

PATRICK MBUGU NJUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Chief Magistrate's Court at Nakuru Criminal Case No.773 of 2005 – L. Wachira [D.M II {PROF}])

JUDGMENT

The appellant, Patrick Mbugu Njuki, was charged 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 13th March 2005 at Kiamunyeki Farm, Nakuru, the appellant unlawfully assaulted Alice Njoki Mwaniki thereby occasioning her actual bodily harm. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the appellant was found guilty and convicted as charged. He was fined Ksh.6000/= or in default was to serve one (1) year imprisonment. He paid the fine. The appellant was aggrieved by his conviction and sentence and duly appealed to this court.

In his petition of appeal, the appellant raised several grounds challenging the decision of the trial magistrate in convicting him. He was aggrieved that he had been convicted based on a defective charge. He faulted the trial magistrate for convicting him on the basis of contradictory evidence of material witnesses. He was aggrieved that the trial magistrate had failed to consider the defence of the appellant and the fact that there existed another criminal case involving the parties to the present case. He was aggrieved that he had been denied the right to be represented by an advocate during trial. He finally faulted the trial magistrate for convicting him on insufficient evidence of the prosecution; He particularly took issue with the failure by the trial magistrate to take into consideration that the fact that the complainant had not produced medical treatment cards in support of her complaint.

At the hearing of the appeal, Mr. Gakinya, counsel for the appeal reiterated the grounds of appeal. He submitted that, although the complainant had stated that she was admitted to the hospital after the alleged assault incident, the evidence adduced by the prosecution witnesses did not support the allegation. He submitted that from the time the complainant was assaulted to the time that she was issued with a P3 form was five days. In his view, it was impossible for the complainant to have been issued with a P3 form while she was still undergoing treatment at the hospital. Mr. Gakinya submitted that the police failed to secure the stone that was allegedly used to hit the complainant; evidence was adduced by the investigating officer that he had left the stone, which was later produced as an exhibit, with the complainant. He maintained that the evidence of the complainant was not sufficiently corroborated. He submitted that the trial magistrate failed to consider the complainant was motivated by malice when he made the complaint against the appellant. He explained that the complainant and the appellant had disagreed over a chicken which had trespassed into the complainant's farm.

Mr. Gakinya reiterated that, although it was established by the prosecution that the complainant was injured, the prosecution failed to establish that it was the appellant who had assaulted her. He maintained that the evidence adduced by the complainant and her witnesses was contradicted by the testimony adduced by the appellant and his witnesses. He submitted that it was implausible that the appellant could have assaulted the complainant for the reasons given by the complainant. He submitted that the appellant had been denied a chance to be represented by an advocate of his choice when his advocate's request for an adjournment was denied. He stated that the request for the adjournment was unreasonably rejected, yet it was a first adjournment. He urged the court to re-evaluate the evidence adduced and reach an appropriate decision allowing the appeal and quashing the conviction and sentence of the appellant.

Mr. Mugambi for the State opposed the appeal. He submitted that the prosecution established the charge against the appellant to the required standard of the law. He explained that the incident that led to the

assault of the complainant was the wounding of a chicken belonging to the appellant. The appellant and the complainant were neighbours. He submitted that the appellant took the law into his hands and injured the complainant by hitting her with a stone. The complainant went to hospital, was treated and later reported the incident to the police. A P3 form was issued. It was filed by Dr. Kahi. It was produced in court by Dr. K'Ogutu. He confirmed that the complainant was injured when she was assaulted with a stone.

Mr. Mugambi submitted that the prosecution had established that there existed a bad relationship between the appellant and the complainant. He maintained that the trial court was within its right to refuse to grant the application for adjournment by the then advocate for the appellant. He reiterated that the said advocate did not advance sufficient reasons that would have enabled the trial magistrate adjourn the case. He submitted that the trial court appropriately assessed the situation and given directions that were correct. He urged the court not to interfere with the conviction and sentence of the appellant by dismissing the appeal.

This being a first appeal, the duty of this court, as a first appellate court, is to re-consider the evidence adduced, re-evaluate it, and reach an independent determination whether or not to uphold the appellant's conviction. This court is however required to put into mind that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any comments as regard the demeanour of witnesses (*See Njoroge vs Republic [1987] KLR 19*). The issue for determination by this court is whether the evidence adduced by the prosecution in the trial established the guilt of the appellant to the required standard of proof beyond any reasonable doubt.

I have re-evaluated the evidence adduced before the trial court, in light of the submissions made on this appeal. That the complainant was injured is not in dispute. This was confirmed by Dr. Kahi when she examined the complainant on the 15th March 2005. She noted that the complainant had an injury on her head. She had a swelling on the parietal region (*right side*). There was tenderness at the same area. She assessed the degree of injury cause to the complainant as harm. She was of the opinion that the injury was caused by a blunt object. The P3 form was produced in evidence by Dr. K'ogutu on behalf of Dr. Kahi. The issue for determination by this court is whether the prosecution adduced evidence, which proved to the required standard of proof beyond reasonable doubt, that it was the appellant who assaulted the complainant.

According to the appellant, on the 13th March 2005, while she was at her home, she saw chicken enter her plot. She chased the chicken away using sand. She then went to the wire mesh fence to check if the same had been breached. She established that the wire mesh fence had been raised to allow the chicken gain access to her plot. Her neighbour on the other side of the fence is the appellant. The complainant, assisted by PW2 Benson Okaya, set out to repair the fence. The appellant arrived at the scene, picked a stone and hit the complainant on the head.

According to the appellant and his two witnesses, DW1 Naomi Mbugua and DW3 Francis Mugo, the disagreement with the complainant arose because the complainant had injured his chicken by breaking its leg. It was therefore clear that the prosecution established that the appellant had a motive to injure the complainant. Although the appellant vehemently denied that he had assaulted the complainant, the prosecution established the appellant was at the scene when the complainant was injured. It can be deduced from the evidence adduced by the prosecution witnesses and that offered by the appellant in his defence, that a quarrel ensued between the appellant and the complainant over the injury caused to the chicken of the appellant. PW2 was at the scene when he saw the appellant hit the complainant with a stone. The stone was produced in evidence as an exhibit. The complainant was attended at the hospital on the same day.

On re-evaluation of the evidence adduced, it was clear that the appellant stoned the complainant when the two quarreled over the injury to the chicken allegedly caused by the complainant. It was apparent that there existed differences between the complainant and the appellant. The difference was exerbated by the chicken incident. The appellant took the opportunity availed to him by the chicken incident to hit the complainant with a stone. He later reported the case of the injury of the chicken to the police to cover up

his assault of the complainant. I hold that the prosecution established, to the required standard of proof beyond any reasonable doubt, that it was the appellant that assaulted the complainant. The trial magistrate properly evaluated the evidence adduced by the prosecution to reach the correct decision finding the appellant guilty as charged. I have considered the submission made by the appellant in this case. The same is devoid of merit. The appeal is dismissed.

I uphold the conviction and the sentence of the trial magistrate.

It is so ordered.

DATED at NAKURU this 29th day of November 2007

L. KIMARU

JUDGE