REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 187 of 2008

SAMUEL THUNGU MUTHAMI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence of the Senior Resident Magistrate's Court at

Karatina in Criminal Case No. 116'B' of 2007 dated 1st March 2008 by S. N. Mbungi – SRM)

J U D G M E N T

The appellant was charged before the Senior Resident Magistrate's Court, Kangema with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the charge were that on the 29th day of May, 2007 at Kayu village in Murang'a District within Central Province the accused unlawfully assaulted Duncan Mwangi Muthami thereby occasioning him actual bodily harm. The appellant pleaded not guilty to the charge. Thereafter the case proceeded to trial with the prosecution calling a total of 3 witnesses.

Briefly stated, the prosecution case was that the complainant (PW1) on the material day noticed that his tree branches had been cut and suspected the appellant who is his brother and immediate neighbour. He went and asked the appellant why he had done so and the appellant's response was that he would mill him like flour. He then unleashed on him a barrage of fists to the mouth and left cheek. In the process some of his teeth loosened. The appellant, when done ran back to his land whilst calling the complainant a dog. The complainant thereafter reported the incident to P.C. Prancras Munyao (PW2) of Rwathia Police Patrol base who duly issued him with a P3 form that was later filled by a clinical officer (PW3) at Kangema health centre. PW3 formed an opinion upon examining the complainant that the degree of injury was harm and that a blunt object was used to inflict the same. The appellant was then arrested and charged with the offence.

Placed on his defence the appellant denied having committed the offence. He dismissed the charge as a frame up due to family differences over land. His witness, the wife testified along the same lines as the appellant.

In a short and terse judgment consisting of one paragraph of 8 sentences only, the learned magistrate found the case against the appellant proved. He thereafter convicted and sentenced him to a fine of Kshs.20,000/= in default to serve 6 months imprisonment. The appellant was aggrieved by the conviction and sentence. Hence he lodged the instant appeal through Messrs Waiganjo Gichuki & Co. Advocates. He faulted the learned magistrate on the following grounds that:-

"1. The learned Senior Resident Magistrate erred in relying on the evidence of the prosecution witnesses to convict the appellant while the evidence contained numerous material contradictions which were fatal to the prosecution case.

2. The learned Senior Resident Magistrate erred in misinterpreting the evidence of P.W.2, the police officer, who never testified that he observed any fresh injuries on the complainant at the time of reporting the alleged assault.

3. The learned Senior Resident Magistrate erred in finding that the complainant had sustained any injuries when the evidence in support of that allegation was shaky and inadequate.

4. The learned Senior Resident Magistrate erred in finding that the police officer and the medical evidence supported the evidence of the complainant and his observation that the complainant was an honest person is not based on any evidence or any other entry in the record.

5. The learned Senior Resident Magistrate erred in not adequately addressing or analysing the evidence of the appellant and thus denied justice to the appellant.

6. The reasons given by the court for disregarding the evidence of the defence witness are neither adequate nor lawful.

7. The judgment of the court is against the weight of all the evidence on record.

8. The sentence is harsh and unmerited.

When the appeal came up for hearing, Mr. Gichuki, learned counsel for the appellant submitted that the trial magistrate did not analyse the evidence tendered, the evidence tendered was in any event contradictory and finally that in rejecting the defence, the learned magistrate did not give any reasons.

The appeal was opposed. Mr. Makura, learned Senior State Counsel, submitted that the evidence on record was overwhelming against the appellant. The evidence of PW1 was corroborated by the evidence of the clinical officer. There was no shifting of the burden of proof and that the evidence was properly evaluated by the learned magistrate. The trial magistrate found PW1 a credible witness. Finally counsel submitted that there were no inconsistencies in the testimony of the prosecution witnesses and even if there were, they were not fatal. In fact they were curable courtesy of Section 382 of the criminal procedure code.

This is a first appeal and this court has a duty to reconsider the evidence which was adduced before the trial court, evaluate it and draw its own conclusions giving due allowance of course to the fact that it has neither seen nor heard the witnesses. See Ogeto v/s Republic (2004) 2 KLR 14, Okeno v/s Republic (1972) E.A. 32 and Ngui v/s Republic (1984) KLR 729. Further the court of appeal in the case of Mutua Mutisya v/s Republic, criminal appeal number 43 of 2006 (UR) observed that "..... Nevertheless a court of appeal will not normally interfere with findings of fact by the trial court, unless they are based on no evidence or misapprehension of the evidence, or the trial judge is shown demonstrably to have acted on wrong principles in reaching the decision." I will bear the foregoing injunctions as I consider this appeal.

It is common ground that the appellant and the complainant are brothers. It is also common ground that they are neighbours and have had disputes over land. There is therefore bad blood between them. It is also common ground that it is the complainant who confronted the appellant seeking to know why he had allegedly cut branches of his trees. However there is no evidence direct or otherwise that it was indeed the Appellant who had cut the tree branches. The complainant himself confirmed in evidence that he merely suspected without any hard evidence that it was the appellant who might have cut the tree branches. This being the background, it behoved the learned magistrate to approach the evidence tendered by the prosecution with abundant caution and circumspection. The possibility of the criminal process being invoked unfairly so as to settle family scores looms large and the learned magistrate ought to have been on the look out. The trial record does not give me that comfort however.

To begin with the judgment was a mere one paragraph of 8 lines. A judgment in terms of section 169 of the criminal procedure code is required to contain the point or points for determination, the decision thereon and the reasons for the decisions. These are mandatory statutory requirements. The learned magistrate's judgment fell far too short of the above requirements. The learned magistrate never evaluated nor appraised the evidence tendered. He never framed the issues in the case, his decision on the same and reasons for such decision. The judgment to say the least was pedestrian and left a lot to be desired. The learned magistrate was contend with casually saying "..... I watched the complainant testify. He struck me as a honest person..." In ordinary circumstances, an appellate court would not interfere with the findings of the trial court on the credibility of witnesses. However having carefully considered the evidence of the complainant, I doubt whether the learned magistrates was right in showering him with such praise. That assessment in my view is not borne out by the evidence on record. His evidence was to say the least contradictory. As correctly put in the case of Ndungu Kimanyi v/s Republic (1979) KLR, 282 "..... a witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of a doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence....." This exactly is the impression I have formed of the complainant going by the evidence on record contrary to the finding of the learned magistrate.

The appellant gave a sworn statement of defence and called a witness to boot. However the judgment of the court is silent on the issue. It is not apparent from the record whether the learned magistrate considered the same. It is not even apparent whether the same was rejected. It is a mandatory requirement and of paramount importance that a defence advanced by an accused person has to be considered and evaluated. If it is rejected, the trial court must give reasons for the rejection. This again did not happen in the circumstances of this case contrary to the submissions of the learned state counsel.

For all the foregoing reasons I am satisfied that the appeal has merit. Accordingly it is allowed, conviction quashed and sentence imposed set aside. The appellant, if he paid the fine imposed then, the same should be refunded to him forthwith.

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

M. S. A. MAKHANDIA

JUDGE