Joel & another v Republic (Criminal Appeal E106 & E107 of 2021 (Consolidated)) [2024] KEHC 278 (KLR) (12 January 2024) (Judgment)

Neutral citation: [2024] KEHC 278 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E106 & E107 OF 2021 (CONSOLIDATED)

GMA DULU, J

JANUARY 12, 2024

BETWEEN

SAMSON MUOKI JOEL ..... 1ST APPELLANT

PAUL MUENDO JOEL ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Criminal Case No. E388 of 2021 at Kilungu delivered on 21st October 2021 by Hon. C.A.Mayamba (PM))

JUDGMENT

1. The two appellants herein were charged jointly in the Magistrate's court with two counts. Count I was for assault causing actual bodily harm contrary to Section 251 of the *Penal Code*. The particulars of offence were that on December 29, 2020 at around 11:30hours at Kisulya village in Makueni County jointly unlawfully and intentionally assaulted Dorcas Wavinya thereby occasioning her actual bodily harm.

2. They were also charged with a second count of assault causing actual bodily harm contrary to Section 251 of the *Penal Code*. The particulars of the offence being that on the same date and at the same time and place jointly unlawfully and intentionally assaulted John Mutunga thereby occasioning him actual bodily harm.

3. They denied both charges. After a full trial, they were each convicted on both counts, and each sentenced to serve three years probation.

4. Dissatisfied with the conviction and sentence, the appellants have come to this court on appeal in two separate appeals, which were consolidated through the same counsel D. M. Mutinda & Company on the following grounds:-

    1. That the trial Magistrate erred and misdirected himself in law and fact in convicting without proper consideration and analysis of the evidence.

    2. The Magistrate erred in law and facts by convicting the appellants against the weight of the prosecution evidence.

    3. The trial Magistrate erred in law and facts by convicting the appellants against the weight of the prosecution evidence which was full of contradictions and as such there was no evidence to convict the appellant with the commission of the offence.

    4. The trial Magistrate erred in law and facts by misdirecting himself to evidence of witnesses who contradicted themselves and gave evidence which was totally different from that of the complainant.

    5. The learned Magistrate erred in law by shifting the burden of proof from the prosecution to the accused person contrary to the principle of the prosecution proving (the charges) beyond reasonable doubt.

    6. The trial Magistrate erred in law and in fact by selectively choosing which prosecution witnesses to believe while ignoring some of them who contradicted their statements and others recounted their written statements.

    7. The learned Magistrate erred in law in totally disregarding the evidence of the appellants and their witnesses which could have shed light on the genesis of the issues, being land.

    8. The trial Magistrate erred in law by failing to consider the evidence of some crucial documents the appellants produced such as P3 form and copy of court judgment to prove that they had been assaulted by the complainant and hence this should have been treated otherwise as affray.

    9. The trial Magistrate erred in law and in fact by wrongly misinterpreting the judgment of Cr. No. E008 of 2021 where the 2nd appellant was the complainant against the two complainants herein. The trial Magistrate imported facts that were not in that judgment to discredit the testimony of the appellants.

    10. The learned Magistrate was factually in his judgment trying to look for loopholes in the appellants defence instead of focusing on whether the prosecution had proved their case beyond reasonable doubt as required, which they did not.

    11. The trial Magistrate erred in law and in fact by disregarding the fact that the alleged offences occurred at the appellant's family land and hence the highest probability would therefore be of the complainants being the aggressors.

12. The trial Magistrate erred by disregarding the testimony and admission of the 1st complainant who testified in court that the appellants never assaulted her yet the Magistrate went ahead to find the appellants guilty of the same offence.

13. The learned Magistrate erred in law and fact by ignoring to consider that this case was brought to court around June/July 2021 which is over 6 months since the alleged offence. This would only have meant one thing which is malice and witch hunt or revenge for having been taken to court by the appellants.

14. The trial Magistrate contradicted himself by failing to consider the contradictions of the prosecution witnesses which would have created a lot of doubt in the case since this was clear evidence of coaching witnesses.

15. The trial Magistrate erred in law and in fact by sentencing the appellants to three (3) years in probation which is excessive in the circumstances.

5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by D. M. Mutinda Advocate for the appellants, as well as the submissions filed by the Director of Public Prosecutions.

6. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences– see *Okeno =Versus=Republic* (1972) EA 32.

7. This being a criminal case, I also have to bear in mind that the proseuciton had the burden to prove each of the two charges against each of the appellants beyond any reasonable doubt see *Stephen Nguli Mulili =Versus= Republic* (2014) eKLR which applied this long standing legal principle applied consistently in the common law jurisdiction since the English decision in *Woolmington =Versus= DPP* (1935) AC 342.

8. In proving their case, the prosecution called seven (7) witnesses. On their part, each of the two appellants tendered a sworn defence testimony and they called one witness DW3 Priscilla Minoo Ngunyu.

9. What constitutes assault causing actual bodily harm has been the subject of consideration by courts. In *Ndaa =Versus= Republic* (1984) KLR the court stated that there has to be actual assault on the complainant or victim. Secondly, that assault has to have caused physical harm.

10. In the old English case of *Rex =Versus= Donovan* (1934) 2 KB 498 the court stated:-

> " For this purpose we think that "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the complainant. Such hurt or injury need not be permanent, but must, no doubt be more than merely transient or trifling."

11. In the present case both Dorcas Wavinya PW1 and John Mutunga PW2 relied on medical examination or P3 report testified to by PW4 Erick Kasiamani a Clinical Officer at Kilungu hospital, in which it was recorded that each of the two complainant suffered noticeable injuries. The said two medical examination reports were produced in evidence as exhibits. Thus like the trial Magistrate, I find that the prosecution proved beyond any reasonable doubt that the two complainants mentioned in count I and II respectively suffered actual bodily harm.

12. Did the appellants or any of them cause the said physical harm. Both appellants claim on appeal that the incident occurred in their land, and that there was a previous criminal case wherein the complainants herein were the accused persons. They state that the complainants herein were the attackers.

13. Having re-evaluated the evidence on record, I do not see any evidence on record that the appellants were the owners of the subject land. The land might be ancestral land to which the appellants and the complainants have an interest, but there is no evidence that the land exclusively belong to any of them.

14. Having stated as above, PW1 stated clearly in evidence that Muendo did not do anything to her. Muendo is the appellant in Appeal No. E106 of 2021. Thus in my view, the trial Magistrate erred in finding that Paul Muendo assaulted PW1. Thus in my view, the Magistrate should have acquitted him of count I. I will thus acquit him of count I, and set aside the sentence therein.

15. With regard to Samson Muoki Joel however, there is evidence from PW1, PW2 and PW5 that he assaulted PW1. I thus like the trial court, find that Samson Muoki Joel was correctly convicted on count I. I will uphold the conviction.

16. On count II, the evidence of PW1, PW2, and PW5 is very clear that both appellants assaulted PW2 John Mutunga. The incident occurred in broad daylight among people who knew one another well. There was no possibility of mistaken identity. I will thus uphold the conviction of both appellants on count II.

17. With regard to sentence, each one of them was sentenced to three (3) years probation on October 21, 2021. The maximum sentence for the offence is 5 years imprisonment. In my view from the circumstances of the case and pre-sentence reports availed to the trial court, the sentence was infact lenient. I will not interfere with the sentence.

18. Consequently and for the above reasons, I uphold the conviction of Samson Muoki Joel on both counts I and count II. I quash the conviction of Paul Muendo Joel on count I, but uphold his conviction on count II. I uphold the probation sentence pronounced against each of the two appellants, for the offence for which conviction was hereby been upheld. Right of appeal explained.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF JANUARY 2024 VIRTUALLY AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Ms. Mwenda for appellants

Ms. Omolo for DPP