



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Criminal Appeal 73 of 2006

WAKHANU NYONGESA JOCKLAIRE.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Wakhanu Nyongesa Jocklaire was jointly convicted with another not before the court of two offences by a Kimilili Court and placed on probation for a period of two years. Count 1 was of assault contrary to section 251 of the Penal Code and count III was of creating disturbance contrary to section 95 (1) of the Penal Code. Both accused were acquitted of count II which was the offence of malicious damage to property contrary to section 339 of the Penal Code.

The Appellant has now appealed against conviction and sentence. Mrs Chungu represented the Appellant and took the court through the grounds of appeal. Firstly, it was submitted that the evidence of the prosecution was full of gaps, contradictory and insufficient to convict. The trial magistrate was biased and did not consider the defence of the accused. Finally, that the sentence was excessive.

The defence explained that there was a scuffle at the material time after the complainant being the head teacher differed with parents during a meeting in school. The witnesses did not see the accused assaulting PW1. Some gave names of other people as having assaulted the accused. Other witnesses said they saw the head teacher fighting with a parent.

The state opposed the appeal by Mr. Onderi, the Senior Principal State Counsel. A scuffle broke out during a parents meeting which was attended by about 80 parents. Some parents left before the scuffle. Other parents forced the head teacher to write and sign a statement. PW2 sat under a tree and later hid in a classroom. From the two places she saw what was happening. She saw PW3 the Deputy Head Teacher escorting PW1 from the scene. The evidence of PW2 and PW3 is not contradictory. PW4 the Clinical Officer confirmed the

injuries on PW1 and the Appellant admitted in his defence that there was a fight.

PW1 said that when the scuffle began, the Appellant and his co-accused in the trial court got hold of him as he attempted to leave the chaotic meeting. Documents were snatched from him and he was felled down by the two accused. He was beaten up. When he rose from the ground, Wafula was one of the people beating him. At that juncture, he saw a teacher Margaret Onyango who had come to his rescue being chased away by the Appellant. He was hit on the back of the neck and fell down unconscious.

It is clear from this piece of evidence that the Appellant and the 2nd accused got hold of PW1 and felled him down. What followed was assault by several people. It was later that PW2 Margaret Onyango came to rescue PW1 and was chased away by the Appellant. I see no contradiction here. The felling down was the first part of the assault and the Appellant was seen by PW1. It was later on that PW2 came and was chased away.

PW2 saw the scuffle when it started. She saw the Appellant, one Tom and Dan Wafula among the first people to assault PW1. She was accused of spoiling the head teacher and this is the time she ran away to hide in a classroom. From the class room she could see PW1 in a torn trouser being escorted by PW3 from the scene. There is no contradiction in this evidence.

PW3 was attracted by noise at the meeting place. He was under a tree. He was in his office and went to the scene where he found parents gone wild and shouting at the head teacher. He saw the head teacher fighting with a parent and documents being thrown all over.

The evidence shows that PW3 found the scuffle going on. He may have found PW1 already felled down and woken up. The fact that PW3 said he saw PW1 fighting with a parent does not mean that this contradicts the evidence of PW1 and PW2. He missed the first part of the scuffle and the assault. PW1 explained that after he was felled down by the appellant, he was beaten up while on the ground. When he woke up, it was Wafula beating him at that time. It appears PW3 came in at this stage.

PW4 confirmed that the complainant suffered injuries on the back, neck, left cheek, lower hip and chest which were only two days old at the time of the examination caused by a blunt object.

The evidence of assault on PW1 by the appellant and others was by PW1 and PW2. They saw the Appellant and others whose names are mentioned assaulted PW1 the complainant. PW1 explained how he was assaulted stage by stage. PW2 corroborated this evidence. PW3 came in later and testified on what he saw at that time. Medical evidence showed that the injuries were consistent with the assault.

The Appellant denied the offence. He said he was present but it was one Dan Wasike who was fighting with the head master. The Appellant only went there to assist pick the files from the ground

His witness DW3 said it was Dan Wafula who was fighting with the headmaster. The two were separated by PW3. The magistrate found out that the appellant and Tom Wafula initiated the assault on PW1. Both held him and he fell on the ground. While on the ground, he was beaten up by many people and at that juncture, he could not tell who was who. When he stood up again, the assault continued with Dan Wafula on the lead. The court found that the appellant was positively identified by PW1 and PW2. It was between 4.00 to 5.00 p.m in broad daylight. The magistrate rejected the defence after considering what the appellant and DW3 said. It is not true that the defence of the Appellant was not considered.

I find that the trial court correctly convicted the two accused persons. The evidence proved all the ingredients of the two offences and there was no material contradiction capable of shaking that evidence.

Section 251 of the Penal Code provides for a maximum sentence of five (5) years imprisonment while section 95 (1) provides for a maximum sentence of six (6) months imprisonment. The Appellant was placed on probation for two (2) years. This was indeed a very lenient sentence given the circumstances of the case. The sentence was therefore not excessive.

I therefore find that this appeal has no merit and must fail. I hereby uphold the conviction and sentence therein.

F. N. MUCHEMI
JUDGE

Dated, Delivered and Signed at Bungoma

This 24th day of November, 2009 in the presence of the accused , Mr. Watanga for Mrs Chungu and Mr. Onderi for the state counsel.