



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO.46 OF 2019

PAUL MAUTI KENYANYA & 3 OTHER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Respondents were charged with 4 counts namely;

COUNT I

Assault causing actual bodily harm contrary to section 251 of the Penal Code.

COUNT II

Assault causing actual bodily harm contrary to section 251 of the Penal Code.

COUNT III

Malicious damage contrary to section 339 (1) of the Penal Code.

COUNT IV

Stealing contrary to Section 275 of the Penal Code.

2. Six (6) witnesses testified and after hearing the said testimony the learned trial magistrate made a finding of no case to answer and acquitted the respondents under section 210 of the CPC in a ruling dated 30/10/2018.

3. Aggrieved by this decision, the Director of Public Prosecutions lodged this appeal and raised 2 grounds viz;

1. The learned magistrate misapprehended the evidence adduced by the prosecution and consequently came to the wrong conclusion.

2. The evidence laid by the prosecution was sufficient to warrant the respondents to be placed on their defence.

4. The appeal was canvassed by way of oral submissions.

5. This being a 1st appeal, this court is required to re-evaluate the evidence and reach its own conclusions thereon all along alive to the fact that it never saw nor heard the witnesses and to give due allowance in that regard. (See **Okeno vs Republic (1992) EA 32, Kariuki Karanja –vs- Republic (1986) KLR, 190 and Pandya –vs- Republic (1957) EA 356**)

6. First, a brief recap of the evidence at trial. Zipporah Nyanchama (PW1) testified that she was at home on the 13/7/2017 where they had a funeral of their father. She was in company of her children and Teresa Kwamboka (PW2) when the 4th accused came with a rungu in company of the 2nd accused and 3rd accused and the 1st accused. The 4th accused hit PW1 on the hand. The 2nd accused hit her with a stone. PW2 came to assist her. She was beaten. They ran away. The group damaged their mother's house.

7. Both PW1 and PW2 sought treatment. Both witnesses identified photographs of the damaged house. They both said there was money in the house. PW1 did not know how much but PW2 said it was Kshs.56, 000 contributed by a group where their deceased father belonged for funeral expenses.

8. Jackson Moreka and Nancy Moraa testified that they saw the accused persons in the Act. P3 forms in respect of injuries suffered by PW1 and PW2 were produced by PW5.

9. The issue for determination is whether the prosecution had established a prima facie case against each of the accused to warrant them being placed on their defence.

10. Mr. Otieno for the DPP submitted that the evidence of PW1 and PW2 who are complainants in the assault identified the respondents as the assailants and the ones who damaged property. It is urged that medical evidence was produced to show that the complainants suffered injuries as a result of the assault.

11. It is further submitted that evidence on malicious damage was adduced and the argument that the respondents were not identified was in error as the complainants knew the attackers. Incident was during the day so there was light. I am urged to place the respondents on their defence.

12. For the respondents, Mr. Ondari submitted that the trial magistrate who saw and observed the demeanour of witnesses was right on her findings. At page 26 of the record of appeal, she states that Mary Morage whose house is alleged to have been damaged was not called as a witness to confirm that.

13. Count IV is said to fail along the same issues as Mary Moraa was not called as a witness. It is added that at page 12 of the proceedings, line 9 – 10, PW1 testified there was money in the house belonging to her mother. The money is said to have gone missing. Count 3 & 4 should fail for lack of evidence in support.

14. Counsel further submitted that going by the evidence of PW6, there was a burial dispute and people fought. What is said to have been stolen was the body of the deceased which was taken to the house of the 1st house for burial.

15. It is urged that PW1 talks of only being assaulted by the 4th accused. She only mentions the 2nd accused and not the others.

16. It is further submitted that there are no treatment notes in the record of appeal in reference to Zipporah Nyanchama to show she was treated.

17. Counsel submits that a prima facie case is one that ought to lead to a conviction. The evidence in the matter is not corroborated. Even if the accused were to keep quiet, the contradictions would lead to an acquittal.

18. In regard to the evidence relating to Count 2, it is submitted that the evidence is contradictory. The treatment notes bear no date. Matter was reported on 3/8/2017.

19. The test of a prima facie case has been settled in the case of **Bhatt –vs- R (1957) E.A. 332**. This was quoted with approval in **Republic – vs- Benson Ochieng Oyungi [2016] eKLR** in which the court stated;

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case on full consideration might possibly be thought sufficient to sustain a conviction. This is previously near to suggesting that the court would not be prepared to convict if no defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is;

“Some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence. It is true as Wilson J said that the court is not required at that stage to decide finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case conclusively; That determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a prima facie case but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”

20. Undoubtedly, at this stage of the proceedings, the standards applicable on whether a prima facie case has been made out is lower than the standard or beyond reasonable doubt which has to be achieved for a conviction to lie.

21. I agree with the decision of Nyakundi J in **R –vs- Charles Kimani Mbugua 2017 eKLR** where the court stated;

“In exercising discretion on this matter is provided by s 306 of the CPC the most important constitutional principle to bear in mind is the right of an accused person not to be forced into assisting his or her prosecution. It therefore means that before a court makes a finding on a prima facie, the prosecution is under a legal duty to establish that there is a case to compel the accused to answer. My understanding of a prima facie case is not one where this court has to decide the accused innocence or guilt, but to review the evidence and consider whether the prosecution has put up a case and materials to the extent to fairly call the accused to defend himself”.

22. Having re-evaluated the evidence on record, I am satisfied that the prosecution failed to establish a prima facie case in respect of Counts III and IV predominantly because the named complainant was not called and the trial court's finding on the these 2 counts is supported by the evidence and legally sound.

23. As regards Counts I and II, the trial court fell into error by misapprehending the legal threshold required to establish a prima facie case. The trial court stated;

“I find that the prosecution case has not been proved beyond reasonable doubt. The accused persons have no case to answer. They are acquitted under s 210 of the Criminal Procedure Code”.

24. This was a misdirection by the trial court. Had the trial court properly addressed itself to the evidence in support of Count I and II, it would have reached the proper conclusion that on the material before court, the prosecution had put up a case to warrant the accused persons being called to defend themselves.

25. With the result that the appeal herein is partially successful. I affirm the acquittal of the respondents in respect of Counts III and IV. I set aside the ruling acquitting the respondents in respect of Counts I and II and substitute thereof a finding that each of the accused persons has a case to answer in respect of Count I and II.

26. This case is remitted to the Principal Magistrates' Court at Ogembo for the hearing of the defence before any other magistrate except C.R.T. Ateya –R.M.

27. Matter be mentioned before the Deputy Registrar on 26/2/2020 to fix a mention date before the Principal Magistrate Ogembo.

Dated, signed and delivered at KISII this 19th day of February 2020.

A.K. NDUNG'U

JUDGE