



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 498 of 2005

THOMAS KHISA WEKESA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original judgment in the Senior Resident magistrates Court Criminal

Case No. 2935 of 2004 – M.W. Mwai, SRM)

JUDGMENT

THOMAS KHISA WEKESA the appellant was charged in the subordinate court with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that –

“On the 7th day of November 2004 at Kimende village in Kiambu Distirct within Central Province unlawfully assaulted FRANCIS KOIGI WAMWERE thereby accessioning him actual bodily harm”.

After a full trial, he was convicted of the offence and sentenced to pay a fine of Kshs.6,000/= and in default to serve four (4) months imprisonment. Being aggrieved by the decision of the learned trial magistrate, he has appealed to this court through his counsel R.W Muhuhu & Company Advocates, on the following grounds, that –

1. The learned Senior Resident Magistrate erred in law and in fact in convicting the appellant in doubtful evidence.
2. The learned Senior Resident Magistrate erred in law and in fact in holding that the doctor did examine the complainant while the evidence is to the contrary.
3. The learned Senior Resident Magistrate erred in law and in fact in holding that force was used while no evidence of such was adduced.
4. The learned Senior Resident Magistrate erred in law and in fact in basing her judgment on a possibility that a porcupine spike reached the complainant through his jacket and sweater instead of relying on the evidence on record.
5. The learned Senior Resident Magistrate erred in law and in fact in introducing her theories to the evidence in finding the appellant guilty.

6. The learned Senior Resident Magistrate erred in law and in fact in convicting the appellant despite observing that he did not anticipate an injury.

7. The learned Senior Resident Magistrate erred in law and in fact in finding the appellant guilty despite doubts created in the evidence and in judgment.

At the hearing of the appeal Mrs. Muhuhu appeared for the appellant while Mrs. Obuo appeared for State.

Learned counsel for the appellant, Mrs. Muhuhu, submitted that the learned trial magistrate erred in making a finding that the doctor examined the complainant while the evidence on record was that the doctor who filled the P3 form merely relied on the treatment card. Therefore in her view, the doctor could not testify as to injuries suffered. In addition, there was no evidence on force used. The learned trial magistrate, in finding that force was used was imposing theories that were not supported by the evidence. This, in counsel's view was a fatal error. She sought to rely on the case of **RANGE – vs – REPUBLIC (2003) KLR 692**. The same issue of introducing theories not covered by evidence related to the learned trial magistrate's findings that a porcupine spike penetrated the jacket and sweater and injured the complainant.

She further submitted that the learned trial magistrate should not have convicted the appellant after making a finding that the appellant might not have anticipated that his action would cause injury.

She finally submitted that the learned trial magistrate was actually in doubt on the culpability of the appellant. She should not have convicted the appellant because of the doubts that were clearly expressed by the court.

Mrs. Obuo, learned State Counsel opposed the appeal and supported both conviction and sentence. She submitted that there was overwhelming evidence from the complainant that she was pricked on the back by the appellant. The evidence of PW1 was corroborated by that of PW3 and PW4, both of whom witnessed the incident. Also the doctor PW1 produced the P3 form in which the degree of injury was classified as harm. In her view, the evidence against the appellant was direct evidence, and there was no possibility of mistaken identity. Identification was positive.

She submitted further that the learned trial magistrate neither absolved the appellant nor did she bring into the case theories that were not supported by evidence. She therefore submitted that the case of **RANGE – vs – REPUBLIC** cited by counsel for the appellant was not applicable. The issue in our present case was whether or not the appellant injured the complainant.

This being a first appeal, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences, taking into account that I did not have the opportunity of seeing the witnesses testify and giving an allowance for the same – see **OKENO – vs – REPUBLIC [1972] EA 32**.

I have evaluated the evidence on record. The fact of the case are that on 7th November 2005, three young boys who were brothers FRANCIS KOIGI WAMWERE (PW2), the complainant, SAMUEL NJOROGI (PW3), and STEPHEN NYUTU (PW4) were sent by their mother GRACE WANGUI (PW5) to collect three cows at 5.00 p.m. It was about 5.00 p.m. and the cows had gone to the protected forest of Kimende in Lari. When the three boys had collected the cows, they were met by forest officers, who took the cows and detained them at their station. One of the boys went to report to their mother, who told her to go for the other two boys. When the boys came back home, one of them was injured on the lower back. It is the prosecution case that the boy (PW2) was pricked with a porcupine spike by the appellant. The matter was reported to the police. A P3 form was later filled by PW1 doctor NDAKARU, who classified the injury as "harm".

In his defence the appellant gave a sworn statement. He also called one defence witness. It was his defence that indeed he met the boys with the cows. The cows were grazing in the prohibited forest area. He therefore detained the cows. One of the boys tried to resist the retention of the cows. However, he neither beat nor injured any of the boys. He denied using a porcupine prick to injure the complainant.

Both counsel for the appellant and learned State Counsel addressed me. The major complaint of the appellant is that he was convicted on doubtful evidence.

I observe that the evidence of the eye witnesses is evidence of children of tender years. None of them was sworn. In **ONSERO – vs – REPUBLIC [1985] KLR 618** at page 620, the Court of Appeal stated thus with respect to such evidence –

“The appellant could only be convicted on Samuel’s evidence if corroborated by material evidence in support thereof implicating him (Section 124, Evidence Act)”.

Evidence that requires corroboration cannot itself be corroboration. Therefore the evidence of the three boys of tender years cannot provide corroboration to each other.

From the evidence of PW5 when her son NJOROGE (PW3) went and reported to her that the cows had been taken he did not mention about the complainant having been injured. Though a porcupine spike was produced in court there was no evidence tendered that it was taken to the Government Analyst to confirm whether it had any blood stains. The doctor (PW1) was not asked whether the porcupine spike that was produced in court would have caused the type of injury complained of especially, if one was wearing a shirt and a sweater. In my view, the evidence on record falls far short of proof that the injury suffered by the complainant was caused by appellant using the porcupine spike as alleged.

The second complaint by the appellant in that the learned trial magistrate erred by introducing theories that were not canvassed in evidence. At page 4 of the judgment the learned trial magistrate stated –

“It was argued that the porcupine spike was light and could easily have been blown off by the wind and was unlikely to cause such an injury. However, we are told that the accused was at close range and if force was used, then there is a possibility that it would indeed have reached the boy”.

PW2 stated that the appellant was about 1 meter from him when he threw the porcupine spike. There is no evidence of force used on PW2. In fact PW2 said that the appellant did not hold him. This reasoning of the learned trial magistrate on force used is not borne by the evidence. In **OKETH OKALE AND ANOTHER – vs – REPUBLIC [1965] EA 555** Crabbe, Duffus and Spry JJA stated at page 557 –

“..... in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and not on any fanciful theories or attractive reasoning. We think it is dangerous and inadvisable for a trial judge to put forward a theory of mode of death not canvassed during evidence or in counsel’s speeches...”

This decision was followed in the case of **RANGE – vs – REPUBLIC (2003) KLR 692**.

In my view, the learned trial magistrate erred in finding that force was used with the porcupine spike to injure the complainant. That inference, is not supported by the evidence.

Having re-evaluated the evidence on record, I find that the prosecution did not prove beyond reasonable doubt that the appellant was the one who injured the complainant. The prosecution did not also prove beyond reasonable doubt that the injury suffered by the plaintiff was caused by the porcupine spike that was produced as an exhibit in evidence. In my view, it will not be safe to sustain a conviction on the evidence on record. I will therefore have to allow the appeal.

For the above reasons I allow the appeal, quash the conviction and set aside the sentence imposed on the appellant by the learned trial magistrate. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated at Nairobi this 24th day of May 2007.

George Dulu

Judge