



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Criminal Appeal 160B of 2005

JOHN MEME M'AWAMBE APPELLANT

AND

THE REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of the learned Hon. Magistrate Mr. J. Nyaga, Ag P.M. in Maua Criminal Case No. 3083 of 2004 delivered on 30.8.2005)

JUDGMENT OF THE COURT

The appellant, JOHN MEME M'AWAMBE was charged, tried and convicted on one count of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that:-

“On 6th august 2004 at Athiru-Rinyine Location in Meru-North District within Eastern Province unlawfully assaulted FLORENCE KITHAKA thereby occasioning her actual bodily harm.”

Briefly the facts were that on the material day at about 6.00am, the complainant was in her house. On coming out of the house, she found the appellant, a fellow-villager standing outside the house. When asked what he was looking for and what he wanted, the appellant told her that he was looking for her. He then started beating the complainant by slapping her. After the complainant fell down, the appellant kicked her on both sides of the ribs. He also stepped on her. The complainant screamed. The screams attracted the attention of PW2, one KARIITHI KANGENTU who arrived at the scene and found the appellant in the act of kicking the complainant who was still lying on the ground. The appellant stopped the attack and went away when PW2 came to the scene. PW2 took the complainant to Laare Police Station where she reported the matter. The complainant was later treated at Laare Health Centre by a clinical officer who testified as PW3. PW3 found the complainant to have suffered a swollen forehead and tenderness in left part of the chest. PW3 classified the injury as harm. P3 form was produced as P exhibit 1. Thereafter, the appellant was arrested and charged.

After a full trial, the learned trial magistrate found the appellant guilty as charged, convicted him and fined him Kshs. 15,000/= in default one (1) month's imprisonment.

The appellant, being dissatisfied with both conviction and sentence has appealed. The Petition of Appeal filed in court on 2.9.2005 sets out three grounds of appeal:-

1. That the learned trial magistrate erred in law and fact by failing to acquit the appellant when the evidence on record clearly showed that the charge against me (sic) was a frame-up.
2. That the learned honourable magistrate misdirected himself in law and fact by convicting me (sic)

when the prosecution's case was marred with contradictions and could therefore not sustain a conviction.

3. That the learned honourable magistrate erred in law and fact by failing to take into account the evidence of PW5 which evidence fully exonerated me (sic) from the charge.

At the hearing of the appeal, the appellant reiterated his grounds of appeal and stated that from the evidence of PW2 it was clear that the case against the appellant was a frame up because of the land dispute between the appellant and the prosecution witnesses. The appellant also contended that in view of the entire prosecution evidence, he was entitled to an acquittal.

The learned state counsel, Mr. Muteti conceded the appeal. He contended that from the printed record, it was clear that there was a concerted effort by PW1, PW2 and PW5 to frame the case against the appellant, especially PW5 who admitted that she had lied to the police because the appellant had refused to vacate her land, and that the whole purpose of the frame up was to force the appellant to vacate her land. Mr. Muteti also contended that the prosecution's failure to declare PW5 a hostile witness was prejudicial to the appellant's case whose defence was one of alibi.

As required by law, this court is under a duty to reconsider and reevaluate the evidence with a view to reaching its own conclusions in this matter regardless of the fact that the respondent has conceded the appeal. Before I make my conclusions, it is necessary to summarise the evidence.

PW1, FLORENCE KITHAKA testified that when she came out of her home on the morning in question, at about 6.00am, she found the appellant standing outside the house. After a brief exchange during which PW1 sought to know why the appellant was at her house and who he was looking for, the appellant slapped her on the face and she fell down. He then kicked her on both sides of the ribs. She screamed. One Kangentu (PW2) and one Tabitha (PW5) came to the scene and found the appellant stepping on PW1 who was lying on the ground. PW2 and PW5 separated PW1 and the appellant. The appellant then left, but he was later arrested and charged after the matter was reported to the police.

In her further evidence during cross-examination, PW1 stated that apart from stepping on her, the appellant also dragged her on the ground. She denied that there was a land dispute between her and the appellant's father. She denied a further suggestion by the appellant that she and her witnesses were fabricating evidence against him.

PW2 was KARIITHI N. KANGENTU a neighbour to both PW1 and the appellant. He stated that in the morning of the material day, he heard the complainant screaming at her home. On rushing there, he found the complainant lying on the ground while the appellant was kicking her. The appellant went away without responding to PW2's question as to why he was kicking the complainant. Together with Sisia (PW5) PW2 took complainant to hospital and later reported the matter to Laare police station.

In answer to questions put to him in cross-examination, PW2 denied that there was a land dispute between him and the appellant's family. He also denied a further suggestion that the appellant was not at the scene on the material day.

PW3 was the clinical officer, HIRAM KANORU, who examined the complainant and filled the P3 form which was produced in court as P exhibit 1. He testified that complainant had a swollen and tender forehead and tender left chest.

PW4 was PC PETER NGANGA of Laare police station. He testified that at about 3.30pm on the material day, he received a report from the complainant who alleged to have been assaulted by the appellant. The complainant had bruises on the forehead and complained of pain on right side of ribs. It is PW4 who issued the complainant with a P3 form. PW4 testified during cross-examination that the appellant and the complainant had a land dispute between them.

PW5 was TABITHA SISIA, a co-wife to the complainant. This witness told the court that she did not witness the events of that morning and that she had lied to the police because the appellant had refused to

vacate her land. She testified further that she had agreed to testify at the request of the complainant so that the appellant could leave her (PW5's) shamba.

During cross-examination, PW5 admitted that she and the appellant had a land dispute which was still pending before the Land Disputes' Tribunal. She also further admitted that she gave a false report about the appellant because the appellant had refused to vacate her miraa shamba. With the admissions made by PW5, her evidence is worthless.

The appellant gave sworn evidence and testified that on the morning of the alleged offence he was in Nairobi, thus raising the defence of alibi. However, no documentary proof of travel to and from Nairobi was produced by the appellant. He testified further that on his return from Nairobi he learnt that the complainant had been assaulted by his workers who had found the complainant stealing miraa from the appellant's shamba. The appellant also testified that PW2 testified against him because of a long-standing land dispute between them. The appellant called two witnesses, NTARANGWI NTWARUGU as DW2 and HENRY KARUMA as DW3. Both of these witnesses testified that during a Njuri Ncheke elders' meeting, the complainant admitted that she had not been assaulted by the appellant.

On the basis of the above evidence, it is my considered view that the prosecution did not establish its case against the appellant beyond any reasonable doubt. The evidence given by PW1 and PW2, was shattered and torn apart by PW5's admission that all that she had told the police was lies, and that she gave the lies to the police because she and PW1 had connived to fix the appellant so that the appellant could vacate her land. I therefore do not concur with the learned trial magistrate's conclusion that it is the appellant who assaulted the complainant as alleged. Although there was no evidence by the appellant that he traveled to Nairobi as alleged, it was not the appellant's duty to prove his innocence. The duty was upon the prosecution to prove its case against the appellant beyond any reasonable doubt.

I have also considered the printed medical evidence adduced by PW3 and found the same to be at variance with the complainant's evidence and the evidence of PW4. According to PW3, the complainant had injuries on the forehead and left side of the chest. According to PW4, the officer who received and booked the complainant's report, the complainant had bruises on the face and complained of pain on the right side of the ribs. According to the complainant, the appellant slapped her on the face and kicked her on both sides of the ribs. Such evidence supports the appellant's complaint to the effect that the prosecution's evidence was so contradictory that it could not sustain a conviction. Those contradictions have been made worse by the admissions by PW5 that she was a liar who was out to fix the appellant in cahoots with the complainant.

In the result, I am satisfied that the learned state counsel was perfectly right in conceding to the appeal, which I hereby allow. The conviction is quashed and the fine of Kshs. 15,000/= i/d one (1) months' imprisonment is set aside.

Unless otherwise lawfully held, the appellant should be released from prison custody forthwith.

It is so ordered.

Dated and delivered at Meru this 26th day of July, 2006.

RUTH N. SITATI

J U D G E