



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NOS. 215, 216 AND 217 OF 2013

(CONSOLIDATED)

BETWEEN

KAMULESI ODUOR JOHN.....1ST APPELLANT

GABRIEL MOI ATHIAMBO.....2ND APPELLANT

THOMAS AGUNDA ONYANGO.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Hon. L Nafula SPM in Mumias SPM's Criminal Case No. 1034 of 2010 delivered on 14th November, 2013)

J U D G M E N T

Introduction

1. The three appellants, Kamulesi Oduor John, Gabriel Moi Athiambo and Thomas Agunda Onyango were the third, first and second accused respectively in Mumias SPM's Court Criminal Case No. 1034 of 2010 in which they were charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that on the 6th day of October [no year] at Nyalenya Village, Erenjo Location in Mumias District within Western Province, unlawfully jointly assaulted Hemeleah K. Akoth thereby occasioning her actual bodily harm.

2. When the appellants appeared for plea on 8th November, 2010, they each denied the charge and the case went to full trial. The prosecution called five witnesses. After hearing both the prosecution and defence case, the trial court wrote a brief judgment in which it convicted each of the appellants under Section 215 of the Criminal Procedure Code.

3. After mitigation, the three appellants were referred to Community Service Order [CSO] and the case fixed for mention on 14th November, 2013. The order of referral to CSO was made on 31st July, 2013. There is no indication from the court record whether the case was ever mentioned on 14th November, 2013, nor is it clear from the record what the reference to CSO was meant to achieve.

The Appeal

4. Being aggrieved by the conviction and "sentence" the appellants through the firm of M/S Nandwa & CO. Advocates filed their respective appeals on 27th November, 2013. The three appeals were consolidated on 1st March, 2018.

5. The appellants raised six grounds of appeal and prayed that the appeal be allowed, the conviction quashed and sentence set aside.

6. As this is a first appeal, this court is under a duty to look at the whole evidence afresh and re-evaluate it with a view to reaching its own conclusion in the matter, while remembering that it neither saw nor heard the witnesses who testified during the trial and make allowance this. See **Mwangi – vs – Republic [2004]2KLR 28**.

Analysis and Determination

7. During the hearing of the appeal, counsel for the appellant submitted that this appeal ought to be allowed on grounds:- (a) that the prosecution did not prove the charge against the appellants beyond any reasonable doubt, (b) the judgement of the learned trial court did not comply with the provisions of Section 169 of the Criminal Procedure Code and(c), there is no record of any conviction or sentence. The State conceded the appeal.

8. I shall deal with grounds (b) and (c) above. To put this whole issue into perspective there is need to look at Section 169 of the CPC which reads.

“169 – Contents of judgment.

1. Every such judgment shall, except as otherwise expressly provided by this code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

2. In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

3. In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.”

9. Again to put the issues into context it is imperative to set out the full judgment of the trial court:-

“23.8.2013

Accused persons - present

Five (5) witnesses gave evidence. Offence was committed in broad day light. Accused persons were well known to the complainant and her witnesses such that case of mistaken identity cannot arise, even if the complainant owed the accused money, the accused persons ought to have followed the well laid down procedures to recover same and not resort to taking the law into their hands. Each convicted under Section 215 CPC 14 days right of appeal.”

10. A reading of the above judgment clearly shows that the provisions of Section 169 of the CPC were not complied with. There is no indication that the learned trial magistrate analysed the evidence placed before her. She merely mentioned that “Five (5) witnesses gave evidence.” Writing that statement was not the same as setting out the evidence and analyzing it. Secondly, there is no indication that the learned trial magistrate found the three appellants guilty of the offence before convicting them. Further, the learned trial magistrate completely omitted any mention of the defence case and she therefore reached her conclusions without bearing in mind the defence case.

11. I have also carefully considered the other grounds of appeal vis-a-vis the evidence on record and agree with both counsel that this appeal ought to be allowed, except to point out that the second ground of appeal has no basis because nowhere in its brief judgment did the learned trial court try to shift the burden of proof onto the appellants. I also find that ground number four is irrelevant since there is no evidence that the sentence imposed upon the appellants was excessive. If indeed the appellants were placed on community service, they have no reason to complain about the gravity of that sentence.

12. What is clear to me though, is that the evidence on record does not support the charge against the appellants, not, just because the complainant, Hemeleah Kusomba Akoth, PW2, referred to the appellants as “My Wife” but because she did not tell the court how the three appellants assaulted her, or on what part of her body either all or any of the three appellants hit her. The complainant’s evidence does not therefore support the offence of assault as set out under Section 251 of the Penal Code.

13. In light of the above, the offence of assault, as defined under the above stated section of the law was not proved, and the benefit of that flaw goes to the appellants.

Conclusion

14. In the circumstances, I allow the appeal, quash the conviction, and set aside the “sentence.”

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 3rd day of May 2018

RUTH N. SITATI

JUDGE

In the presence of:-

Mr. Nandwa (present).....for all 3 appellants

Mr. Ngetich.....for state/Respondent

Mr. Polycap Mukabwa.....Court Assistant