesses had to be looked at with keenness to obviate a conviction founded on family animosity.

To my mind and just like the learned magistrate held, the contradictions as to the kind of weapons carried by the respondents and used on the complainant, who assaulted the complainant and where are neither minor nor immaterial. Those contradictions goes to the credibility of the complainant and indeed the complaint itself. The complainant was the victim. Apparently, PW2 came to the scene and found the respondents in the act. If the two were witnesses to the act, why then should there be a discrepancy between their testimonies as to what they observed?. It means one of them or indeed all of them were not being candid with the court.

Mr. Mutuku, conceded that indeed there were such contradictions. However, to him they were immaterial and inconsequential. However, I do not agree with this submission just like the learned magistrate. These contradictions given the family ties were material. More so when no reason is given for the sudden attack of the respondents on the complainant. Apart from PW2, the other alleged eyewitness was PW3, a stepbrother to the complainant. From the record and contrary to the submissions of **Mr. Mutuku,** he never found the respondents in the act of assaulting the complainant. It was his testimony that when he went to the scene, he did not find the respondents. He infact saw them at distance of 200 metres walking away. It was PW2 who actually told him of the assault.

All the respondents gave sworn evidence and were cross-examined. They advanced alibi defence. They all said that at the time the complainant alleged to have been assaulted they were all in church. The defence of alibi was never displaced by the prosecution by calling evidence in rebuttal.

I do find, like the trial court, therefore that offence of Assault causing actual bodily harm contrary to section 251 of the **Penal Code** was not proved beyond reasonable doubt. That being my view of the matter, I decline to interfere with the judgment of the learned magistrate acquitting the respondents of the charge. The appeal is dismissed.

Ruling dated, signed and **delivered** at Kisii this 17th day of January, 2011.

ASIKE-MAKHANDIA

JUDGE