



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 19 of 2006

FRANCIS MUGAMBI N'CHOKEAPPELLANT

VERSUS

REPUBLICRESPONDENT

*(Appeal from the judgment, conviction and sentence of Hon. G. Oyugi Resident Magistrate Tigania
Criminal Case No. 1434 of 2005)*

- **Criminal Practice and Procedure**
- **Plea – equivocal all ingredients not explained to the accused sentence set aside-**
 - **Language of Court in English/Kiswahili to be clearly indicated**
 - **Evidence – admissible only if credentials first established**

JUDGMENT

The appellant was charged with two offences of assault causing actual bodily harm contrary to section 251 of the Penal Code (CP. 63, Laws of Kenya) an interfering with land demarcated boundary features contrary section 33 (D) and (E) of the land **Demarcation** Act, Cap 284, Laws of Kenya. The Trial Magistrate on the evidence found the Appellant guilty on both counts, and convicted him on the first count and sentenced him to twelve (12) months imprisonment, and three (3) months on second count, and both sentences to run concurrently. Being aggrieved with the conviction and sentences, the appellant has appealed to this court and prays that if his appeal is successful he conviction be quashed and sentences set aside.

There are ten grounds of appeal set out in the appellants Amended petition of Appeal, and these are that:-

- (1) Learned trial magistrate erred in Law and fact in that he failed to consider or sufficiently consider the circumstances under which the offences were committed and father failed to consider what defence was available to the appellant;**
- (2) The learned trail Magistrate erred in law in fact in finding that the appellant had no interest in his father's land as against trespassers;**
- (3) The learned trail magistrate erred in law and fact in that he convicted the appellant on defective charges;**

- (4) **The judgment and conviction of the trial magistrate is against the weight of the evidence;**
- (5) **The learned trial magistrate erred in law and in fact in that he failed to consider the Appellant's mitigation that he was a government employee and that imprisonment would cost him his job;**
- (6) **The remark that the Appellant was being punished for other people's offences show that the learned trial magistrate had a biased mind which affected his sentence;**
- (7) **The sentence of the trial magistrate is harsh and excessive for a first offender;**
- (7A) **The learned trial magistrate erred in law and fact in accepting the P3 as an Exhibit without considering that PW1 who produced was not qualified to do so.**
- (7B) **The learned trial magistrate erred in law and fact in failing to consider that there were material contradictions in the prosecutions case as well as erroneously accepting hearsay evidence;**
- (7C) **The learned trial magistrate erred in law and in fact in failing throughout the proceedings to indicate that the proceedings were conducted in the language of the Court and whether interpretation was done, contrary to the law.**

Retired Mr. Justice Rimita, learned Counsel for the Appellant urged the appeal in clusters of grounds 1 & 2, grounds 4, 7A and 7B, ground 7C and last grounds 5,6 and 7 of the Amended petition of Appeal. Mr. Kimathi, learned State Counsel, opposed the Appeal on behalf of the Republic. Other than ground 3 & 7 (C) this judgment will follow the clusters in same order urged by the Appellant's Counsel.

Grounds 3 and 7 (c) of the petition of Appeal are dealt with first in this judgment **firstly** because the charges are the foundation of prosecution's case. If they are found to be defective law, there is no need consider further grounds of the appeal. **Secondly** ground 7 (c) refers to the language of the court. If the prosecution was conducted in a language which the appellant did not understand or comprehend and have violated appellant's fundamental rights under section 72 of the constitution but whenever a person is charged with a criminal offence, the charges must be explained to him in a language which he understands or comprehends.

Count II of the charge was "**interfering**" with land demarcated boundary features contrary section 33 (D) and (E) of "**the Land Demarcation Act, Cap 284 Laws of Kenya**". The appellant's learned counsel urged that the appellant was convicted on a non-existent law, that there is no Demarcation Act, that Chapter 284, Laws of Kenya is not a Demarcation Act, and that even if the consent of the Attorney General. For those reasons counsel concluded that the charge was a nullity, and the conviction therefore should be quashed, it was unlawful.

In opposition to the submission Mr. Kimathi for he Republic; submitted that even if the charge was defective, it was curable under section 382 of the Criminal procedure Code Cap 75, Laws of Kenya which says –

383. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered an appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, change, proclamation order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code unless the error, omission or, irregularity has occasioned a failure of justice.

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the Court shall have regard to the question whether the objection could and should have been raised an earlier stage in the proceedings.

The issue here is whether the description of the Land Adjudication Act as Land "Demarcation" Act

(Cap 284, Laws of Kenya) occasioned the appellant a failure of justice. Mr. Rimita submitted that it did, while Mr. Kimathi for the Republic submitted that it is curable under above provision of the Criminal Procedure Code. The word “**adjudicate**” means to make a judicial decision – between two or more opposing claims. “**Demacate**” means “**to make or fix a boundary, fix limits**”. Under the Land Adjudication Act, both processes are undertaken, claims are adjudicated upon, and boundaries are fixed or marked – by sisal or euphorbia or other available local material for fixing fences or boundaries.

When a charge is therefore drawn and an expression such “**demarcation**” is used, it refers to the process which is also undertaken under the Land Adjudication Act. It is of course an error to refer the Act as the **Land “Demarcation” Act**, but it is an error which has not caused the appellant any failure of justice, and is thus curable under section 382 of the Criminal procedure code. I would disallow ground 2 of the appeal on the ground.

There was however another submission that were the court to hold that the error did not cause any failure of justice, there was no consent from the attorney General to persecute as is required under section 33 of the Land Adjudication Act, and in absence of such consent he charge was a nullity. Section of the said Act provides-

33. Any person who-

(a) – (b)

(e) contravenes section 8 (1) of the Act shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding six months, or to both such fine and such imprisonment provided that a prosecution for an offence under paragraph (e) of this section shall not be instituted except with the consent of the Attorney General.

Section 8 (1) of the Act requires every member of a committee or board under the Act to declare any direct or indirect interest in land which is before the committee or board (as the case may be), and is present at a meeting of the committee or board at which the determination of the claim is under consideration.

The appellant is not a member of any committee or board under the Act, and was not charged for any offence under section 33 of the Land Adjudication Act. The consent of the attorney General under the proviso to section 33 of the Act is therefore not required. Ground 3 of the Appeal also fails on the basis of this submission.

Ground 7 (c) of the petition of the Appeal was that the trial court failed throughout the proceedings, to indicate the proceedings were conducted in the language of the Court, and whether interpretation was one, contrary to the law.

The test on the question whether or not appellant understood or comprehended the language of the Court in which proceedings were conducted is whether the appellant participated in the proceedings, and there were fact or omission to mention language used does not render the proceedings a nullity. Was there for instance cross-examination by the Appellant. Did the appellant give his defence?

In this case, the appellant cross-examined PII, (the complainant), PWIII (the Act Assistant Chief of Katiati Sub-Location) PWIV (officer from the ministry of lands and Housing who was directing the planting of the boundary), PWV, (a local farmer who was present where the appellant assaulted PWII and PWVI (who actually saw the accused uproot the boundary fence), and even PWVII, police officer to whom the report of the assault was made. Lastly, the Appellant gave an unsworn statement.

In summary, the appellant took full part in the proceedings, and cannot claim to have failed to either understand or comprehend the proceedings. Ground 7 (c) of the appeal therefore fails.

Grounds 1, 2, & 4, 7A & 7B

These grounds are connected and are therefore considered together in the judgment.

Ground 1 – Of the petition of Appeal was that the trial magistrate erred in law and fact in that he failed to consider or sufficiently consider, the circumstances under which the offences were committed and further failed to consider what defence was available to the appellant;

Ground 2 – of the petition of Appeal was that the trial magistrate erred in law and in act in finding that the appellant had no interest in his father's land as against trespassers;

Ground 4 – of the petition of Appeal was that the judgment and conviction of the trial magistrate is against the weight of the guidance.

Ground 7A of the petition of Appeal was that the learned trial magistrate erred in law and in fact in accepting the P3 Form as Exhibit without considering that PW1 who produced it was not qualified to do so,

And Ground 7B of the petition of Appeal was that the learned trial magistrate erred in law and in fact in failing to consider that there were material contradictions in the prosecution case as well as erroneously accepted hearsay evidence.

Mr. Rimita, learned counsel for the appellant urged that had he learned trial magistrate considered the **circumstance** of the case, he might have come to a different conclusion. In his defence, the Appellant gave an unsworn statement, that he did not uproot any fence, and that the evidence of the prosecution was full of contradictions, that P3 Form does not support the prosecution's case, that whereas the complainant says he went to hospital the same day, he was assaulted, the p3 Form says he was sent to Hospital on 29.07.2005, under police escort. Counsel submitted that this is a serious contradiction, it does not give the reference of the Hospital at p.2, or the particulars of the medical details to be filled by the Medical Officer Practitioner who carried out the examination. Section A requires that it to be completed in all examinations. The P3 Form created doubt as to whether it came from the Hospital.

On ground 7 A concerning the evidence of PW1, Mr. Rimita discredited the evidence of PW1 because his qualifications or credentials had not been established, that it was not enough to say he was from Mathene Sub-District Hospital. Counsel submitted that in matters of expert evidence, it was first necessary to establish the credentials or competency of a witness, such as whether one is an expert in matters of firearms as in the case of **GATHERU S/O NJAGWARA VS REGINAM** Criminal (Appeal No. 938 of 1954) where it was held that special skill referred to in section 45 of the Indian Evidence Act (section 52 of the Evidence Act, Cap 80 Laws of Kenya) is not confined to knowledge acquired academically, but includes skill acquired by practical experience.

Reverting therefore to the grounds in issue under this segment of this judgment, commencing with Ground 1 that the trial Magistrate did not consider or sufficiently consider the circumstances under which the offences were committed, and failed to consider what defence was available to the appellant, the circumstances of a case is a question of fact and not law. The question of ownership of land is one of both law and fact with regard to ground 2 of the petition of Appeal.

From the record and the evidence of the prosecution witnesses, and in particular of the complainant (PW11 – One Patrick Mirithi Kithira, who in the company of PWIII (the Assistant Chief Kiati Sub-Location), PWIV, John Bocha Nganga and PWV (Lawrence Kangiria), it is clear that the Appellant assaulted the complainant PWII by holding the scraps of his shirt collar and looking him in the eye, head butted him to the ground and thereafter proceeded to kick him in the rib-cage while he was on the ground. PW11 the complainant was saved from further battering and therefore more severe injuries to his person by the Appellant's father, Stephen Chokera, his brother Ntongai and others from the crowd at the scene.

From the evidence of PWIV, John Bocha Nganga an officer from the Ministry of Lands and Housing, Maua Office, he and his colleague Kenneth Kimeu had gone to the site in response to a complaint by the committee of the local Kalimba Catholic Church and wanted to be shown the boundary between their Plot

No. 1674 and the neighboring Plot No. 1130 belonging to Stephen Chokera, the father of the accused. The two plots were said to be separated by a road which Chokera had encroached upon.

According to the prosecution evidence, the accused demanded the names of all those who were planting the boundary between the two plots, and that the exercise stop forthwith. This was despite the officer and the witnesses identifying themselves and explaining the nature of the exercise they were carrying out. It is clear from the evidence of PWII – V that the appellant without any form of provocation whatsoever from the complainant, PWII, got hold of the complainant, PWII, by the head, and head-butted him to the ground. The Appellant followed the complainant to the ground with kicks to his rib-cage until he was restrained by his own father, Stephen Chokera his brother, Ntongai and others in the crowd.

Mr. Rimita learned Counsel for the appellant submitted that the trial court should have taken into account the circumstances of the case and the appellants defence. The Appellant took umbrage in Section 211 of the Criminal Procedure Code to give, and gave an unsworn statement that Appellant stated that he did not beat the complainant, that he did not uproot an fence and that according to the Clinical Officer' evidence, the complainant was seen some 15 days after the incident. Mr. Rimita also found reliance on section 8 of the Penal Code which absolves any person from criminal responsibility in respect of an offence relating to property if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud. Said Counsel also found succour in the case of **REPUBLIC Vs ISSA NDARAMA & OTHER [1958] E.A 294 at P.296** [Where the court of Appeal for EASTERN Africa opined –

“..... In the defence of his property, a man is not bound to retreat and yield his property to his adversary, to resist an attempt to deprive him thereof”

I have described above, the circumstances of how the offence was committed. I have also set out above the Appellant's defence. In his judgment the trial magistrate found at P 2 thereof, (and p. 15 of the Record of Appeal

“..... That the evidence is overwhelming and the accused's person's mere denial cannot fault that evidence”.

I entirely, with respect, to counsel for the Appellant, agree, with the learned trial Magistrate's summation of the matter. The evidence was overwhelming. The Appellant's father Stephen Chokera, or the appellant's family members had encroached upon the road separating their Plot No. 1130 from that of the Kalimba Catholic Church, Plot No. 1674 – (which was the subject of the same charge – interfering with land demarcation boundary feature, contrary to section 33 (d) and (e) of the Land Adjudication Act (Cap 284 Laws of Kenya) (erroneously referred to as the Land “Demarcation” Act) which error as I have held above did not cause any failure of justice.

The defence is a mere denial by way of an unsworn statement which has no probative value in evidence. I have often wondered why we in Kenya continue to retain the provisions of section 211 of the Criminal procedure Code and allow accused persons to indulge in evidentiary valueless unsworn statements while other progressive justice systems such England have long abolished. In England for instance the only unsworn statement on accused person is allowed to make is in either a personal statement or in mitigation before the court passes sentence upon him.

Counsel sought succour in section 8 of the Penal Code, and the case of the **Republic Vs Issa Ndarama & others (supra)** that a person is not criminally liable for acts or omissions made in defence of property, and may resist all intruders or trespassers.

Those provisions are, and the said case is no avail to the appellant. **Firstly** the land in issue, Plot No. 1130 is said to have belonged to Stephen Thokera the appellant's father. **Secondly**, the said Stephen Chokera was present at the scene when PWIV and his colleague with office maps or sketches (from the office), were re-aligning the road separating the two plots. **Thirdly**, even if the appellant was defending his father's property (of which he, as a son, certainly has an interest) his head-butting and kicking of

PWII on the ground, was without any provocation at all. Neither PWII, nor PWIV was using any force or any threat of force which could be said to have so inflamed the appellant that he had to assault PWII causing him actual bodily harm according to the evidence of Pw1, a clinical officer a Miathene Sub-District Hospital.

Mr. Rimita learned Counsel for the appellant attacked the evidence of PW1, Stephen Guatai Ringera who testified that he treated PWII, the complainant and described his injuries as a swollen upper mouth lip, tender and swelling on the right rib-cage, and

“I treated him after the injury”, and I filled the P3 Form on 1.08.2008”.

The Appellant saw contradictions between PW1,S evidence, and the p3 Form which he testified he filled on 1.08.2005. I see no contradiction at all when the P3 Form is looked at together with the evidence of PW 11 a p.3 of the proceedings (and p.9 of the Record of Appeal,) who testified –

“.....The accused person then came held mo on the head-butted me and I fell down. The accused person then hit me on the right side of the rib cage. Miriti Assistant Chief and others came and held the accused person away. Then I was escorted to Miathene Police Post to report the incident. I was referred to Miathene Sub-district Hospital for treatment. I later on was issued with P3 from which was filled out we finally put up the boundaries on that road by putting up euphorbia plants but the accused person was said to have uprooted it”.

The P3 Form is clear, and is consistent with the evidence of PWII, it was filled later. It was sent to the MOH Miathene Sub-District Hospital on 29th July 2005. it relates to a Report made on 14th July 2005, at 18.30 hrs, that is the date of the assault. It is signed and dated 1st August 2005, and tally’s with the evidence of PW1, that he filled it on 1st August 2005. The only drawback is that it lacks the Medical Officer’s Ref. No. which is mandatory in terms of part II of the Form. Does it render the entire document inadmissible? I think it does, for two reasons.

Firstly, P3 Form is a Police Investigatory document. It is called Kenya Police Form P3. Part 1 is completed by the Police Officer (requesting examination) Part II – is required to be completed by a Medical Officer or practitioner (carrying out examination). Section A of part I is compulsory. It must be completed in all sections. The first entry is a Medical Officer’s Ref. No..... In the absence of such a reference, the subject information filled in has no reference point, and would be filled in by persons who are neither medical officers of health or Medical Officers of Health or Medical Practitioners.

Secondly, the competency or the credentials of PWI were not established prior to his evidence being admitted. The holding by the Court of Appeal for Eastern Africa in **Gatheru s/o Njagwara Vs Reginam** (supra), that the competency of all expert witness should, in all cases be shown before his evidence is properly admissible is still good law.

There was no evidence that PW1 was either a Medical Officer of Health or Medical Practitioner. The P3 Form could not be properly admitted. The evidence of PW1 was therefore inadmissible.

This does not however detract from the evidence of other prosecution witnesses. The purpose of P3 Form is not to prove a particulars offence or like in this case, the assault, but rather the degree of the injury. The assault was established by evidence of the complainant of (PWII) and corroborated by the evidence of PWIII-IV. The p3 Form ascertained the degree of injury as actual bodily harm, and having excluded that part of the evidence, the offence is reduced to common assault under section 250 of the penal code (Cap63, Law of Kenya).Grounds 7 (a) of the petition of the petition of Appeal succeeds.

There is however no basis for sustaining other grounds of the petition of Appeal. I have demonstrated above that the trial magistrate took into account the circumstances of the case, including the appellant’s unsworn statement. I have demonstrated that notwithstanding the law that the appellant has, as a son, an interest in his father’s land, there was no cause for assaulting the complainant (PWII) grounds I and 22 of the petition of Appeal therefore fail, and I so hold.

Ground 4 of the petition of Appeal was that the judgement and conviction of the trial magistrate is against the weight of the evidence.

This is not so at all. I have shown above that the evidence of PWII-V conclusive showed that the appellant assaulted PW1 without any cause. What I have not discussed is the evidence in supported of the court II “Interfering with Land Demarcated Boundary Features Contrary to section 33 (D) and (E) of the Land Adjudication Act (Cap 284, Laws of Kenya). PWII, in the evidences I have already referred to above says –

“We finally put up the boundaries on that road, by putting up euphorbia plants but the accused person was said to have uprooted it”.

That last part – **“but the accused person is said to have uprooted it”** is hearsay” and if it were to stand alone, it would not support the second charge. However PWVI testified that he saw the appellant uproot the euphorbia fence on 30.07.2007 PWVII, No. 65899 P.C. Fedeson Mwangi testified upon receiving a report on 31.07.2005, he went to the scene, and confirmed that damage of the fence and collected euphorbia fence uprooted. He subsequently arrested the appellant and charged him.

Coupled with the uncontradicted evidence of the assault, the evidence is overwhelming, the judgment and conviction by the trial magistrate was in line with, and not against the evidence. So I hold grounds 1, 2, 4, 7A & 7B of the petition of Appeal fail and that leaves grounds 5, 6 and 7C.

Grounds 5, 6 and 7(c)

Ground 7 of the petition of Appeal was that the sentence of the learned trial magistrate is harsh and excessive for a first offender.

Ground 6 was that the appellant was punished for other people’s offences to show that the learned trial magistrate had a biased mind which affected the sentence.

Ground 5 of the petition of Appeal was that the appellant failed to consider the Appellant’s mitigation that he was a government employee and imprisonment would cost him his job.

The appellant was charged with two counts, assault causing actual bodily harm contrary to section 251, of the Penal Code, and interfering with a demarcated boundary contrary to the provisions of section 33 (D) & (E) of the Land Adjudication Act. The punishment for the first count is 5 years maximum. The appellant received 12 months for the first count the punishment for the second count is a fine not exceeding here thousand shilling or to imprisonment for a term of not exceeding six months, or to both such fine and imprisonment. The appellant was sentenced to 3 months for the second count, and both sentences to run concurrently. In the case of *LEBIRINCIN VS REPUBLIC* [1974] E.A. 103, Hancox J. as he then was, held *inter alia* that-

The loss suffered by an accused in losing his employment is a factor which may be taken into account in assessing sentence

In his mitigation the appellant said –

“I work with the government. I pray for leniency”

In this case the trial court had every reason to pass a maximum sentence upon the appellant. Is conduct as a government servant supposed to be civil? He was not. As a government servant he was to show respect to others. He did not. As a government servant he was to show respect to others. He did not. I cannot say the sentence was harsh or excessive. I cannot also, from the point of view of punishment as a deterrent to other would offenders, that the remarks by the trial magistrate were influenced by any form of bias. Ground 5, 6 and 7 therefore fail, and I so hold.

The Appellants entire appeal therefore fails except for the sentence under section 250 for which I find the appellant guilty in the exercise of the power donated to this court under section 354 (3) (a) (ii) the criminal procedure code – and sentence the appellant to one year imprisonment to commence from the date of first conviction.

There shall be orders accordingly.

Dated, delivered and signed this 15th day of May 2009

M. J. ANYARA EMUKULE

(JUDGE)