



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 76 OF 2017

1. CATHERINE MONTHE NZILA

2. STEPHEN KIOKO NZILA.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence by Hon. I. M. Kahuya (SRM) in Machakos Criminal Case No. 1899 of 2014 on 28th January, 2016)

JUDGEMENT

1. The Appellants were convicted of the offence of assault causing actual bodily harm contrary to section 251 of Penal Code. The particulars therein were that the Appellants on 21st September, 2013 at Miwani estate in Machakos District within Machakos County assaulted Paul Nzioki Maile thereby occasioning him actual bodily harm.

2. A plea of not guilty was entered. Brief facts are that Paul Nzioka Maile (PW1) was on 2nd September, 2013 instructed by Nzioka Nzomo with whom he lived with not to open the gate for anyone. While standing at the gate, the Appellants went over to him and asked for the key to the gate. He refused to give them the key. The 1st Appellant went back to the car and came back while armed with a metal bar and hit PW1 at the back of the head. He fell and the 2nd Appellant stepped on his chest. He raised alarm. The 1st Appellant took the key from his pocket. Muthui, a watchman came over and took the keys from the 1st Appellant and the Appellants drove off. PW1 was assisted to the house and Nzomo's wife called for help. He was taken to Machakos police station where he reported the matter and later to hospital. Dominic Ndunda (PW2) who is a mason was at Nzomo's plot which he accessed from the back to pick his tools. He heard a motor vehicle parking at the front gate. He checked and confirmed it was the 1st Appellant then left for his errands. While at a distance, he saw PW1, 1st Appellant and 2nd Appellant engage in a struggle. He saw the 1st Appellant go to the vehicle where she took something which she used to hit PW1 on the shoulder. PW1 fell down and the 2nd Appellant stepped on his chest. Muthui, a watchman then came to PW1's rescue. Albanus Muthui (PW3) a watchman at Miwani Secondary School was on the material day asleep in a room behind the gate. He heard screams and when he went out, he found the 1st Appellant at the scene while PW1 had fallen down. The 2nd Appellant threatened to beat him up the way he had assaulted PW1. He at that point sought help from the main house. He called PW2 to help but on returning, the Appellants had taken off. He later saw the 1st Appellant trying to gain access from the back gate. PW3 refused him entry and they went away. Police Constable Ngeno (PW4) recorded the witnesses' statements and issued PW1 with a P3 form. He later visited the scene at Miwani area at Nzomo's homestead. He stated that PW1 alleged that the 1st Appellant hit him on the neck with a metal bar while the 2nd Appellant stepped on his chest. He screamed and PW3 went to his rescue. He thereafter charged the Appellants. Dr. Mutunga who is conversant with Dr. Musyoka's handwriting and signature produced a P3 form as Exhibit 1. He stated that PW1 was found to have sustained soft tissue injuries on the neck and anterior chest and the approximate age of injury was 3 to 5 days. The Appellants were put to their defence but gave no evidence.

3. Aggrieved by the conviction and sentence, the Appellants appealed on grounds that the trial magistrate failed to factor in the withdrawal of Criminal Case No. 1401 of 2013, that they were convicted on uncorroborated, inconsistent and contradictory evidence, that they were convicted on a medical report produced by a person who was not the author and that their defence was not considered.

4. It was the Appellants' submission that the trial court, despite being informed of the withdrawn case, failed to call for the file and that it failed to explain the meaning of section 87 (a) of the Criminal Procedure Code to the Appellants thereby infringing their rights under Article 50 of the Constitution. It was submitted that PW1's testimony was inconsistent when he stated that it was the first time he was visiting Nzomo's while on cross examination he stated that he was living with him. That while PW2 stated that he witnessed the assault from a distance then left, PW3 stated that he called PW2 who was in the house for help. It was further stated that the witnesses did not mention any screaming. It was argued that the prosecution did not summon all witnesses to shed light. They took issue with the prosecutions' failure to call Nzomo as a witness. That when the 1st Appellant asked for time to cross examine PW1 she was denied for the reason that she had been cross examined in Criminal Case No. 140 of 2013. It was submitted that the p3 form and OB number did not correspond with the charge sheet. That the p3 form reveals that the names were altered from Paul Nzui Maile to read Paul Nzioki Maile and the complainant's

name from the proceedings is Paul Nzioka Mainge. The Appellants in that regard cited **Seif Juma Mohammed v. Republic [2007] eKLR** to illustrate the effect of conflicting names in a p3 form. It was argued that the charge sheet indicated the case number as criminal case no. 1401 of 2013 and it seems there was no charge sheet for criminal case no. 1899 of 2014. It was argued that the trial court's judgment does not make reference to the Appellants' submissions. It was submitted that the prosecution case was not proved beyond reasonable doubt since the weapon alleged to have been used was not furnished to court.

5. The Respondent submitted that PW1's evidence was corroborated by the prosecution witnesses. That the amendment does not affect its authenticity. That the Appellants having chosen not to testify, the trial court used the correct approach to exhaustively examine the entire prosecution evidence in totality and weigh it as against that of the Appellants evidence and then make a finding supported with reasons that the prosecution had proved its case beyond reasonable doubt. It was submitted that the discrepancies did not prejudice the Appellants and were inconsequential.

6. This being a first appeal, this court has warned itself of its duties to reconsider and re evaluate the evidence afresh with a view to arrive at its own independent conclusion. With regard to the Appellants' submission on the case number. I have taken the liberty to peruse the charge sheet and it emerges that the charge sheet in fact bears the case number 1899 of 2014 and not number 1401 of 2013. Secondly, it is worth noting that a withdrawal under section 87 of the Criminal Procedure Code does not bar subsequent charges being brought against the appellants and hence the trial magistrate cannot, to this extent, be faulted. On the issue of failure to call Nzomo as a witness, it is first clear that it emerged that Nzomo was not an eyewitness to the alleged assault. Further, failure to call crucial witnesses by the prosecution entitles the court to make an adverse conclusion against the prosecution's case. However, each case is to be determined on the basis of the circumstances therein. In this case, the witnesses called by the prosecution established the charge beyond reasonable doubt. The failure to call Nzomo is therefore not fatal. See **Keter v. Republic [2007] 1 EA 135** where the court held thus:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses who are sufficient to establish the charge beyond any reasonable doubt.”

7. Section 77(1) of the Evidence Act allows for production of a document by a person familiar with the handwriting or signature of the maker. The record reveals that in making her decision to allow PW5 to produce the P3 form, the trial magistrate considered that waiting for Dr. Musyoka would cause unnecessary delay which would be prejudicial to the Appellants. In the circumstances, the trial magistrate's decision to allow PW5 to testify bearing in mind that he was in fact familiar with Dr. Musyoka's handwriting and signature cannot be faulted. On the alteration on the p3 form, the same is in my view a typographical error that does not raise any doubt. PW1's evidence that he was hit by the 1st Appellant and later stepped no by the 2nd Appellant was corroborated by PW2 and PW3. Further, the injuries found to have been suffered by PW1 too corroborated PW1's evidence. In the circumstances, the inconsistencies raised by the Appellants are not material so as to cast doubt on the prosecution case. Having so said, the ingredients of assault were satisfied by the prosecution case even without bringing the weapon. It must be noted further that it emerged that the 1st Appellant was in possession of the weapon. The prosecution cannot therefore be faulted for not availing the same since it was not recovered by the police. The defence evidence did not shake that of the prosecution which was overwhelming against the Appellants.

8. In the end, I find no merit in this appeal and it is hereby dismissed. The conviction and the sentence by the trial court is hereby upheld.

Dated signed and delivered at **Machakos** this **19th** day of **September 2018**.

D.K. KEMEI

JUDGE

In the presence of:-

J. N. Kimeu for Madahana - for the Appellant

Machogu - for the Respondent

Josephine - Court Assistant