



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL CASE NO. 168 OF 2009

ELIAS MWANGI WACHIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence by Gathuku J., Resident Magistrate, in the Senior Principal Magistrate's Criminal Case No.784 of 2008 delivered on 11th August 2009 at Murang'a)

JUDGMENT

On 28th July 2009, **Mwangi Wachira**, the appellant herein, was convicted for the offence of assault causing bodily harm contrary to *Section 251* of the Penal code, by J. Gathuku, learned Resident Magistrate, vide **Murang'a S.P.M.CR. C. NO. 784 of 2008**. He was then sentenced to serve three (3) years imprisonment. Being dissatisfied, the Appellant preferred this appeal.

On appeal, the Appellant listed the following grounds in his Petition.

- 1. The Learned Magistrate erred in law and principal in convicting the appellant when the whole process was void in that the appellant's constitutional rights had been violated.***
- 2. The Learned Magistrate erred in law and principal in convicting the appellant when there was insufficient evidence to do so.***
- 3. The Learned Magistrate erred in law in not paying sufficient consideration to the appellant's defence.***
- 4. The Learned Magistrate erred in principal when he meted out an excessive custodial sentence.***

Before considering the merits of the appeal, let me set out in brief the case that was before the trial court. The prosecution tendered the evidence of four witnesses. Rhoda Wambui (P.W. 1), the complainant, told the trial court that on 5th May 2008, she left the Appellant's home for her parents' home in Nairobi. At Kiambu bus station, P.W. 1 said, she saw the accused while armed with a panga run towards her. The Complainant claimed the Appellant hit her on the thighs, cheeks, left arm and on the back with the panga on the flat side. P.W.1 claimed that the Appellant was prevented by the area chief P.W. 2 who was passing by from further assaulting her. The Chief summoned P.W. 1 and the Appellant to visit his office the next day. The duo then went back to their matrimonial home. It is said the Appellant went ahead of P.W. 1 where he locked up the house thus forcing P.W. 1 to seek refuge in the home of her neighbour called Mama Waithera. P.W. 1 said she made telephone calls to her mother who made arrangements to visit her. P.W. 1's mother came with police officers. The Complainant booked her

complaint with Muranga Police Station after which she went for examination and treatment at Muranga District Hospital. **Stephen Kairi** (P.W.2), said on 5th August 2008 at about 2.00 p.m. he met the Complainant and the Appellant among other people at Kiambu Centre. P.W. 2 said he saw P.W. 1 bleeding from the mouth while crying. P.W. 2 was told by P.W. 1 that the Appellant had assaulted her. P.W. 2 said he saw the Appellant with a panga. He claimed he told the Appellant to take his wife (P.W.1) to hospital for treatment after which he left for his office. P.W. 2 said he was told by the Appellant that their disagreement with P.W. 1 started when P.W. 1 started wearing long trousers. **P.C. Isaac Tekan** (P.W.3) told the trial court that he was one of the officers who arrested the Appellant to face a charge of assault on 20th May 2008. It would appear the Appellant was held and kept in Police custody for five (5) days. P.W. 3 said that the Police wanted to take him to court on 21st May 2008 but he requested the Police not to do so to enable him reconcile with the Complainant. **Linus Muturi Kabwo** (P.W. 4) produced the P3 form he filled in respect of the Complainant. P.W.4 noted in the P3 form that the Complainant had sustained injuries on the face, chest, humerous and thigh.

The Appellant gave sworn testimony plus the evidence of one independent witness to buttress his case. The Appellant denied assaulting the Complainant. He also denied that he was in possession of a panga. The Appellant alleged that on the fateful day they (i.e. appellant and P.W.1) trekked together to P.W.1's home. It is said P.W.1 left the Appellant at her home and came back to collect some items from the Appellant's house. It is said people were curious when they saw her carrying those items. The Appellant confirmed having met the area chief (P.W.2) who summoned them to his office the next day. The Appellant said that P.W.2 met them when he was busy questioning P.W.1 as to why she had gone to his house leaving him at her parent's home. The Appellant further alleged that the assistant chief (P.W.2) had a grudge against him. Josphat Mwangi (D.W.2) said he saw both the Appellant and P.W.1 at the road. D.W.1 said, the Appellant had no panga and that he did not see him assault his wife.

At the end of the evidence, J. Gathuku, learned Resident Magistrate, came to the conclusion that the evidence of D.W. 2 was not credible. He believed the prosecution's evidence and found that the Complainant (P.W.1) had been assaulted by the Appellant.

On appeal, the Appellant alleged *inter alia* that his constitutional rights were breached in that he was held in Police custody for more than 24 hours before being taken to court. He urged this Court to allow the appeal and acquit him. The State opposed this ground on the basis that the then constitution provided for the Appellant a remedy in form of damages. The record shows that the Appellant was arrested on 20th May 2008 and taken to Court on 26th May 2008. The prosecution do not deny that the Appellant was held in Police custody beyond the period fixed by the Constitution. No good reasons were given to justify the breach. The prosecution simply stated since the Police breached the Appellant's Constitutional rights, the Appellant should pursue the remedy of damages. I agree that the remedy for damages is clearly spelt out but that did not bar the Court from making a finding to the effect that the charge against the Appellant was brought contrary to the Constitution hence it should be declared as null and void. In such a case, the charge would be dismissed and the Appellant acquitted. I am convinced I should do so in the circumstances of this case. The Police blatantly breached the Appellant's constitutional rights hence there was no valid charge which could be sustained by any evidence.

The Appellant has also argued that there was no credible evidence to sustain a conviction. I have carefully re-evaluated the evidence presented by the prosecution in support of the charge. It is clear from the evidence of P.W. 1 and P.W. 2 that the Appellant was in possession of a panga. The medical evidence produced by P.W. 4 corroborated the evidence of assault stated by P.W. 1. In my view that was overwhelming evidence to prove the offence, hence the trial magistrate cannot be faulted.

In the end I will allow the appeal on the basis that the Appellant's constitutional rights were breached. Consequently the conviction is quashed and the sentence set aside. The Appellant is hereby set free forthwith unless lawfully held.

Dated and delivered at Nyeri this 11th day of March 2011.

J. K. SERGON
JUDGE

In open court in the presence of the Appellant and in the presence of Mr. Makura Learned Senior State Counsel.