



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 634 of 2006

GEOFFREY MBURU CHEGEAPPELLANT

VERSUS

GEOFFREY MBURU CHEGERESPONDENT

(From the original conviction and sentence in Criminal Case No. 293 of 2006 of the Senior Resident Magistrate's Court at Limuru M.W. Mwai – SRM)

JUDGMENT

GEOFFREY MBURU CHEGE, the appellant, was charged before the subordinate court with assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of charge were that on 13th April 2005 at Rukuma Village in Kiambu District within Central Province unlawfully assaulted one FRANCIS WATHARI MBUGUA thereby occasioning him actual bodily harm. He was also charged with a second count (count 2) of stealing contrary to section 275 of the Penal Code. The particulars of charge were that on 14th April 2005 at Rukuma village in Kiambu District within Central Province, stole one bicycle make Avon valued at Kshs.5000/= and cash value Kshs.2500/= from FRANCIS WATHARI MBUGUA all to the total value of Kshs.7,500/= being the property fo JOSEPH KAMAU KANYIRI.

After a full trial, he was acquitted of the offence of stealing. The appellant was however convicted on the offence of assault and sentenced to a fine of Kshs.5000/= and in default 4 months imprisonment. Being dissatisfied with the decision of the trial court, the appellant has appealed to this court; through his counsel R.W. Muhuhu advocate.

At the hearing of the appeal, Mrs. Muhuhu, learned counsel for the appellant submitted that the magistrate erred in convicting the appellant, as the evidence on record did not support the charge. Counsel submitted that PW1's evidence was that he was assaulted on 13/4/2005 and that he went to hospital the same day. On the other hand, PW2 testified that PW1 reported that he was assaulted on 14/4/2005 and, as there were no physical injuries, they did not believe in him. In cross-examination, PW2 clarified that the complainant never made a report that he was assaulted. The magistrate went ahead to contradict herself by finding that PW3 heard screams contrary to the evidence on record.

Counsel further submitted that the magistrate erred in finding that the doctor, PW5, saw the complainant on the same day of alleged assault, while the evidence of the doctor was that he saw the complainant 5 days afterwards. Counsel also argued that the magistrate did not consider the defence, which was an error. Counsel contended that the court should have considered the disputes raised in the appellant's defence, and emphasized that there was a civil case between them pending in court since 2005, before this case was brought to court in 2006.

Counsel lastly, argued that the language of the court was not recorded, which was a fatal error.

The learned State Counsel, Mr. Makura, opposed the appeal. Counsel submitted that the evidence on record proved the charge on which the appellant was convicted. The evidence of PW2 was clear that the complainant worked for the appellant. PW3 heard the screams and went and found out what was happening. The doctor PW5, confirmed in the P3 form, that the complainant suffered a painful neck and head.

On language, counsel submitted that on the date of taking plea, the language was not stated. However, the appellant pleaded not guilty. Therefore there was no prejudice visited on the appellant, and the proceedings did not become anullity.

On the defence, counsel contended that it was duly considered by the magistrate and rejected. Lastly, counsel argued that the magistrate considered the mitigation and consequently only fined the appellant.

I have considered the evidence on record, and the submissions of the Counsel for the appellant, as well as the submissions of the State Counsel. Several arguments have been put across before me in the appeal.

I must state at the outset that in a criminal case, the burden is always on the prosecution to prove the case against an accused person beyond any reasonable doubt. That burden does not shift to the accused person – see MUIRURI –vs- REPUBLIC (1983) KLR 205.

The appellant herein was convicted of assault. Other than the statement of the complainant, there is no evidence to support that assault. In fact, the evidence that is on record shows that the complainant owed the appellant some Kshs.3800/= which the appellant was pursuing for payment. The complainant, PW1, agreed to the allegation of debt. The person who heard screams on 14/4/2004, who was PW3 WILLY NJOROGI KARUGI, testified that he only saw the appellant trying to take a bicycle. He neither saw the appellant assaulting the complainant, nor did the complainant inform him of any assault. The doctor's evidence (PW5 DR. NGURE), was hearsay evidence as he neither examined nor treated the appellant, nor did he fill the PW3 form, which was said by this witness to have been filled by DR. NDAKARU. There was no evidence to support the allegation of assault. No wonder, the magistrate stated thus in her judgment –

“It seems to me that the accused was incensed by complainant's behaviour and conduct and for not being truthful, that he may have got annoyed and acted by beating up the complainant who then ran off to Kanyiri's place where he found PW2 and informed him what had happened”.

With profound respect to the learned magistrate, the above was a misdirection. It was for the prosecution to prove beyond any reasonable doubt that the appellant assaulted the complainant. They did not do so. It was not for the court to assume what might have happened, but to make findings on the actual evidence on record. The learned magistrate erred in making inferences that were not based on the evidence on record. On that ground alone, the appeal will succeed.

Secondly, the complainant (PW1), and PW2 clearly stated that there were other people who presumably witnessed the assault. These other people, in my view, were crucial witnesses. None of them was called to testify and no reason was given for the failure to call those crucial witnesses. In **BUKENYA –vs- UGANDA [1972] EA547** – the court of Appeal for East Africa held that such failure to call material crucial witnesses can be justification for a Court to make an adverse inference that the evidence of those witnesses would be adverse to the prosecution case. I make that adverse inference in this case. On that ground also, the appeal will succeed.

For the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that if the appellant is in custody, he be set at liberty unless otherwise lawfully held. If he paid the fine, the same should be refunded to him.

Dated and delivered at Nairobi this 22nd April 2008.

George Dulu

Judge

In the presence of –

Mrs. Muhuhu for appellant - absent

Appellant present

Mr. Makura for State - absent

Mwangi - court clerk