REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

CRIMINAL APPEAL 40 OF 2005

BETWEEN

SAMUEL MUTUA M'ARITHI ……...…….... APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

(Being an appeal from the conviction and sentence in Tigania Criminal Case No. 737 of 2004 dated 6.4.2005, (G. Oyugi Esq)

JUDGMENT OF THE COURT

The appellant, Samuel Mutua M'Arithi was charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code, particulars of which were that on the 4.6.2004 at Rwanda Location, the appellant jointly with others not before the court unlawfully assaulted Fredrick Kaindio thereby occasioning him actual bodily harm.

After a full trial, the appellant was found guilty as charged and sentenced to suffer twelve (12) months' imprisonment on the 6.4.2005. It is against both conviction and sentence that the appellant has appealed.

There are six grounds of appeal. The appellant has complained:-

1. That the learned resident magistrate erred in law and in fact in trying the appellant in this case while he heard and sentenced the appellant on the same day in Tigania Criminal case No. 737 of 2004 which involved the same subject matter.

2. The learned resident magistrate erred in law and in fact in convicting the appellant on a charge of assault on the evidence before him.

3. The learned resident magistrate erred in law and in fact in convicting the appellant on the contradictory evidence of the prosecution witnesses.

4. The learned resident magistrate erred in law and in fact in shifting the burden of proof to the appellant throughout his judgment.

5. The learned resident magistrate erred in law and in fact in ignoring and or not taking into account the appellant's defence.

6. The sentence is manifestly excessive and or wrong in law.

Briefly, the facts of the case were that on 4.6.2004 at around 11.00am, the complainant, Fredrick Kaindio was at a place called Kibiru in the company of a lady by the name Kanario Chokera and her son where the three were harvesting beans at Chokera's farm. It was then that the appellant, accompanied by his son Gitonga Mutua and his (appellant's) brother went to where the complainant and Chokera were. The appellant instructed the son to cut the complainant five times. As the appellant's son hit the complainant on the left rib cage the appellant threw a stone at the complainant, hitting him on the right eye region. The complainant, who testified as PWI, tried to escape but he fell down. The appellant's brother slapped the appellant on the back with the flat side of a panga. Chokera and her son screamed for help as they ran away from the shamba. The complainant managed to run away too. He went and reported the matter to Isiolo Police Station and later to Tigania Police Station.

The complainant was later referred to hospital after being issued with a P3 form. PW2, Kanario Chokera gave an account similar to that given by PWI as to what happened that morning of 4.6.2004 at about 11.00am. She also testified that the shamba where she and PWI were harvesting the beans was her shamba and that it is her who had planted the beans. She also testified that she and the appellant had a dispute over the land from about October 2003 when the appellant tried to grab the land from her. She also testified that the dispute had been arbitrated upon by both the chief and DO of the area.

PW3 was one Stephen Ringera a clinical officer from Miathene sub-district hospital. He is the one who examined PWI after PWI had already been treated at the Isiolo District Hospital. According to PW3, he noted the following injuries on the complainant:-

- Injuries on the outer side of the right eye

- Bruises on the left chest wall.

He classified the injury as harm. The P3 form was produced in evidence as P Exhibit 1. PW4 was Police Constable Justus Wambua who received the report of the assault from PW1. He testified that at the time of the report, PW1 had a visible injury on the head; and that PW1 also complained of pains on the ribs and the back.

The appellant gave sworn evidence. He stated that on the day in question, he was grazing his cattle at no man's land. He denied that the complainant owns land at Kibiru but that he himself owned a shamba there. He testified further that on 4/6/2004, he received a report that the complainant had harvested his (appellant's) beans. He however denied assaulting the complainant, but stated that he had a dispute with one lady called Mukuyu over the land. He further stated that it was Mukuyu and the complainant who harvested the appellant's beans, but denied that he saw Mukuyu on he day in question. The appellant called two witnesses namely DW2, Muthinja Koronya and DW3, Gichegi Thirindi, both from Twale. DW2 testified that he was a neighbour to both the appellant and the complainant and that the complainant had a shamba at Kibiru. That on 4/6/2004, he saw the complainant and others harvesting beans on the appellant's land but could not say who beat the complainant. He also stated that he did not see the appellant at the scene of the alleged offence on the material day.

DW3 also stated that he saw some people harvesting beans from the appellant's shamba. He could not however, say who assaulted the complainant and further that he did not see the appellant at the shamba.

In his judgment the learned trial Magistrate believed the version of the story as given by the complainant and his witnesses. He also found that during the assault, the complainant sustained injuries as set out in the P3 form which was produced by PW3. The learned trial Magistrate dismissed the appellant's defence of alibi and instead found that the appellant was at the scene of crime and that it is the appellant, his son and brother who attacked the complainant and inflicted injuries upon him. The injuries were classified as 'harm' by PW3.

This appeal is opposed on the ground that there is overwhelming evidence on record to support the charge of assault against the appellant.

The issue for my determination is whether the learned trial Magistrate could safely convict the appellant on the evidence before him. Secondly and assuming that the conviction was proper, can it be said that the sentence imposed upon the appellant was excessive in the circumstances?

After carefully reconsidering and re-evaluating the evidence on record, I find that I have no reason to make me interfere with the judgment of the learned trial Magistrate. In the first place, the appellant has complained that the learned trial Magistrate ought not to have tried the appellant in this case because on the same day the same Magistrate had heard another case against the complainant involving the same subject matter. Apart from making that allegation, no evidence was adduced by the appellant to show how and why the learned trial Magistrate was barred from trying him in this case. This ground of appeal must fail.

Mr. Gichunge who appeared for the appellant also submitted that the learned trial Magistrate failed to take account of the fact that there is a land dispute between the complainant and the appellant.

The evidence on record shows, and I believe the same to be true, that the appellant, in the company of his son and brother descended upon the complainant and assaulted him causing him actual bodily harm which was classified as harm by PW3. Even assuming for a moment that there was indeed a land dispute between the appellant and the complainant, the dispute cannot be said to have provided a licence to the appellant to assault the complainant. I have considered the evidence of the appellant and that of his witnesses, and find that apart from the discrepancy between the evidence of DW2 on the one hand and that of the appellant and DW3 on the other hand as to whether or not the complainant owned land in Kibiru I find that that whole evidence is a well doctored piece of evidence. I find it difficult to believe that the appellant was not at the scene on that day of the attack. The appellant states in his evidence that on 4/6/2004, he was at his shamba at Kibiru. DW2 stated that the complainant also has a shamba at Kibiru. What comes out clearly therefore, is that on 4/6/2004, the appellant was not only at Kabiru, but that while he was there he attacked the complainant in the manner and to the extent testified to by the complainant and his two witnesses, PW2 and PW3.

It has also been contended on behalf of the appellant that the prosecution evidence is contradictory, especially as to whether PW2 actually witnessed the assault or not. It is alleged that PW2 never witnessed the assault. Throughout her evidence in chief and also during cross-examination, PW2 stated clearly that she saw the appellant's son hit the complainant on the rib cage with a "bakora" while the appellant threw a stone that hit the complainant on the right eye region. She also testified that when she saw the appellant and his company beating the complainant she screamed as she ran away. The complainant stated as much. I therefore cannot see the contradictions in these testimonies that the appellant has complained of.

It has also been contended that the learned trial Magistrate shifted the burden of proof in this case from the prosecution to the appellant. I have carefully perused the learned trial Magistrate's judgment and from it I have established that the learned trial Magistrate never at any one time shifted the burden of proof from the prosecution to the appellant. The learned trial Magistrate said in part of his judgment: -

> "To start with it must be noted, that where an alibi defence is advanced by the accused person, it is the prosecution side that must prove beyond reasonable doubt that such a defence does not exist and not for the accused person to prove its existence.
>
> Now, the evidence on record to me satisfies that requirement ……."

The learned trial Magistrate in the penultimate paragraph of his judgment made mention of the fact that he was not sure whether the appellant and his witnesses reported the incident of the alleged harvesting of the appellant's beans by the complainant and his group.

It is not correct in my view, therefore, for the appellant to contend that the burden of proving the case against him was shifted to him. The comment by the learned trial Magistrate regarding the appellant's expected report to the police would appear, on the face of it, to show that the burden of proof was being shifted. In my view, the allegation that the complainant harvested the appellant's beans was side issue and

did not affect the otherwise uncontroverted and corroborated evidence adduced by the prosecution.

Now, on the question of sentence. The appellant contends that because the injuries inflicted upon the complainant were not so serious, and in view of the fact that there was a land dispute between the appellant and the complainant, the twelve (12) months imprisonment was excessive. I hasten to state at the outset that neither the complainant nor the appellant admits that there was a dispute between the two. According to the complainant, there was a land dispute between the appellant and Kanario Chokera (PW2). According to the appellant, there was a land dispute between himself and a lady by the name Mukuyu, not PW2. But even if there was such a dispute, the same would only come in during mitigation of sentence if the appellant had pleaded guilty. The appellant did not do so. In any event, the maximum sentence for the offence of assault contrary to Section 251 of the Penal Code is five years. Taking the circumstances of the case into account, the twelve months' imprisonment was indeed manifestly lenient.

For the reasons I have given hereinabove, I find that the appellant's appeal lacks merit. Accordingly I dismiss the same. I confirm both the conviction and sentence by the learned trial Magistrate.

It is so ordered.

Dated and delivered at Meru this 27th day of October 2005.

RUTH N. SITATI

J U D G E

27.10.05