REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL APPEAL 774 OF 2007

PETER KIGUTA MWAURA .....APPELLANT

- AND -

REPUBLIC …….....…….....……RESPONDENT

(An Appeal from the judgment of Senior Resident Magistrate Ms. L. Mutai dated 22nd June, 2007 in Crim. Case No. 1570 of 2006 at Githunguri Law)

JUDGMENT

The appellant was charged with assault causing actual bodily harm contrary to s. 251 of the Penal Code (Cap. 63, Laws of Kenya); the particulars being that he, jointly with another not before the Court, on 17th August, 2006 at Githunguri Township in Kiambu District of Central Province, unlawfully assaulted ***Daniel Mbiiri Mugi*** thereby occasioning him actual bodily harm.

The complainant, ***Daniel Mbiiri Mugi*** (PW1) testified that he was at Githunguri Social Club, on the material date at 10.00 a.m. In PW1's capacity as acting chairman of the club, he took certain files of the club, and handed them over to ***Francis Ng'ang'a Wahuria*** (PW2) who was outside the club premises. When PW1 now returned to the premises, the appellant tripped him, and he fell; and he was thereafter punched, and otherwise assaulted by the appellant and the appellant's friends; he sustained injury on the forehead, the nose, and the knees; and he reported the matter at Githunguri Police Station, and also went to hospital for medical attention.

Njuguna Ndarua (Pw5), the clinical officer who examined the complainant on 28th August, 2006 reported that he found the complainant with a scar on the forehead, on the nose ridge and on the lower nose and lips. The knee too had a healed scar; and the injuries were about one week-and-a-half old. In PW5's assessment, the weapon that caused the said injuries would have been blunt. He classified the degree of injuries as *harm.*

It was the complainant's evidence that he was assaulted by the appellant and another man on the material date, and that he knew those who assaulted him very well. PW1's testimony was corroborated by that of PW2, who said he too was at the *locus in quo* at the material time. After PW1 had handed over the files to PW1 and as PW2 walked away, he heard a commotion in the rear; and he turned, and saw the appellant trip the complainant who fell down; and he saw those who punched and injured the complainant.

The learned Magistrate found that PW2's evidence was clear and unchallenged, and was well corroborated by the evidence of PW3, ***Samuel Richard Kinuthia.*** PW3 said he too was at the *locus in*

quo, and he saw the appellant trip the complainant who fell, before he was punched on the forehead

The appellant claimed to be the legitimate chairman of the club, and that the complainant and others had gone to attack him as he held a meeting of the club.

The learned Magistrate considered all the evidence, and came to the conclusion that there was "clear and cogent" evidence not discredited by the defence, showing not only that there was a physical attack on the complainant as alleged, but also that there was a motive behind the said attack. The learned Magistrate held:

"**I find that even if the complainant did take away the said files, the accused person was not justified [in doing as he did] ... since nobody has any right to [take] the law into his own hands. He should instead have moved the relevant authorities ... for the appropriate remedy.**

"**I find that the prosecution's evidence was very clear and cogent and ... was not discredited by that of the defence. The prosecution did prove that [the] complainant was indeed assaulted and injured.... I declare [the] accused guilty as charged, and I convict him accordingly ....**"

The trial Court treated the appellant herein as a first offender, took into account his mitigation statement, and imposed a fine of Kshs.18,000/= and in default, a prison term of eight months.

In the petition of appeal filed for the appellant by M/s Irungu Mwangi Ng'ang'a T. T. & Co. Advocates on 11th December, 2007 the grounds raised were as follows: that there had been no unequivocal plea of guilty; that there were contradictions in the prosecution evidence; that the judgment had introduced new evidence not in the proceedings; that the trial Court had ignored the evidence of the appellant; that the evidence on record did not support conviction; that the sentence imposed was excessive.

In the submissions, learned counsel ***Mr. Etemesi,*** for the appellant, urged that the prosecution had not proved the ingredients of an assault causing actual bodily harm; that it was the complainant who provoked the material incident, by "running away with the ... files"; that the evidence implicating the appellant was inadequate; that the required standard of proof was not met by the prosecution; that the trial Court failed to take into account the appellant's evidence; that the trial Magistrate gave no reasons for dismissing the appellant's evidence; that the learned Magistrate failed to take into account the appellant's mitigation address.

Learned counsel, ***Ms. Gateru*** for the respondent, contested the appeal, and supported both conviction and sentence. But she submitted that, by virtue of s. 28 of the Penal Code, the default sentence awarded was not in accordance with the law; although the fine of Kshs.18,000/= was "lenient", the maximum term of imprisonment that could be imposed in default was *six months* and not *eight.* Counsel urged that this irregularity in the sentence be rectified.

Ms. Gateru urged that there was sufficient evidence to support the conviction: the appellant's action of tripping the complainant caused the complainant to sustain several injuries ? as was confirmed by the clinical officer (PW5). PW1 had perceived the assault incident occur, and his testimony was corroborated by PW2.

Learned counsel discounted the contention that the complainant had provoked the appellant, and that this is what led to the incident of assault: for "even if the evidence shows that [the complainant] should have stayed away, still, the appellant took the law into his own hands ...."

Ms. Gateru submitted that the defence evidence had been duly considered but found to have no merits. Counsel urged that such contradictions as remained in the record of evidence, was "very minor, and [did] not affect the prosecution case". Thus, counsel urged, the charge had been proved as required; and the appeal had no merits and so ought to be dismissed.

This detailed review of the evidence and the assessment thereof by the trial Court, leaves no doubt that

the complainant was assaulted on the material day, and that the appellant herein was the main player in the conduct of the assault. Hardly surprising is it that, rather than raise any evidence that shows a different story, counsel for the appellant tries to find *justification* for the complainant's tribulations. That cannot be done, within the law relating to assault. To contend, as ***Mr. Etemesi*** did, that the complainant was wrong, by taking away certain documents of the club, and so he deserved to be assaulted, is hardly a *legal argument* at all. When members of the club disagreed among themselves, and with regard to the club documents in question, they only raised a matter that has the makings of *civil claims;* the law would dictate that an aggrieved party should sue and seek injunctions; but for the aggrieved party to deal physical blows upon another person, went beyond the terms of the law, and fell squarely within the notion of criminality.

I hold hat the appellant herein was rightly convicted; and so I dismiss the appeal, and uphold the conviction. I affirm sentence, save that the default term of imprisonment is hereby reduced to six months.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 16th day of February, 2009.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Huka

For the Appellant: Mr. Etemesi

For the Respondent: Ms. Gateru