

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO

Criminal Appeal 16 of 2006

JOSEPH KORIR APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant, Joseph Korir, was charged with assault causing actual bodily harm contrary to **section 251 of the Penal Code**. The particulars of the charge were that, on the 18th May, 2003 at Sotik Township, Bomet District the appellant unlawfully assaulted David Kirui thereby occasioning him actual bodily harm. The appellant pleaded not guilty to the charge and after a full trial was found guilty and duly convicted. He was sentenced to serve three years imprisonment. Being aggrieved by his conviction and sentence, the appellant has appealed to this court.

In his petition of appeal, the appellant has raised seven grounds of appeal challenging the decision of the trial magistrate in convicting him. The said grounds of appeal may be summarized as thus; the appellant was aggrieved that the trial magistrate had failed to analyse the evidence that was adduced and therefore arrived at the wrong decision convicting the appellant. He was aggrieved that the trial magistrate had put into consideration irrelevant factors and thereby convicted him. He faulted the trial magistrate for failing to take into account all the relevant evidence before arriving at the said erroneous decision convicting him. He was finally aggrieved that he had been sentenced to a too harsh custodian sentence that did not reflect the nature of the offence committed. At the hearing of the appeal, I heard the submissions made by Mr. Nyaingiri, learned counsel for the appellant. He made persuasive argument urging this court to allow the appeal. Mr. Koech, Learned State Counsel did not oppose the appeal. He was concerned that the trial magistrate seemed to have been prejudiced against the appellant and had not evaluated the evidence adduced as required by the law.

This being a first appeal, this court is required to re-consider and to re-evaluate the evidence adduced before the trial magistrate so as to reach an independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is mandated to put in mind the fact that it neither saw nor heard the witnesses as they testified (*see **Njoroge vs Republic [1987] KLR 19***). The issue for determination by this court is whether the prosecution established its case of assault against the appellant to the required standard of proof beyond reasonable doubt.

I have re-evaluated the evidence that was adduced before the trial magistrate's court. I have also considered the grounds of appeal that were put forward by the appellant and the submissions made before me by the learned counsel for the appellant and the learned State Counsel. The facts of this case are straight forward. The appellant purchased a cassette from PW2 Bernard Kirui for the sum of Kshs.100/-. After about a week, he went back to PW2 returned the cassette and demanded to be refunded his money because he claimed that the cassette which was sold to him was of low quality. PW2 refused to refund the money and instead offered to exchange the cassette with another one. The appellant was adamant that he wanted nothing to do with the cassettes that were being sold by PW2. PW2 then referred the appellant to PW1 David Kibet Kirui (hereinafter referred to as the complainant) who was the owner of the cassettes.

When the appellant met with the complainant, the complainant told him that he could not refund him the money because at the time the complainant did not have any money. An altercation took place between

the appellant and the complainant which degenerated into a fight. According to PW3 Erick Rotich, he found the appellant and the complainant fighting outside his shop. He separated them and told them to go away from his shop. Immediately after the incident, both the appellant and the complainant went to Sotik Police Station where they met PW4 Police Constable James Owino. Whereas the complainant made a report that he had been assaulted by the appellant, the appellant wanted to complain to the police about the fact that the complainant had refused to refund him his money after he had returned the cassette which he considered to be substandard.

It is apparent from the evidence of PW4 that when the appellant went to the police station, he was annoyed and after a short while disagreed with PW4. PW4 did not take kindly to the fact that the appellant was shouting at him. He arrested the appellant and locked him in the cells. It is then that PW4 recorded the complaint of PW1 but did not consider interviewing the appellant. The complainant was seen by PW5 George Ouma a Clinical Officer based at Kapkatet District Hospital who assessed the injuries that he had sustained in the fight to be harm. He observed that the complainant had bruises on his left side of his neck and left elbow joint. There was tenderness on his left thigh. In his view, the probable weapon used was blunt. When the appellant was put on his defence, he denied that he had assaulted the complainant. He testified that the charge of assault was brought against him by the police because there existed a grudge between him and the police. He further testified that the complainant had made complaint against him so that he could escape refunding him his money.

I have re-evaluated this evidence. It is clear that the complainant and the appellant fought when they disagreed over the issue of the refund of money when the appellant returned the cassette. The matter however was turned on its head when both the appellant and the complainant went to Sotik Police Station to lodge separate complaints. Whereas the appellant wanted police assistance to have his money refunded, the complainant lodged a complaint that the appellant had assaulted him. Matters were not helped by the fact that the appellant formed an opinion that he was not being helped by the police which resulted in a heated argument between the appellant and PW4, the police officer who was at the report office. Matters became worse for the appellant when PW4 arrested him when he heard the complaint made by the complainant. PW4 was not prepared to give the appellant audience.

It is clear that the complainant and the appellant fought over the issue of the refund of money. The evidence of PW3 was clear in this regard. If any charge was to be laid against the appellant, then he ought to have been charged together with the complainant for **affray contrary to section 92 of the Penal Code**. As it were, the appellant's behaviour at the police station sealed his fate. The police became partial to the complaint made by PW1. They did not investigate the circumstances of the case to determine what actually took place. It is apparent that PW4 communicated his dislike of the appellant to the police prosecutor who was prosecuting the case which resulted in the said prosecutor being hostile to the appellant.

The unfortunate thing is that the prosecutor's prejudice of the appellant was transmitted to the trial magistrate who was caught up in the police machinations against the appellant. He lost his sense of proportion and instead of becoming an arbiter of the dispute entered into the ring of conflict. The comments that the trial magistrate made against the appellant, to the effect that he was arrogant and deserved to be punished, is a clear pointer that the trial magistrate was biased against the appellant. It is evident that the trial magistrate took into account irrelevant facts when he arrived at the decision convicting the appellant. He considered extraneous facts instead of putting into consideration the evidence that was placed before him by the witnesses who appeared before him. Due to his bias, he failed to evaluate the evidence that was adduced by the appellant in his defence in an impartial manner and therefore arrived at the wrong conclusion that the prosecution had proved its case to the required standard of proof beyond reasonable doubt.

The upshot of the reasons above is that the appeal succeeds. Mr. Koech, learned State Counsel, rightly conceded to the appeal. The conviction of the appellant by the subordinate court is therefore quashed. The sentence imposed is hereby set aside. The appellant is ordered set at liberty and released from prison unless otherwise lawfully held.

It is so ordered.

DATED AT KERICHO THIS 8TH DAY OF JUNE, 2006

L. KIMARU

JUDGE