



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 48 OF 2017

REPUBLIC.....APPELLANT

VERSUS

MARKLEVIS EKUTAN.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 558 of 2016 by the Senior Principal Magistrate – Hon. M.K. Mwangi delivered on 2nd November, 2017 at Lodwar)

JUDGEMENT

1. The Respondent was charged with two counts of :- **I** assault causing actual bodily harm contrary to **Section 251** of the **Penal Code** the particulars of which were that on the 4th day of September, 2016 at Nakwamekwi area in Turkana Central Sub-county within Turkana County willfully and unlawfully assaulted **NELLY EYANAE LONGOLAN** thereby causing her actual bodily harm, and **II** malicious damage to property contrary to **Section 339 (1)** of the **Penal Code** the particulars of which were that on the 8th day of September 2016 at the same place willfully and unlawfully destroyed/damaged two semi-permanent houses valued at Kshs.400,000/= the property of **NELLY EYANAE LONGOLAN**.

2. He was tried of the said charges and acquitted on both counts. Being aggrieved with the said acquittal the State filed this appeal and raised the following grounds of appeal:-

1. The learned trial magistrate failed to appreciate that the evidence produced by the Appellant was sufficient to convict the Respondent.

2. The learned trial magistrate erred in considering matters which were not before court in acquitting the Respondent.

3. The learned trial magistrate failed to appreciate that the Respondent was facing an assault charge and not affray, and therefore misdirected himself when he ventured to address matters which had not been presented to him.

4. The trial magistrate erred in determining the case against the weight of available evidence.

3. The Appellant therefore sought the orders that:-

1. The appeal be allowed.

2. The order acquitting the Respondent be set aside.

3. A retrial be ordered.

SUBMISSIONS

4. When the appeal came up for hearing, both the Appellant and the Respondent filed written submissions which they relied upon. On behalf of the Appellant it was submitted that the court should analyze and evaluate the evidence afresh and determine whether the offence herein ought to have been affray rather than assault, whether the complainant was actually assaulted and occasioned actual bodily harm as alleged and whether the Respondent sustained injuries.

5. It was submitted that there was strong evidence against the Respondent to support and sustain a conviction on a charge of assault and therefore the finding of the trial court went against the weight of the evidence tendered. It was submitted that the evidence of **DW2** contradicted the evidence of other defence witnesses. In support of these submissions the case of **ADAN ABDULLAHI HUSSEN v**

6. On behalf of the Respondent it was submitted that during the trial before the lower court both the complainant and the Respondent produced duly filed P3 forms confirming that they both sustained injuries classified as harm. It was submitted that the prosecution witnesses were not present at the fight so as to clarify who started it all as opposed to the Respondent's witnesses. It was submitted further that an order of retrial would amount to prosecuting the Respondent twice on the same facts contrary to **Article 50** of the **Constitution**. It was submitted that both Respondent and the complainant should have been charged with the offence of affray. On the charge of malicious damage to property, it was submitted that there was no evidence of ownership tendered before the lower court.

PROCEEDINGS

7. This being a first appeal the court is under legal duty to re-examine and re-appraise the evidence adduced before the trial court to come to its own conclusion thereon as was stated in the case of **KIILU & ANOTHER v REPUBLIC [2005] KLR 174** as follows:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 findings and conclusions; It must make its own conclusion only then can it be decided 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.” (Emphasis added)

8. It must be stated from the onset that **Section 348 A (1)&(2)** of the **Criminal Procedure Code** gives the right to the DPP to appeal to the High Court on acquittal in the following terms:-

“(1) When an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Director of Public Prosecutions may appeal to the High Court or Court of Appeal, as the case may be, from the acquittal or order on a matter of law and fact.

(Emphasis added)

(2) If the appeal under Sub-section (1) is successful, the High Court or the Court of Appeal, as the case may be, may substitute the acquittal with a conviction and may sentence the accused appropriately.”

9. The prosecution case against the Respondent was that **PW1** who is his sister was working at their mothers house when the Respondent followed her, punched her on the back of neck causing her to fall down. Many people went to the scene and her farmhand one **MARTIN PW3** and **PW2 SAMUEL IDAPAE** went to her aid and took her to the hospital where she was treated and P3 issued. In cross-examination she denied planning to grab land from her parents and attempted to beat the Respondent while naked. **PW2** stated that he saw the accused kicking the complainant who was on the ground and together with **PW3 MARTIN MWITUNI** took her to the hospital. It was his evidence that the Respondent was kicking her on the back of heels while **PW2** stated that the complainant was lying on her belly. **PW4 SHARRIFF LOKOPOI** a clinical officer stated that the complainant was bleeding from the mouth, and upper limb had pain. The object used was blunt and the injuries classified as harm.

10. **PW5 CORP. BENARD MOROKE** investigated the complaint and stated that the complainant had made initial report for assault and that the Respondent later on made a report of assault and trespass. It was his evidence that the assault was as a result of property dispute. He stated that **PW2** was an employee of the complainant and that there were other independent witnesses who were at the scene. He confirmed that no document of ownership of the disputed land was produced in court.

11. The Respondent denied assaulting the complainant and stated that he had hired some mason and labourer to fence his mother's plot when the complainant arrived and started to abuse him, attacked him on the back grabbed him and started to bite him. In cross-examination he confirmed fighting with the complainant after a quarrel and he was issued with P3 form. **DW2 JENNIFER LONGOLAN** the mother of both the complainant and the Respondent corroborated his account and confirmed that they fought. She confirmed that the complainant bit the Respondent on the hand and removed her underwear which she threw on the Respondent. This evidence was corroborated further by **DW3 KLEMENTINA LOPUR KOKILEU** who confirmed that the complainant undressed and struck the Respondent on the face causing the fight. **DW4 SAMSON EKARAU** confirmed the fight.

12. In acquitting the Respondent the trial court had this to say:-

“From the evidence lead, both PW1 and the accused were injured on the material day. P3 forms were completed confirming that each suffered harm. PW1's witnesses were not present at the inter inception of the attack to clarify as to who started it all. Defence witnesses on their part put it on the complainant as the party that cast the first stone. This coupled by the ensuring injuries to both parties cast serious doubt into the prosecution's case leading to the supposition that this must have been a case of affray as repulsing an attack does not translate to an assault.”

13. Having analyzed the proceedings, the judgment and the submissions, thereon I have identified the following issues for determination in this appeal:-

1. Whether the prosecution proved its case against the Respondent to the required degree on the two counts.

2. What order should the court make herein.

14. The burden of proof in criminal matters rests with the prosecution to prove its case beyond reasonable doubt. On the count of malicious damage to property, the evidence on record is that the property in dispute belonged to the mother of both the complainant and the Respondent (**DW2**) who testified on behalf of the Respondent. The prosecution did not tender in evidence any documents in support of ownership and further the issue was pending before Environment and Land Court in High Court Case No. 143 of 2016 Kitale. It is therefore clear that this issue was of a civil nature and therefore find no fault with the trial court's finding that the prosecution did not prove the elements of the offence beyond any reasonable doubt.

15. On the count of assault the evidence by the prosecution witnesses was that the Respondent assaulted the complainant causing her bodily harm while the evidence by the Respondent was that the complainant attacked him and as a result thereof a fight arose between them in which both of them were injured as evidence through the P3 form in respect of the complainant and **PW4** confirmed that the Respondent was also issued with P3 form. In criminal matters the accused is only required to give probable explanation which raises doubt in the prosecution case. It was for the prosecution to disapprove the Respondent's defence and having failed to do so, I am not persuaded by the Appellant's submissions that the trial magistrate erred when he admitted evidence envisaged in the P3 form of the Respondent since this fact was confirmed by the investigating officer that the Respondent's report was booked and he was referred to Lodwar Level 4 hospital where P3 form was later completed in respect thereof.

16. It thereafter follows that the prosecution failed to prove the case of assault as **PW1** in her evidence in chief did not state what would have caused the Respondent to assault her, whereas the Respondent and his witnesses confirmed that it is the complainant who provoked the same leading to the fight. I therefore find no fault with the trial court's finding that repulsing attack does not translate into assault as the defence of self defence was available to the Respondent who was therefore lawfully acquitted under **Section 215** of the **Criminal Procedure Code**.

17. On what order the court should make:- Whereas the trial court found that the case should have been that of affray since there was adequate evidence before him to sustain a conviction on the same, since the complainant was not jointly charged with the Respondent, I am unable to substitute the trial court's finding on acquittal with a conviction on the same as per **Section 179 (1)** of the **Criminal Procedure Code** which allows the court to convict an accused person for minor cognizant offence in lieu of the main charge.

18. In the final analysis I find no merit on the appeal herein by the State which I hereby dismiss and affirm the trial court's finding in acquitting the Respondent on both counts and it is so ordered. The Appellant has right of appeal.

Dated, delivered and signed at Lodwar this 4th day of June, 2019.

.....

J. WAKIAGA

JUDGE

In the presence of:-

_____ *for the Appellant*

_____ *for the Respondent*

Accused _____

_____ *- Court assistant*