



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
[CORAM: AZANGALALA, J.]
CRIMINAL APPEAL NO. 37 OF 2008

BETWEEN

REPUBLIC ::::::::::::::::::::::::::::::::::::::: APPELLANT

AND

AMSON KIMONDWO TUWEI ::::::::::::::: RESPONDENT

[Appeal from the Judgment of G.A. Mmasi (SRM) dated 9/6/2008 in Eldoret CMCRC No. 8033 of 2002]

JUDGMENT

The appellant in this appeal is the **Republic of Kenya**. The appeal is from the judgment of **G.A. Mmasi, SRM** delivered on 9th June 2008 in Eldoret Chief Magistrate’s Court Criminal Case No. **8033 of 2002**. In that case, the respondent, **Samson Kimondwo Tuwei**, was charged before the said court with the offence of doing **Grievous Harm contrary to section 234 of the Penal Code**. The allegation was that the respondent, on the 7th day of May, 2002, along Oloo Street in Eldoret Township, Uasin Gishu District of the Rift Valley Province, unlawfully did grievous harm to **Veronichah Wangeci** (hereinafter “**the complainant**”)

The respondent pleaded not guilty and after a full trial, the learned Senior Resident Magistrate found that the prosecution’s case had not been proved beyond reasonable doubt and acquitted the respondent. Being dissatisfied with these findings, the appellant has appealed to this court on four (4) grounds expressed as follows:-

1. **That the learned trial Magistrate erred in law and in fact in acquitting the respondent under section 215 of the Criminal Procedure Code.**
2. **That the learned trial Magistrate erred in law and in fact in acquitting the respondent on the wrong decision of the law.**
3. **That the learned trial Magistrate erred in law and in fact in acquitting the respondent, a**

verdict that was unsafe and unsatisfactory.

4. That the learned trial Magistrate erred in law by not adhering to the laid down procedure under section 169 (1) of the Criminal Procedure Code.

The brief facts giving rise to this appeal may briefly be stated. The complainant, a second-hand clothes dealer, left her business at West Eldoret with **John Gichuru Kangethe (P.W.3)** at 7.30 p.m. on 7th May, 2002 and when they reached Ukwala Supermarket, near Jambo Hotel, she decided to buy bananas from a hawker, **Sarah Wairimu (P.W.2)**. Before she did so, Municipal Counsel Askaris pounced on them. Despite her protests that she was not hawking at the time, the askaris refused to listen to her. She resisted and held on to the vehicle. The respondent, who had been sitting in the driver's cabin, alighted there from and ordered the askaris to put the complainant on to the vehicle. When the complainant continued resisting, the respondent kicked her left hand with his right leg and the askaris then put her on to the vehicle. She sustained a fracture of the radius of the left arm. The victims of the arrest were taken to the police station at Eldoret where the complainant filed her complaint. She was then treated at Huruma Hospital and Moi Teaching & Referral Hospital. She then had a P.3 completed by **Dr. Joseph Imbenzi** of the latter hospital.

The respondent initially wished to reconcile with the complainant and according to the latter, an agreement to that effect was entered into between her and the respondent but the respondent resiled on the same.

The respondent was subsequently arrested and charged as already stated.

The respondent gave sworn testimony. He told the trial court that he was at the material time in charge of the enforcement section of Eldoret Municipal Council. He recalled the date in question while he was on patrol within the town at 8.15 p.m. At that time, he was in the company of Municipal Council Askaries who included **John Busienei (D.W.2)** and **Anthony Alwany (D.W.4)**. They used a Municipal Council Lorry which was being driven by **Luka Kibiwot (D.W.3)**. D.W.3 parked the lorry next to Oloo Street near Ukwala Supermarket and the askaries alighted leaving the respondent and D.W.3 in the lorry. Shortly afterwards, the askaries returned to the lorry with a suspect whom they placed at the back of the lorry. Another suspect was subsequently placed onto the lorry and the lorry was driven to Eldoret Police Station.

At the Police Station, one of the suspects who happened to be the complainant denied hawking and the respondent released her accordingly. According to the respondent, she made no complainant at the time. At a later date, 19th September 2002, the OCS informed the respondent that there was a complaint against him. The respondent, in sum, denied the charge and the agreement to pay hospital charges.

D.W.2, John Busienei, supported the respondent's testimony that during their operation, he (the respondent) remained in the driver's cabin throughout and that upto the time of her release, the complainant did not complain about being assaulted. **D.W.4, Anthony Alwany** gave similar testimony as D.W.2. He in fact told the court that he is the one who arrested the complainant and placed her on the lorry and at no time during the arrest did the respondent alight from the driver's cabin. **Luka Kibiwott, (P.W.3)**, the driver, too testified that the complainant was arrested by **D.W.4, Anthony Alwany**, and further that the respondent throughout the arrest never alighted from the lorry.

The learned Senior Resident Magistrate, in her judgment, identified various contradictions in the testimonies of the prosecution witnesses which contradictions cast doubt on the case presented by the prosecution. She resolved that doubt in favour of the respondent.

I have on my own independent evaluation of the evidence made the following observations. The complainant alleged to have identified the respondent because the scene of the arrest was well lit. She also referred to an agreement executed by the respondent vide which he agreed to meet treatment costs and in fact partially did so. **P.W.2, Sarah Wairimu**, in her evidence in chief fully supported the complainant that the latter was kicked on the hand by the respondent who used his right leg. In cross-

examination however, she admitted that she could not see the complainant from where she was in the lorry but she had witnessed the kicking before getting onto the lorry. That aspect of her testimony was in conflict with her testimony in chief. In her own words:-

“I was put on top of the lorry after being pushed with my load. The other lady who had not even bought the bananas was holding the side of the lorry saying she was not a hawker. The askaries said she would report that day. Shortly, the accused at the dock came from the front seat. He came to check what was happening. He found P.W.1 holding onto the lorry and had refused to enter the lorry.

Accused then kicked P.W.1’s left hand with his right leg. P.W.1 screamed saying she is not a hawker. She then left holding the lorry and the askaries lifted her on top of the lorry”.

The impression given by the above testimony seems to be that P.W.2 went onto the lorry and left the complainant on the ground as she resisted the arrest. The testimony further suggests that the respondent alighted from the driver’s cabin to enquire about the resistance when P.W.2 was already on board. Given the above observation, it is doubtful whether she indeed witnessed the respondent kicking the complainant.

The testimony of P.W.3, **John Gichuru Kangethe**, was categorical that the respondent alighted from the driver’s cabin and kicked the complainant when P.W.2 was already on board. In his own words:-

“as she was being put in the lorry, she held onto the lorry. At that juncture, the hawker was already on top of the lorry. The hawker was pushed on top of the lorry front. One askari came from the front seat. He found the askaries and P.W.1 arguing. He then kicked P.W.1’s left hand with his leg as she held onto the lorry.”

So, it is clear that P.W.2’s testimony was not in consonance with the testimony of P.W.3.

P.W.4, Samwel Kamli, gave evidence regarding the agreement in which the respondent allegedly agreed to cater for the complainant’s treatment. He testified that he was a witness to that agreement. **Jared Kamau Mwangi (P.W.5)**, also witnessed the said agreement.

The record however shows that the agreement in question was never produced. It could therefore not be taken into account by the trial court since it was not part of the evidence on record. Even if the said agreement had been produced, its weight was greatly reduced because it did not indicate the correct names of the respondent and the correct identity card number of the respondent. The testimony of P.W.4 and P.W.5 was therefore of no significance. The prosecution had the duty to produce the agreement if it intended to rely upon the same. It cannot, with all due respect, seek to rely upon the same in this appeal without an application to adduce additional evidence. No such application was made.

As against the case presented by the prosecution at the trial, the respondent in answer thereof, gave his testimony on oath as already stated. He called 3 witnesses whose testimony has already been referred to in outline. The gist of the defence was that the respondent did not, at any time during the arrest, alight from the driver’s cabin and kick the complainant. His testimony was buttressed by that of D.W.2, D.W.3 and D.W.4. They were all cross-examined at length and kept to their positions.

As it is now obvious, it cannot be said that the learned trial Magistrate erred in acquitting the respondent under section 215 of the Criminal Procedure code. I have also not detected any error of law. I have perused the judgment of the learned trial Magistrate and find that she fully complied with the provisions of Section 169(1) of the Criminal Procedure Code and the challenge made by the appellant in that regard is with respect unfounded.

As I conclude this judgment, I remind the appellant that the onus rested on the prosecution to prove, beyond any reasonable doubt, that the respondent did grievous harm to the complainant. The respondent bore no legal responsibility to prove his innocence. I need not also remind the appellant that the

respondent was presumed innocent until and unless the prosecution proved him to be guilty of the offence charged.

In the matter before the learned trial Magistrate, the prosecution, after several adjournments, closed its case before the testimonies of the investigating officer and the arresting officer were received. The learned trial Magistrate noted that omission. She too detected the discrepancies in the case presented by the prosecution just as I have done and concluded, quite properly in my view, that the prosecution had not discharged its burden. It is noteworthy that as the appellant is the Attorney General, his right to appeal against the acquittal of the respondent was limited to matters of law. I regret that despite alleging errors of law in his grounds of appeal, the appellant failed to demonstrate the same.

The upshot is that this appeal has no merit and is dismissed.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF FEBRUARY 2011.

**F. AZANGALALA
JUDGE**

Read in the presence of:

1. **Mr. Chemoiyai** holding brief for **Kalya** for the respondent and
2. **Mr. Kabaka** for the State.

**F. AZANGALALA
JUDGE**