



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Criminal Appeal 223 of 2005

MAURO MUTHENGI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appeal herein arises from the decision of the learned Magistrate at Chuka Hon. A.N. Kimani in Criminal Case No. 413/2003. In that case, the appellant, Mauro Muthengi Nta'Rongo had been charged with the offence of assault causing actual bodily harm contrary to s.251 of the Penal Code. It had been alleged that on 22.4.2003 at Igumo Village, Kithigiri Sub-Location, Marimanti Location in Tharaka District within Eastern Province, he unlawfully assaulted Lydia Gacheri occasioning her actual bodily harm. He was convicted of the said offence on 17.11.2004 and sentenced to a fine of Ksh.5,000/- and in default to serve 1 year's imprisonment. He was dissatisfied and filed this Appeal.

2. The Appeal is conceded by the State because of one fundamental reason; that whereas the complainant P.W.1 said that she was assaulted on 22.4.2003 at 1.p.m., P.W.3, the investigating officer said that in fact the report of assault was made on 18.4.2003, some six (6) days before the alleged assault.

3. I have seen the grounds in the Petition of Appeal and they can be summarized thus;-

- (i) whether the offence of assault was proved beyond reasonable doubt.
- (ii) Whether the sentence in any event was excessive.

4. A first appellate court must in all instances evaluate the evidence afresh and determine the first question above irrespective of the findings of the trial court. The disadvantage of course is that the appellate court relies entirely on the record and does not have the benefit of seeing the witnesses. Notwithstanding, I note from the record that P.W.1 Lydia Gacheri stated that on 22.4.2003, the Appellant came to her land slapped her and when she fell, he **"injured [her] by stone (sic)."** She added that the Appellant and her family had a long standing dispute over land.

5. P.W.2, Mwinji Kinoro said that on 22.4.2003, he saw the Appellant **"hitting"** the complainant, P.W.1, as she lay on the ground. That P.W.1 was injured on the head and the hand.

6. P.W.3 P.C. Phineas Kirimi stated that when he received the report of assault on 18.4.2003, he booked it, proceeded to the scene, gave out a P 3 form to the Complainant and arrested the accused and charged him. In cross examination the witness said;

“I do not recall the date of your arrest. I met you at some place. I never went with you. The doctor did the examination.”

7. In his defence, the Appellant said that it was on 19.12.2002 that P.W.1 and he had an altercation because her son had burnt a fence erected by the Appellant. He knew nothing about the incident in the charge sheet and he professed innocence. His witness, D.W.2, Magdalene Gitiria said that P.W.1 fell down on 16.4.2002 and it was D.W.2 who assisted her for two days in nursing the injury.
8. I have looked at the above evidence and one of the most glaring inconsistencies is with regard to the date that the alleged offence was committed. P.W.1 said that she was assaulted on 22.4.2003, the same date given by P.W.2. P.W.3 said that he received the report at Marimanti Police Station on 18.4.2003 and it was on the same day that he gave her the P3 form. P.3 form on the other hand was issued on 6.5.2003 as is clearly indicated on its face and not 22.4.2003 when the offence was allegedly committed. The contradictions are compounded when the Appellant and D.W.2 insisted that in any event the incident involving the Appellant and P.W.1 happened in 2002 and not 2003 as alleged. Clearly there is such a material contradiction that I agree with the Appellant that the offence could not be conclusively proved beyond reasonable doubt. On the other hand, the Appellants defence that he knew nothing of the event in the charge sheet is lent credence when the Prosecution failed to discharge the burden of proving all facets of the offence including the date when the offence was committed.
9. The second and equally important issue relates to the production of the P.3 form. I hold the view that in other circumstances, where the doctor or medical practitioner cannot be found and a tenable explanation is given for that fact, then as was said by Hayanga J. in Joseph Lumumba vs R. [1999] eKLR, the P3 form was admissible under s.33 of the Evidence Act. In this case however, there is a bigger anomaly because the person who produced it, P.W.3 is discredited by his own evidence. I have above cited his evidence in cross-examination and he knew close to nothing about the case and with the contradictions between the date the P3 was given and filled, the P3 itself became suspicious and the maker should have been called to produce it. Worse of all no explanation whatever was given why the person who made it (and it is not even clear who he was because the name is not given) should have come to tender it in evidence.
10. The third issue I consider necessary to address is the injuries sustained by P.W.1. She said that she was slapped and injured with stones. P.W.2 said that he saw the Appellant “**hitting**” P.W.1 but did not say with what, although he said that she was lying on the ground. Even if that evidence, unclear as it is, was to be believed, the P3 form, with all the difficulties I have with it, completely goes against that evidence. The P3 form indicates that at the time of examination, P.W.1 had no injuries or bruises whatsoever but whoever filled it when on to state that the probable type of weapon causing injury “[**was**] **blunt**”. If there was no injury seen, how would one determine the probable weapon used? Again, the defence by the appellant is lent credence by this unreasonable explanation as to the cause of, and the alleged injuries.
11. Lastly, this is a case classicus of not just poor investigations but also of a land dispute escalating and being used as the basis to institute unwarranted criminal proceedings. One cannot but look with pity at the Appellant in the face of the evidence of P.W.3 who could not recall the date of arrest, the place of arrest or even where he took the Appellant after arrest! How can the police leave constitutional rights in the hands of such incompetence? How can the innocent be presumed to be so when the investigator casually presumes guilt? Our Constitution was never designed to be left to the whims of those who do not respect it and this court will loudly proclaim and uphold its dictates.
12. The Appellant is an innocent man from my evaluation of the evidence and more likely than not he was framed up by a quarrelsome neighbour. This court will hold that his conviction and sentence were completely unjustified.
13. If any Appeal should be held to be merited, this one more than meets the criteria and is allowed as prayed.
14. The Appellants conviction is quashed, the sentence set aside and if he is in custody, he shall be released forthwith unless he is otherwise lawfully held.
15. Orders accordingly.

Dated, signed and delivered in open court at Meru this 2ND day of August . 2007

ISAAC LENAOLA

JUDGE

In presence

Mr. Mosota Advocate for the Appellant

Mr. Muteti State Counsel for the State

ISAAC LENAOLA

JUDGE