



REPUBLIC OF KENYA.
IN THE HIGH COURT OF KENYA
AT KITALE.
CRIMINAL APPEAL NO. 48 OF 2011.

JAMES LOITALIMA.....
APPELLANT.

VERSUS

REPUBLIC
RESPONDENT.

(Being an appeal from the original conviction and sentence by R.M. Washika – RM. In Criminal Case No. 939 of 2009 delivered on 18th April, 2011 at Kapenguria.)

J U D G M E N T.

1. The appellant, **JAMES LOITALIMA**, was charged with the offence of assault causing actual bodily harm contrary to section 251 of the penal code. The information of the charge stated that on the 19th day of September, 2009 at Chebon sub location in west Pokot district within the Rift Valley Province unlawfully assaulted **PAULO LOREMA** thereby occasioning him actual bodily harm. The appellant pleaded not guilty to the charge and was convicted and sentenced to four (4) years in prison.
2. Being aggrieved by the conviction and sentence, the appellant has appealed, he relied on the following grounds of the appeal.
 1. **THAT**, the trial magistrate erred in law and fact by convicting the appellant on insufficient and contradicting evidence.
 2. **THAT**, the trial magistrate erred in fact and law by disregarding the evidence tendered by the accused.
 3. **THAT**, the learned trial magistrate gave a harsh sentence of 4 years in jail without option of fine.
 4. **THAT**, the trial magistrate erred in law and fact by deciding the case before him against the weight of evidence.
 5. **THAT**, the trial magistrate erred in fact and in law by shifting the burden of proof to the appellant

The appellant set down their grounds of Appeal and also submitted. Mr. Kaosa for the appellant stated that there were contradictions between the injuries and the clinical officer’s report. That what happened to he complainant as as adduced by the witnesses vary. That the sentence was harsh. The state conceded to the appeal on the basis that there were contradictions. That again the parties fought and both the complainant and accused person ought to have been charged with affray and not assault. That the trial court took into contradiction on matters not adduced before court.

The facts of this case are that on the 19/9/2009 the accused took his cows to complainant’s premises. When asked as to why he had done that, that he hit the complainant’s finger. DW2 says he saw

the accused and the complainant fighting.

This is a 1st Appeal court and as a matter of law has the responsibility of appreciating the evidence. The court has a duty to re-appraise the evidence, subject it to exhaustive examination and reach its own findings. The court, however, appreciate that the trial learned magistrate had the advantage of seeing and hearing the witnesses. The court further appreciate that because of that advantage, the trial magistrate is best equipped to assess the credibility of the witnesses and that it is a principle of law that an appellate court should not interfere with those findings by the trial court which are based on the credibility of the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law (see **Republic vs. Oyier [1985] KLR 353.**

This has been restated in the case of **GABRIEL KAMAU NJOROGE vs REPUBLIC (1982 -1988) KAR 134** where the court held that:-

“It is the duty of the first appellate court to remember that parties are entitled to demand of the court of first appeal a decision both on the question of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions bearing in mind always that it has neither seen nor heard the witnesses and make allowance for this neither seen nor heard the witnesses and make allowance for this”.

The issues that need to be determined are whether the rights of the accused person were breached and whether the trial was conducted in accordance with the law. Whether the charge sheet was defective. Is there sufficient evidence to sustain a conviction?

The evidence is riddled with contradictions as to the nature of the injury and how they were inflicted. PW1 testified that he was cut on the head, and ear, or is it that there were a fight as per PW2 's evidence or did he as per PW3's evidence have wounds at the rib and he got kicks see par. 7 of the typed proceedings. The clinical officer PW4 said that the complainant's eye was injured.

PW5 said he had been injured on the cheek, eye and hand.

In his defence the accused stated that he is the one who was beaten up. Or the Hon. Magistrate in her judgment saying the accused slurred and boxed DW1. There is no record that the accused and the complainant had a land dispute. It is not clear as to where the learned magistrate got this information.

This is a clear case where the Hon Trial Magistrate considered facts not placed before her. At page 14 of the typed proceedings and as part of the evidence the trial court stated that the accused slapped and boxed P.W1 for being asked as to why he took the firewood P.W1 said that the accused person hit her on the head. PW2 a prosecution witness say they were fighting. P.W 3 stated that he saw the complainant's eye was swollen.

From P.W2 Julius Lokonyiro an eye witness when he responded to the screams he came out and found the two parties fighting but that the complaint sustained more serious injuries. The fact perse that he sustained more severe injuries did not make the case an assault, this was a clear case of affray and the two parties therefore ought to have been appropriately charged.

The conviction is not safe and it is based intearlia on the evidence not on record, the same is quashed and the appellatant is set free unless otherwise lawfully held.

READ, DATED & SIGNED IN THE OPEN COURT THIS 24TH DAY OF NOVEMBER 2011

S.M MUKETI
JUDGE

