



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 256 of 2004

NARAYANAN JAISANKAR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant **NARAYANAN JAISANKAR** was found guilty of one count of **ASSAULT CAUSING ACTUAL BODILY HARM** contrary to **Section 251** of the **Penal Code**. He was fined Kshs.15,000/- and in default 3 months imprisonment. He paid the fine. He was dissatisfied with the conviction and sentence and therefore lodged this appeal.

The petition of Appeal is dated 19<sup>th</sup> May 2004 and in it, eight grounds were raised: -

One that the judgment was at variance with evidence adduced.

Two that the learned trial magistrate shifted the burden of proof.

Three that the learned magistrate failed to resolve doubts in the two persons of evidence adduced before him.

Four that the Appellant's defence and the evidence of his witnesses was disregarded.

Five that the learned trial magistrate erred in failing to find that the charge was actuated by malice.

Six that learned trial magistrate speculated on the evidence the investigating officer would have adduced had he been called.

Seven that trial magistrate speculated on reasons for investigating officers failure to testify, and

Eight that the learned trial magistrate erred in failing to acquit the Appellant on grounds the investigating officer's evidence was a glaring and profound omission.

The evidence adduced by the prosecution comprised that of the Complainant, PW1 one eye witness, PW2, the arresting officer who examined the Complainant PW4. The Complainant's evidence was that his superior at Alpha Knit Ltd. in Ruiru went to where he was working and informed him that the Appellant wanted to see him. That after finishing what he was doing, he went to the Appellant. That on seeing him, the Appellant first quarreled him for giving him an incomplete order before punching him on the neck and holding him by the shirt. The Complainant said that he started screaming and one **ANN WANJIRU** went to his rescue by restraining the Appellant. That he was sacked same day. That he went to hospital and on 9<sup>th</sup>, two days later he reported the matter to the police. The second prosecution witness, **ERICK WANJALA** corroborated the Complainant's evidence and said that he sat facing the Complainant and that he saw the Appellant punch the Complainant on the back and then held him before **ANN** restrained him. PW3 said he arrested the Appellant six months after the incident and that he was identified to him by the Complainant. PW4 on his part confirmed that the Complainant had been assaulted on his head with a blunt object and had suffered harm.

The Appellant gave a sworn statement in defence and told the Court that after the Complainant took an incomplete order to his desk, he asked him to call the customer so that they could tell what action to take. That instead the Complainant held him by the shirt and told him that he could not take orders from him. That **ANN WANJIRU** (PW2) restrained the Complainant from assaulting him. DW2, **ANN**, corroborated the Appellant's evidence and also stated that neither the Complainant nor the Appellant had assaulted the other. DW3 **VIGILANCE SHALI** and DW4 **TERESIA NJOKI** all corroborated the Complainant and

DW2 that indeed the neither the Complainant nor the Appellant had assaulted the other.

**MRS. NJUGUNA** who argued this appeal submitted that the learned trial magistrate erred in dismissing the defence evidence on the grounds that it was unreliable, yet all the witnesses in the case worked in the same place with the Complainant and the Appellant. Further that there was no reference to demeanour before the evidence was rejected.

**MRS. OBUO**, learned counsel for the State opposed the appeal. Learned counsel submitted that the evidence adduced by both the Complainant and PW2 was direct evidence. That PW2 could clearly see the Appellant's desk and witnessed the assault. That PW4, a clinical officer and therefore, an independent witness confirmed the Complainant's evidence that he had been assaulted.

I have carefully considered this appeal and re-evaluated the entire evidence adduced before the lower court while bearing in mind that I neither saw nor heard the witnesses and giving due allowance (See **OKENO vs. REPUBLIC 1972 EA 32**).

The Appellant challenges the learned trial magistrate's conclusion in disregarding the defence arguing that the same was not based on reasonable basis like, for example, the demeanour of the witnesses in the judgment. At J4, the learned trial magistrate observed: -

***"The Court is faced with two versions of the incident .... The version of the Complainant and his witness. The accused's version also supported by his witnesses..."***

The learned trial magistrate continued to observe: -

***"From my own observation of the Complainant herein, I found him a reliable witnesses who spoke the truth. On the other hand, I was not convinced that the accused was a reliable trustworthy witnesses. As for the defence witnesses their impartiality is doubtful given that they were and are still in the accused employment. Their evidence was no doubt geared towards protecting their boss..."***

I find that the learned trial magistrate was very clear in his mind that he faced two different versions of the incident in question. The learned magistrate knew and clearly stated that his role was to determine which of the two versions to accept. The learned trial magistrate carefully analyzed the evidence before him and, contrary to the Appellant's submission, considered the demeanour of each of the witnesses before him. Concerning the Complainant and his witnesses, the learned trial magistrate observed that they impressed him as honest witnesses, reliable and worthy of belief. That is a finding of fact. As an appellate court I neither saw nor heard these witnesses, I cannot therefore form a different opinion on their demeanour. Having evaluated their evidence afresh, I find no basis upon which to differ with the learned trial magistrate's finding as to their demeanour. Same argument follows the learned trial magistrate's finding on the evidence of the defence witnesses. The learned trial magistrate, after consideration of defence witnesses, formed the view that they were protecting their jobs. Considering that the Complainant and his witnesses actually lost their jobs directly as a result of this case, the learned trial magistrate's conclusion is not without basis. Learned counsel for the Appellant belittled the finding arguing that the Appellant had no choice but to bring witnesses from the same company where he worked. That was not the basis of the learned trial magistrates finding on the evidence of DW2, DW3 and DW4. These witnesses' evidence was not doubted merely because they worked in their company. It was disbelieved because their impartiality was in doubt given the fact that PW2, who stood by the Complainant, lost his job for choosing to support him and the 3 defence witnesses had not. The learned trial magistrate's reasoning was sound in the circumstances of this case and cannot be challenged.

On the charge being actuated by malice on grounds that the report to the police was made two days after the witnesses, did not escape the learned trial magistrate. The learned magistrate considered the delay in reporting the matter to the police and correctly found that two days delay was not inordinate. I also agree with the learned magistrate. A delay of two days is not inordinate. Further the Complainant gave very reasonable explanation for the said delay.

On speculation in the learned trial magistrate's judgment concerning the investigating officer, the learned trial magistrate remarked on the prosecution's failure to call the investigating officer. In the learned trial magistrate's view, that failure did not affect the prosecution case. He observed: -

***"I think the counsel is trying to speculate as to what evidence would have been but even assuming he is right, a court is not bound by whatever recommendation such an officer makes. The court has a duty to evaluate the evidence and make its own conclusion irrespective of whatever recommendation someone else may have made... Its absence, however, is not fatal to the prosecution case at all as the officer who received the Complainant's complaint on 9<sup>th</sup> January 2003 and issued the P3 form and subsequently arrested and charged the accused....PW3 testified in this case. The Complainant's evidence is corroborated by the Clinical Officer PW4."***

**MRS. NJUGUNA** submitted that the Investigating Officer should have been called as a witness being a vital witness and that failure to call him should be interpreted to mean that his evidence would have been detrimental to the prosecution case. **MRS. OBUO** on the other hand submitted that the prosecution called eye witnesses of the incident and that their evidence was sufficient to convict and therefore failure to call the investigating officer did not prejudice the prosecution case.

The test applicable in determining whether the failure to call certain witnesses should lead to an adverse inference against the prosecution case, are well settled. It is when the prosecution adduces evidence that is insufficient to sustain a conviction and leaves out important evidence that an adverse inference can be made. In this case, all the important witnesses were called.

The only witness not called was the investigating officer. The investigation officer's evidence would not have made the prosecution case the better or worse, if it had been adduced. The investigating officer would have told the court what he did and how he arrived at the decision to charge the Appellant. The absence of that evidence does not affect the prosecution case one bit and neither did the Appellant suffer any prejudice. The learned trial magistrate properly directed himself on that point.

Having carefully considered this appeal, I find no merit in it and consequently this appeal is dismissed.

Dated at Nairobi this 22<sup>nd</sup> day of March 2006.

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**LESIT, J.**

**JUDGE**

Read, signed and delivered in the presence of;

Mrs. Njuguna Advocate for the Appellant – present

Appellant - present for the State

CC: Huka

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**LESIT, J.**

**JUDGE**