REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO.174 OF 2001

REPUBLIC ……..PROSECUTOR

VERSUS

KIRURU MUIUKI …….ACCUSED

JUDGEMENT

The appellant Kiruru Muliuki was charged jointly with another with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. They were tried by the lower court, found guilty, convicted and sentenced to serve three years imprisonment as he accused used excessive force on his brother and he almost killed him.

The appellant was aggrieved by that order and he appealed to this court citing six (6) grounds of appeal namely that he pleaded not guilty to the charge, the trial magistrate erred and misdirected himself on the law and facts when he convicted him on the charge of assault while the evidence before him disclosed the offence of affray, erred and misdirected himself on the law and the facts when he relied on contradictions evidence of the prosecution witnesses whereas such contradictory ought to have been resolved in his favour, erred and misdirected himself on the law and the facts when he failed to take a critical analysis of the evidence tendered in the whole case an omission which led to fail to realize that the complainant had a score to settle with him due to long standing grudge which led to the complainant to frame the complaint, the sentence was manifestly harsh and excessive in the circumstances of the case as the learned trial magistrate did not consider all the relevant facts when assessing the sentence among them his advanced age of 72 years, the evidence adduced in court by the prosecution witnesses and the arresting officer were not concrete enough to warrant his conviction and sentence and as such he humbly begs the Honourable High Court to consider his case with a view to facilitating his immediate release from prison for the betterment of his deteriorating health on that basis he prayed that this appeal be allowed, sentence set aside and he be re-released immediately for the interest justice to be done.

In his oral submissions to court counsel for the appellant reiterated the grounds of appeal and stressed the following points. That the evidence disclosed the charge of affray, it was admitted that appellant fought the complainant on a public path and both sustained injuries and appellant was issued with a P3 and treated for these injuries, the evidence was full of contradictions and no eye witness recorded a statement, that the entire case was a frame up as the appellant was frame because of a long standing grudge between them which was confirmed by the witnesses, the rest of the evidence was hearsay, that the sentence was harsh in view of the fact that appellant was a first offender and he was an old man aged 70 years and over. The state on the other hand supports the conviction because the evidence adduced discloses the offence charged, that it is clear that the complainant was assaulted on a piece of land not belonging to the appellant, that affray does not arise as it was not in a public place, that complainant was injured and he was unable to move and the appellant ran to police to report what had happened, then the relatives of PW1 came and made the correct reporting and after listening to the two versions, the police decided to charge the appellant. That there is no law which bars the magistrate from convicting on the evidence of a single witness. On the sentence he submits that it appears to have been on the upper side in view of the age of the appellant.

In reply counsel for the appellant submitted that the evidence was not weighed in its totality, as there was contradiction, the evidence of accused two supported that of the appellant. They maintain that the evidence was that of affray and not assault and they agree with the state that the sentence was excessive. This being an appeal the duty of this court is to determine whether the conclusions reached by the lower

court are top stand or not. The findings of the learned trial magistrate are that from the evidence of both sides the court is convinced that it is not the complainant who started the fight but the accused persons, that if they are the ones who were attacked by the complainant then why did they continue assaulting him after they had overcome him and he was unconscious, that it was not necessary to tie him with tree barks and then pull him on the ground, that from the evidence of the police officer who was an independent witness found the complainant unconscious having been seriously injured, that although the first accused produced a P3 purporting that he was injured his injuries were minimal, that even if he was injured it is him who provoked the show down himself any injuries were caused they were because the complainant was defending himself. On trial basis the learned trial magistrate found that the case for the prosecution has been proved beyond reasonable doubt and on that basis convicted the appellant and sentenced him as charged.

On the court's assessment of these findings in the light of the evidence adduced I find that it is correctly found by the learned trial magistrate that there was bad blood between accused persons and the complainant over family disputes, that the grudge started over a tree the complainant had found cut and which he was using to make beehive lids which the appellant claimed to be his. It is correct that there was exchange of words between them and then a fight ensured. According to the complainant the appellant and the younger brother fought him and left him for dead after injuring him using tree barks, According to the appellant he says it is true they fought with the complainant. He says that the second accused did not join in the fight. As found by the learned trial magistrate the aggressor was the appellant because of the tree. It is correct that the complainant suffered more serious injuries as shown by the P3. The appellants suffered harm which could have arisen as a result of falling and rolling over sticks on the ground as they struggled.

The scene was in a bush and not a public place. Neither of the complainant/appellant or the co-accused maintain that there were any eye witnesses as alleged by appellant's lawyer. If there were any then PW1 and the appellant would have named them. The fight having taken place in the bush in the presence of only participants in the fight the issue of affray does not arise as there was no public place and no spectators.

As for the assault I find that the same has been proved by the evidence and if the appellant suffered any injuries it was truly sustained in the cause of the fight but he was the aggressor. I, therefore, find that the offence was properly laid and proved. The conviction is proper. Appeal against conviction is dismissed.

As for the sentence I find that indeed the injuries sustained were serious and aggravated but in view of the fact of presence of bad blood between the brothers, in view of the fact that appellant was a first offender and because of his age, the sentence was on the upper side. I agree with both counsels that it merits interference. A fine would have been appropriate. The appeal against sentence is allowed. The same is substituted with one of a fine of Kshs.10,000.00 in default 12 months imprisonment.

Dated, read and delivered at Machakos this _____ Day of

_____ 2002.

R. NAMBUYE

JUDGE.