REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 5 of 2006

LUCY WANGITHI MUGAI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence of the Resident Magistrate's Court at Kangema in Criminal Case No. 66 of 2005 dated 17th January 2006 by G. P. Ngari – RM)

J U D G M E N T

The appellant, Lucy Wangithi Mugai jointly with her son**,** Hiram Njuguna were on 21st February 2005 presented before the Resident Magistrate's Court at Kangema on a charge of assault causing actual bodily harm contrary to section 251 of the Penal Code. It was alleged that on the 27th day of January 2005 at Kiawambogo village in Murang'a District within Central Province jointly and unlawfully assaulted Elizabeth Wanjiru Ndungu thereby occasioning her actual bodily harm. They both pleaded not guilty to the charge and the case was set down for hearing. A total of five witnesses testified for the prosecution.

The prosecution case was that on 27th January 2005, one Elizabeth Wanjiru Ndungu, hereinafter referred to as "*the complainant"* a farmer in Kiawambogo area had gone to Kiriti tea buying centre to deliver her tea leaves. When done she had inadvertently left behind her card at the tea centre and went back for it. Upon rejoining the queue the appellant confronted her claiming that she had pushed her and that is when she started beating her. Her son, the co-accused soon joined the fray and assaulted her as well. The two pulled her to the ground and the appellant punched her on the head. Members of public present intervened and quelled the fight. The complainant reported the incident to P.C. Ayub Kirinya Kiaya (PW4) of Kiawambogo police post who investigated the case and issued her with the P3 form. She was later treated at Kihoya dispensary and thereafter at Kangema health centre where the P3 form was filled by a clinical officer, Paul Gathogo (PW5). He assessed the degree of injury sustained by the complainant as harm. Later the appellant and her son were arrested and charged.

At the conclusion of the prosecution case, the learned magistrate acquitted the appellant's son for want of evidence. However the appellant was put on her defence. She elected to give a sworn statement of defence. She stated that she was pushed from behind and fell on a sack full of tea leaves and on standing up she saw the complainant who slapped her after she asked her why she had pushed her. That she held her and there was a struggle and they all fell on the ground and members of public intervened. Her son, initially co-accused also testified in her defence and his testimony supported her evidence aforesaid.

Having carefully considered and evaluated the prosecution as well as defence case, the learned magistrate found favour with the prosecution. Accordingly the appellant was convicted as charged and thereafter sentenced to a fine of Kshs.7,000/= in default 3 months imprisonment.

Aggrieved by the conviction and sentence, the appellant lodged the instant appeal. She faulted her conviction and sentence on the following grounds that:-

"1. The learned Resident Magistrate erred in finding that the evidence of P.W.1 and 2 supported the evidence of the complainant (P.W.1) when it is clear from the recorded (sic) that both of them said they witnessed a fight between the appellant and the complainant; it was therefore open to the court and incumbent upon it to find that the prosecution had not proved the offence of assault against the appellant.

2. The learned Resident Magistrate erred in ruling that the evidence of D.W.2 could not be relied upon without giving any reason whatsoever for making that statement; to this extent the learned Resident Magistrate exhibited bias against the defence as his finding is not supported by anything on the record.

3. The learned Resident Magistrate erred in placing an unwarranted, unfair and intolerable burden of proof on the appellant by:-

(a) Faulting the appellant for not providing a motive for the complainant's attack upon her while not placing a similar burden upon he prosecution to lay a motive for he appellant's alleged attack on the complainant;

(b) Faulting the appellant for not calling what the court described as an independent witness when the evidence of PW4 supported that of the appellant.

(c) Placing a requirement upon the appellant to prove that she suffered injuries or sought remedy so as to prove that she was attacked by the complainant.

(d) Disbelieving the appellant's evidence merely because she did not sustain any serious injuries or get her clothes torn while the record shows that she fell on sacks of green tea which were unlikely to cause her any serious injuries or tear her clothes.

4. The evidence of the complainant (P.W.1) was uncorroborated and this place (sic) it in no better status than that of the appellant and the benefit of the doubt should have been given to the appellant.

5. The judgment is not in conformity with the evidence on record.

6. The sentence is harsh and unmerited."

When the appeal came up for hearing, the appellant, now represented by Mr. Gichuki, learned counsel submitted that the evidence of P.W.2 and P.W.3 was contradictory, that the trial court was not meticulous with the assessment of evidence and in any event the court exhibited bias towards the appellant. That the appellant's defence was rejected without reasons being assigned. Counsel further submitted that the court shifted the burden of proof to the appellant as the court required the defence evidence to be corroborated. In conclusion, counsel submitted that the evidence did not support the charge.

Mr. Makura, learned Senior State Counsel opposed the appeal. He submitted that the evidence on record was sufficient and well corroborated. There was no bias at all nor the shifting of the burden of proof. The learned magistrate did not require of the appellant to seek corroboration of her evidence. Finally counsel submitted that motive was irrelevant and immaterial.

This court as a first appellate court has a duty cast on it to re-appraise the evidence and come to its independent finding. In doing so it has to appreciate that it did not have the advantage enjoyed by the trial court of seeing and hearing the witnesses and has to make due allowance for that – Soki v/s Republic (2004) 2 KLR 21 and Kimeu v/s Republic (2002) 1 KLR 756.

As correctly pointed out by the learned magistrate, it is common ground that the complainant was assaulted on the material day. The evidence of the clinical officer confirms that fact. However, what is in dispute are the circumstances under which she was assaulted and who did it. The incident happened in broad daylight so that the issue of mistaken identity does arise. The complainant fingered the appellant as the person who assaulted her. So were her witnesses, Jane Wangari (PW2) and John Mugo (PW3). All these witnesses knew the appellant very well. The appellant herself too admitted having been involved in a skirmish with the complainant. So that the issue of a fight between the appellant and complainant as the appellant would prefer to refer to it, is not in dispute. However, for the complainant, the appellant assaulted her pure and simple. I tend to agree with the complainant's version of events on that day going by the evidence on record.

The circumstances leading to the assault are that when the complainant rejoined the que so that she could collect her card, she may have pushed the appellant as is a normal occurrence where there are long ques. Apparently, the appellant was not amused by the complainant's action and confronted her. In her own testimony the appellant stated

"…. She was the first to deliver her tea leaves and she took her card and at the time I was pushed from behind and I fell on the sacs (sic) full of tea leaves. I woke up and looked behind. I saw the complainant and asked her why she had pushed her and we struggled and we fell. We did not talk at the time and members of the public intervened…."

find this testimony unconvincing, however how could the complainant have pushed her when immediately before that the appellant had seen the complainant in another que going by her own testimony. And why should the complainant slap her without any provocation and or any apparent reason. I think that the appellant's defence was wholly unbelievable and the learned magistrate was therefore right to disbelieve it. There is no evidence of any prior grudge between the two that would have been the catalyst for the complainant to fight with the appellant. Much as the appellant mentioned of a dispute involving the digging of "a foundation for a home and put the soil to our land…." as a basis for a possible grudge between the two, it is nonetheless not clear as to who had dug the foundation for a home and who had put the soil on their land.

Under cross-examination on the issue, the complainant categorically stated that she had never had a case with the appellant in the past nor quarrelled with her husband. In any event there is no evidence of any grudge between the appellant and the other witnesses who testified in favour of the complainant and who were witnesses to the assault that would perhaps persuaded them to testify falsely against her.

In my view the learned magistrate cannot be faulted and or impugned over the decision to convict the appellant, going by the evidence on record.

However it was unfortunate that in arriving at the decision, the learned magistrate misdirected himself here and there. For instance it was not for the appellant to provide the motive as to why she thought that the complainant pushed her. Motive is irrelevant in criminal cases. Secondly, it was not necessary that following the encounter the appellant should have sought some sort of redress elsewhere and finally it was not upon the appellant to avail independent witnesses to corroborate her testimony. In my view these misdirections were not as grave as to cloud the learned magistrate's final decision. They did not go to the root of the prosecution case. On my part, having carefully re-appraised the evidence, I think that the appellant's conviction was inevitable.

In the result I have come to the conclusion that this appeal lacks merit and is accordingly dismissed.

Dated and delivered at Nyeri this 31st day of July 2009

M. S. A. MAKHANDIA

JUDGE