



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI
HCCR APP. NO. 121 OF 2002

**(From the original conviction and sentence in Criminal
Case No.2634 in the Chief Magistrate' s Court at Nyeri by
Kaburu Bauni –C.M.)**

JOSEPH KAIREBI WAMBUGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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AUGUSTINE WAGURA WANGOMBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

(CONSOLIDATED)

Joseph Kairebi Wambugu and Augustine Wagura Wangombe (hereinafter referred to as first and second Appellants *respectively*) were jointly tried and convicted by the Chief Magistrate Nyeri, for the offence of Assault causing actual bodily harm Contrary to Section 251 of the Penal Code. They were each placed on probation for a period of three years. Being dissatisfied with their conviction and sentence they have now each appealed to this court. Their appeals have been consolidated for purposes of hearing.

Their grounds of appeal are basically that the prosecution evidence was contradictory and doubtful and therefore ought not to have been relied upon to sustain a conviction and that the trial Magistrate further erred in rejecting the Appellants defence without sufficient reasons.

Briefly the evidence in the Lower Court was that the Complainant Aloysius Wanjohi Wambugu wanted to take building stones to his plot. He therefore instructed his son Kenneth Karimi Wanjohi (P. W. 2) to clear an access road which they could use to take the stones to the plot. P. W. 2 cleared the access road.

On 31/7/01 when P. W. 2 tried to use the access road that He had cleared to take the stones to the plot He found that the second Appellant (who was Accused 1 in the Lower Court) had blocked the access road by dumping stones on it. The complainant and P. W. 2 reported the matter to P. W. 7 Albert Muthoga Kihara the assistant chief and to the police. P. W. 7 advised the Complainant to get three elders so that the dispute could be arbitrated upon on the 10th August 2001 when all the parties were to meet at the site.

On 10/8/01 the Complainant and P. W. 2 went to the site where the meeting was to take place. They found the assistant chief (P. W. 7) had not arrived. They found P. W. 3 David Gitonga Mwangi a stone cutter and P.W. 5 Charles Maina Njuguna a Mason. As the two were talking with P.W. 1 discussing the possibility of P. W. 1 engaging their services. The second Appellant, his wife and children appeared, the 2nd Appellant was armed with a stick and a sword. He hit P. W. 3 and 5 with the stick. He then attacked the complainant hitting him several times on the head with the stick and also stabbed Complainant on the left side on the head and on the back of his head with the sword. The first Appellant who was also armed with a rungu hit the Complainant on the leg with the rungu which broke. The Complainant and his son left the site and reported the matter to P. W. 8 P. C. Harun Nyagah who issued him with a P3 form and referred him for treatment. The Complainant was later on the same day examined by Dr. Joseph Thuo who found him with a cut on the left side of his face, a cut on the back of his head and a swelling on the left leg. He assessed the Complainant's injuries as harm.

The two Appellants were later arrested and charged with the offence. In their defence each of the Appellant gave sworn evidence. Three witnesses also testified in support of the defence.

The defence was that Complainant and the two Appellants are brothers. They had a dispute over land Parcel No. Thigingi/Karia 133 which belonged to their mother who was deceased. They discussed and divided the land among the four brothers (including a fourth brother not involved in this suit). The second Appellant poured building stones on his portion. On the day of the incident the two Appellants were informed by P. W. 7 of a meeting with clan elders, when the second Appellant reached the site He found the son of the Complainant and two other men scattering the second Appellant's stones, while Complainant was supervising the exercise. The second Appellant became angry took a tree branch and hit one of the young men with it. The other two ran away leaving P.W. 2 who held second Appellant by the neck and tore his shirt. P. W. 2 hit second Appellant on the chest and in retaliation second Appellant slapped him. It was then that Complainant removed a sword from under his jacket. The second Appellant got hold of the complainant and the two struggled and second Appellant managed to get the sword from the Complainant. One Edward Mutemi (D. W. 3) came and separated the two. The first Appellant came and found the second Appellant and Complainant struggling when the two were separated the Complainant started threatening the first Appellant and abusing him that He was not sired by their father. The first Appellant stood at a distance and never participated in the struggle.

The second Appellant was later examined by one Michael Ochola D. W. 4 who found him with a swelling on the chest wall and tenderness on the hip joint, injuries which He assessed as harm.

On the above evidence the trial Magistrate found that the first and second Appellants attacked and injured the Complainant. He therefore convicted them of the charge thereby giving rise to this appeal.

I have reconsidered and re-evaluated the evidence. It is not disputed that the two Appellants and Complainant are brothers and that the dispute between them arose out of their late mothers land known as Thegenge/Karia/33. It is also not disputed that the dispute was ignited by the dumping of stones on a portion of the disputed land.

The main issue was whether the two Appellants jointly and unlawfully attacked the Complainant or whether as contended by the defence, the second Appellant was merely trying to stop the Complainant and his son from scattering the second Appellant's building stones and whether it was the Complainant who accosted the second Appellant with simi. Both the Complainant and P. W. 2 testified that the second Appellant was the one who initiated the attack and that he was armed with a stick and a Somali sword.

This was supported by the evidence of P.W. 3. P. W. 4 on the other hand stated that the second Appellant was armed with a tree branch and a small simi. While this may appear as a contradiction in actual fact it was not a contradiction but simply a difference in description when in actual fact referring to the same thing i.e. a stick being described as a tree branch whilst a sword being described as a simi. To a simple mind there may really be no differences between the items described.

All the four witness stated that the first Appellant was armed with a rungu and did participate in the assault. Faced with the two versions of how the incident occurred the trial Magistrate found that the second Appellant was the aggressor.

I have considered the defence version against the evidence of the prosecution witnesses and do find that it was not true that the Complainant was the one armed with the sword. I am satisfied that it is the second Appellant who was armed with the sword and stick and who initiated the attack. I find that He did attack and injure the Complainant and that first Appellant also participated in the assault and hit complainant with a rungu. The defence that it was the Complainant who was the aggressor was rightly rejected. I am satisfied that the evidence adduced was clear and sufficient to prove that both Appellants attacked and injured the Complainant.

There was therefore sufficient evidence to sustain the conviction of both the Appellants. The Appellants were lucky to have escaped with an order for probation.

I find that there is no substance in these appeals. I do therefore dismiss both appeals.

Dated, Signed and Delivered this 14th day of January 2004.

H.M. OKWENGU

JUDGE