



No. 2777

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 216 OF 2010

SAMSON OGONGO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an Appeal from the original conviction of sentence of the Principal Magistrate's Court

at Nyamira Hon. J. Macharia in Criminal Case No. 599 of 2007 delivered on 6th October, 2010)

The appellant, **Samson Ogongo** faced three counts before the Senior Principal Magistrate Court at Nyamira. In the first count, he was charged with assault causing actual bodily harm contrary to section 251 of the **Penal Code**. The particulars given were that on 17th May, 2007 at Charachani Sub location in Nyamira District within Nyanza Province, he unlawfully assaulted **Peter Onyancha** thereby occasioning him actual bodily harm.

On the 2nd count, he was charged with malicious damage to property contrary to section 339(1) of the **Penal Code**. The particulars were that on the same day and place, he wilfully and unlawfully destroyed one acre of maize and one hundred and sixty tea bushes of **Peter Onyancha** valued at Ksh.31,430/=.

In the last count, the appellant was charged with forcible detainer contrary to section 91 of the **Penal Code**. The particulars were that between 2nd and 17th days of May, 2007 at Charachani Sub-location in Nyamira District of Nyanza Province being in possession of land parcel number **West Mugirango/Busamaro/422** of **Peter Onyancha** without colour of right held possession of the said land in a manner likely to cause a breach of the peace, or reasonable apprehension of breach of the peace against **Peter Onyancha** who was entitled by Law to the possession of the said land.

The appellant pleaded not guilty to all the counts and the case went to trial. The complainant in all the counts was **Peter Onyancha**. He testified that the appellant was his nephew. On 17th May, 2007, he was on his land with workers when he noticed some structures thereon. It was the appellant who had put them up. He emerged from the structures which was actually a house and without any provocation or saying anything threw stones at the complainant. The stones hit his right leg, right hand, chest, ribs and right hand. He was injured as a consequence. His children thereafter took him to Nyamira District Hospital for treatment. After treatment he proceeded to Nyamira Police Station and reported the incident. He was received by **PC Kipkoech** who issued him with a P3 form. From there he proceeded to Nyamira District Hospital where the P3 form was filled by **Peter Momanyi (PW6)**, a Clinical Officer thereat. He assessed the injuries sustained by the complainant as harm and probable weapons used as blunt. He tendered in evidence the P3 form. The land, **West Mugirango/Busamaro/422** belonged to the complainant's father, **Clement Getate**. Apparently, the complainant had built on a portion of the aforesaid parcel of land given to him by his father. He had planted napier grass, maize and tea bushes. In the course of the scuffle, the appellant cut the tea bushes, the napier grass as well as the maize. The complainant caused the destruction to be photographed. Those photographs were subsequently tendered in evidence by **CPL Daniel Njoka**, the Investigating Officer of the case. In the course of his investigations, he had visited the land and established that there was a building thereon erected by the appellant. He also established that there were tea bushes, maize and napier grass which had been cut. The appellant too had assaulted the complainants by throwing stones at him. He asked and was given the title deed for the land. The land belonged to the complainant's father but was being occupied by the complainant. He conducted a search and confirmed such ownership. He thereafter arrested the appellant through the assistant chief of Charachani sub location and had him charged with the offences. Prior to this, the complainant had caused the damage by the appellant aforesaid to be assessed by **Peter Nyarangi Ondieki, (PW5)** a technical officer with Ministry of Agriculture, Nyamaiya division. In his report dated 22nd May, 2007 he assessed the total damage at Ksh.16,030/=. He produced the report in evidence.

Put on his defence, the appellant elected to give a sworn statement and called one witness. The appellant in his defence denied assaulting the complainant. He claimed that the land belonged to him through his father. He concluded by stating that there existed a grudge between him and the complainant. His witness, **Sarah Moninga** told the court that she did not know why she was in court.

The learned Magistrate having considered and evaluated the evidence adduced as aforesaid found the prosecution case water tight and proved beyond reasonable doubt. Consequently he convicted the appellant for the offence of assault occasioning actual bodily harm and sentenced him to one year imprisonment.

The appellant was aggrieved by the conviction and sentence aforesaid. He therefore appealed to this court on four grounds; that the prosecution case was not proved beyond reasonable doubt, the court placed undue reliance on the prosecution evidence, rejected his defence unfairly and that the sentence imposed was manifestly harsh and excessive.

When the appeal came up for plenary hearing before me on 8th March, 2011, the state conceded to the same. In doing so, **Mr. Mutai**, learned Senior State Counsel submitted that there were several material contradictions by the prosecution witnesses principally, PW1, PW2 and PW3. Those contradictions should have been resolved in favour of the appellant. He also submitted that the trial court did not sufficiently evaluate the defence adduced by the appellant and his witnesses.

In my view, there was a much better ground upon which the state should have conceded to this appeal. Initially, the appellant was arraigned before court on one count of assault causing actual bodily harm. Along the way and on 26th September, 2007 to be precise the initial charge was substituted with another charge in which the appellant faced three counts set out at the commencement of this Judgment. However, when the learned magistrate crafted his Judgment, he proceeded as though the initial

charge sheet had not been substituted. In other words, the judgment was crafted on the basis of the initial charge sheet which had been substituted. To that extent, the judgment is a nullity. It was based on an existent charge sheet. The act of substituting the initial charge sheet with a fresh one meant that the old charge sheet did not exist anymore. It had been done away with. It could not therefore be the basis of any proceedings and subsequent judgment. The proceedings after the substituted charge sheet could only have been on the basis of the new charge sheet and not the earlier one. Yet this is what happened in the circumstances of this case.

I also agree with **Mr. Mutai**, that there were material contradictions in the evidence of PW1, PW2 and PW3 with regard to the events of the day. The complainant stated that having found illegal structures on his land, he went to enquire. Suddenly, the appellant came out of the structure and attacked him without any provocation by stoning him. On his part, PW2 testified that as they were tilling the land, the appellant and his two sons accosted them armed with a pang and jembe. The appellant's wife then shouted that the complainant be killed. The appellant and his sons then attacked them by throwing stones at them. How about PW3. His story was that on the material day, the appellant's wife was tilling the complainant's land. Suddenly she screamed and the appellant and his sons attacked them. He saw the appellant beat the complainant mercilessly. Then there is the evidence of PW4. According to him, on the material day, whilst on his land, he heard screams coming from the complainant's land. Someone was shouting "**maliza Onyancha**". He noted that it was the appellant's wife who was screaming. Shortly thereafter, he saw the complainant pass by. The appellant then unleashed 8 stones and knocked him down.

How about **Peter Momanyi (PW6)**, the clinical officer. According to the history of the incident he was given by the complainant it was that he had been attacked by 8 people with stones.

From all the foregoing, it cannot be denied that the discrepancies and contradictions in the testimonies of these witnesses are telling and material. They point to one thing, that they are all or some of them are lying. They could not have been present at the scene of the alleged crime, observed and appreciated the goings on differently. Given the defence advanced by the appellant, that he had a long standing dispute, with the complainant, those contradictions can only help to buttress that defence. It is not in dispute that the appellant and complainant are related. Infact the appellant is a nephew to the complainant. It is also common ground that there is a land dispute between the two. Considering the foregoing, the trial court should have been wary of the complainant invoking the criminal justice system unnecessarily so as to settle family scores. I am persuaded that the complainant invoked the judicial system malafides for purposes of achieving ulterior objectives. Thus, **Mr. Mutai** was right in conceding to the appeal.

The appeal is allowed and conviction quashed. The sentence imposed is set aside with the consequence that the appellant is set at liberty forthwith unless otherwise lawfully held.

Judgment dated signed and delivered at Kisii this 04th day of May, 2011.

ASIKE-MAKHANDIA

JUDGE