THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 76 OF 2014

MARTIN IKINDI NZIOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgement of the Senior Principal Magistrates Court

at Kangundo delivered on 8.5.2014 by the Resident Magistrate T.N. Sinkiyian

in Kangundo SPM Criminal Case 458 of 2013)

JUDGEMENT

1. The Appellant was charged with one count of assault occasioning actual bodily harm contrary to section 251 of *The Penal Code Act*. It was alleged that the appellant on the 21st day of September, 2013 at around 12.00 noon at Isinga Location of Kangundo District within Machakos County assaulted Beth Ndindi Nzioka by slapping her on the left cheek.

2. At their trial, the prosecution adduced evidence from four witnesses. P.W.1, Beth Ndindi Nzioka told the court that on 21.9.2013 she was taking porridge when a lady called Nduko wa Ikindi came out of a car together with the appellant. She stated that she never liked the lady and didn't want her to be married by the appellant. She stated that she told the lady to go away but she slapped the appellant who in turn slapped her. On cross examination, she told the court that she went to hospital for examination in 21st September, 2013. She told the court that her problems with the appellant began when the appellant brought a woman whom she did not like and it soured the good relationship that the appellant had with Pw1. She told the court that she slapped the appellant because she was angry and he in turn slapped her. On re-examination she testified that the appellant started treating her badly when she was involved with Nduku and that she was in court because the appellant slapped her and that her pressure went up as she fell sick.

3. Pw2 was Emmanuel Musyoki a clinical officer at Kangundo District Hospital who testified on an examination carried out on Pw1 on 25.9.2013 who had a history of assault by a person known to her. It was his testimony that he observed tenderness on the left cheek mandible and noted that the injuries were 4 days and opined the weapon to be a blunt object. He told the court that he gave diclofenac tablets and assessed the injury as harm and produced the P3 form. On cross examination, he testified that the complainant's cheek was not swollen.

4. Pw3 was Kanini Kivuva who told the court that on 21.9.2013 she heard Pw1 shouting that the appellant had beaten her.

5. Pw4 was Erastus Gichuhi from Kangundo Police station who testified that on 23.9.2013 he received a report of assault of Pw1 and visited the scene and took a statement on 24.9.2013 where Pw1 informed him that a certain Nduko visited her home and this upset her. He stated that he filled the P3 form and on cross examination, it was his testimony that no step was taken against Pw1 for slapping the appellant because he did not complain. The court found that a prima facie case had been established against the appellant who was put on his defence.

6. In his sworn defence, the appellant testified that on 21.9.2013 he was at home slaughtering a cow and he sent his wife to bring papers to pack meat but he was later informed that the complainant had chased her. He testified that he approached the complainant who slapped him and told him that she did not want to see Nduku in the compound. It was his testimony that she started saying that the appellant slapped her. He denied slapping her. He testified that on 24.9.2013 he received information that the DCIO was under pressure to handle the case personally. He added that the acrimony had its genesis in him marrying Nduku.

7. Dw2 was Jonathan Muasia Kunga who testified that he was at the scene on the material date slaughtering a cow and did not see the appellant assault Pw1.

8. Dw3 was Sammy Mulinge Maundu who told the court that he slaughtered a cow together with the appellant on 21.9.2013.

9. Dw4 was Antony Muinde who testified that on 21.9.2013 he was busy slaughtering a cow.

10. The court on its own motion called Patrick Wambua Noka who testified that, there was need to a reconciliation meeting in the ethanga clan between the appellant and Pw1.

11. In her judgment, the trial magistrate found that the lack of a P3 form did not negate the fact that the appellant assaulted Pw1. It was found that the prosecution proved that Pw1 was assaulted by the appellant and the lack of treatment notes meant that harm was not proven hence the offence of common assault was proven and that the appellant was convicted of the same. The court sentences the appellant to pay 5 goats as compensation in addition to a fine of Kshs 30,000/- and in default one month imprisonment and noted that the parties had reconciled fully.

12. Being dissatisfied with the decision, the appellant challenged the same for lack of proof, reliance on inconsistencies, uncorroborated evidence, wrongful invocation of Section 179 of the Penal Code for conviction for an offence that the appellant was not charged and dismissing the defence of the appellant.

13. The appeal was canvassed vide written submissions. It was counsel for the appellant's submission that the prosecution did not meet the threshold of proof of the offence that the appellant was charged with. Counsel testified that all the 4 defence witnesses did not witness the assault and the trial magistrate relied on the evidence of a single witness to convict the appellant. Counsel pointed out that there was a stormy relationship between the appellant and Pw1 and that the complainant was the aggressor hence this created doubt in the prosecution case that ought to be resolved in favour of the appellant.

14. Submitting in conceding to the appeal, counsel for the state submitted that there was evidence of a grudge between the appellant and Pw1 fuelled by his marriage to a damsel whom the complainant disliked. Counsel submitted that the conviction was not safe.

15. This being a first appellate court, it is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see **Pandya v. Republic [1957] EA. 336**) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see **Shantilal M. Ruwala v. R. [1957] EA. 570**). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see **Peters v. Sunday Post [1958] E.A 424**).

16. The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence. By his plea of not guilty, the appellant put in issue each and every essential ingredient of the offences with which he was charged and the prosecution had the onus to prove all the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused are innocent, (see **Miller v. Minister of Pensions [1947] 2 ALL ER 372**).

17. Since the respondent conceded to the appeal, I would be constrained to explain in detail the re-evaluation I have conducted an analysis of the evidence in relation to the charge that faced the appellant. Suffice to state that the evidence that was relied upon was entirely circumstantial and before convicting an accused of an offence depending entirely on circumstantial evidence, a trial court must direct itself on the requirement that before deciding to convict upon such evidence, the inculpatory facts should be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt of the accused (see **Simon Musoke v. R [1958] EA 715**). I find that the trial court misdirected itself when it concluded that the appellant assaulted Pw1. It did not consider the possibility that the existing grudge fueled the charge and yet it presented a reasonable hypothesis that is inconsistent with the guilt of the appellant.

18. Apart from participation of the appellant, the prosecution was required to prove in addition that; (a) there was an unlawful assault of the complainant, (b) as a result of which the complainant sustained bodily injury. As regards proof that there was an unlawful assault of P.W.1 it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved then one of the elements of the offence is as good as proved. In the instant case, it was testimony of P.W.1 that the appellant slapped her on the left cheek. She told the court that she slapped him first and that she was riled by the presence of Nduku in her compound. I have found there is evidence on record to contradict this testimony and the evidence of the appellant and his witnesses show that the appellant was truthful. There is doubt that the appellant slapped Pw1. This ingredient of the offence was not proved beyond reasonable doubt.

19. The prosecution was required to adduce evidence to prove the second ingredient to show that P.W.1 sustained some bodily injury as a result of that assault. On a charge of assault occasioning actual bodily harm, there is need for medical evidence to ascertain the nature of the harm. In the instant case, the prosecution did present a P3 form that was doubtful. However the court decided not to rely on it and convicted the appellant of a minor offence. It meant that the prosecution did not adduce any medical evidence although P.W.1 testified that she received medical treatment for the injury she sustained. No medical or treatment notes were availed. In absence of medical evidence, the trial court was right to find that this element was not proved beyond reasonable doubt and in having recourse to section 179 of the Criminal Procedure Code.

20. However, according to section 179 of *The Criminal Procedure Code*, when a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it (see **Paipai Aribu v. Uganda [1964] 1 EA 524 and Republic v. Cheya and another [1973] 1 EA 500**). The minor offence sought to be entered

must belong to the same category with the major offence. The considerations of what constitutes a minor and cognate offence were set out in **Ali Mohamed Hassani Mpanda v. Republic [1963] 1 EA 294**, where the appellant was charged together with others with obstructing police officers in the due execution of their duty contrary to s. 243 (b) of *The Penal Code.* The magistrate found the appellant not guilty of the offence charged but convicted him of the minor offence of assault occasioning actual bodily harm, contrary to s.241 of *The Penal Code*. On appeal it was considered whether the magistrate had power to substitute a conviction of the lesser offence and whether that offence must be cognate with the major offence charged. The High Court of Tanganyika held that;

> "**s. 181 of The Criminal Procedure Code (similar to section 179 of The Criminal Procedure Code) can only be applied where the minor offence is arrived at by a process of subtraction from the major charge, and where the circumstance embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also, and further where the major charge gave the accused notice of all the circumstances going to constitute the minor offence of which the accused is to be convicted**."

21. Section 179 of the Criminal Procedure Code envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence and may then, in its discretion, convict of that offence. In the instant case, the only distinction between the offence of Unlawful Assault c/s 250 of *The Penal Code* and Assault Occasioning Actual Bodily Harm c/s 251 of *The Penal Code*, is that the latter requires proof of bodily harm or injury which the former does not. Therefore by a process of subtraction, the offence of Unlawful Assault c/s 250 of *The Penal Code* is minor and cognate to that of Assault Occasioning Actual Bodily Harm c/s 251 of *The Penal Code*, and a person charged with the latter offence and facts are proved which reduce it to the former, he or she may be convicted of the minor offence although he or she was not charged with it. The circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also. The charge under section 251 of *The Penal Code* gave the appellant notice of all the circumstances going to constitute the offence under section 250 for which he could be convicted.

22. The trial magistrate having discounted the offence of Assault Occasioning Actual Bodily Harm c/s 251 of *The Penal Code*, only because of absence of a medical report to aid in classifying the injury inflicted, considered the offence of Common Assault c/s 250 of *The Penal Code* whose facts had been proved. Had she properly directed herself, she would have come to the conclusion as I do now that the prosecution evidence had not proved the two elements of the minor and cognate offence of Common Assault c/s 250 of *The Penal Code* to the required standard.

23. The evidence on record brings to mind a consideration of the defence of self - defence. Did the appellant act in self defence? Did he avert a slap and in the process Pw1 was hurt? **In Black's Law Dictionary, 9th Edition at Page 1481**:- self defence is "The use of force to protect oneself, one's family or one's property from a real or threatened attack: Generally a person is justified in using a reasonable amount of force in self -defence, if he or she reasonably believes that the danger of bodily harm is imminent and that force is necessary to avoid this danger".

24. The defence of self defence derives from section 17 of The Penal Code. Lawful self -defence exists when (1) the accused reasonably believes that he or she is in imminent danger of an attack which causes reasonable apprehension of death or grievous hurt; (2) the accused reasonably believes that the immediate use of force is necessary to defend against that danger, and (3) the accused uses no more force than is reasonably necessary to defend against that danger. In no case does it justify the inflicting of more harm than it is necessary to inflict for the purpose of defence. An accused person raising this defence is not expected to prove, beyond reasonable doubt, the facts alleged to constitute the defence. Once some evidence is adduced as to make the defence available to the accused, it is up to the prosecution to disprove it. The defence succeeds if it raises some reasonable doubt in the mind of the court as to whether there is a right of self defence. (**see Selemani v. Republic [1963] E.A., at p. 446).**

25. Giving the appellant the benefit of the doubt and taking the facts from the perspective as narrated by him that Pw1 slapped him and he did not want to earn another slap hence immediate use of force was necessary to defend himself against that danger would be justified in the circumstances. The imminent slap required immediate repulsion on grounds that he had been cornered without an opportunity of escape. The situation that existed right before the confrontation as explained by the appellant is one where it can be said that he was faced with danger hence the defence of self - defence was available to him. It would be wrong for the courts to fail to take into account the fact that the appellant was under attack and found himself in a tight situation.

26. All in all, having re-scrutinized the entire evidence on record, I have reached the conclusion that the conviction of the appellant by the learned trial magistrate was wrong in law. It is demonstrated from the evidence that the prosecution had not satisfactorily proved the case beyond reasonable doubt and the conviction therefore cannot not be sustained. The presence of a grudge between the complainant and the appellant was the motive behind the charge. The complainant herself told the court that she hated the appellant's lover with a passion and the presence the said woman at her compound was anathema to her. She did not want the appellant to marry the said woman by all means. The complainant admitted slapping the appellant and thus it is clear that she was the aggressor and author of her own misfortune if at all an assault took place. The complainant's claim of assault was further put into doubt by the failure by the prosecution to produce the treatment notes. The trial magistrate's action in descending into the arena of the conflict by calling a witness suo moto put further doubt upon the prosecution's case. There were doubts created in the case and which must be resolved in favour of the appellant in any event.

27. In the result it is my finding that the appeal has merit. The conviction is quashed and the sentences set aside. The appellant is released forthwith unless otherwise lawfully held. Any fines paid be refunded to the appellant.

It is so ordered.

Dated and delivered at **Machakos** this **16th** day of **January, 2020**.

D. K. Kemei

Judge