



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 62, 64, 65 AND 66 OF 2017

(CONSOLIDATED)

RAPHAEL MBURU KARIUKI.....1ST APPELLANT

VERONICA WATHITHI WAMBUGU.....2ND APPELLANT

GEOFFREY MUNGAI WAIHERO.....3RD APPELLANT

ROSE NJERI.....4TH APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal to the High Court at Kiambu against the ruling delivered by Hon. Kinyanjui – Senior Resident Magistrate sitting at Gatundu and delivered on 11th day of November 2013)

JUDGMENT

1. The above four appellants were charged with two counts of the offence of **Assault** causing actual bodily harm **Contrary to Section 251 of the Penal Code**, particulars being that on the 21st January 2012 at Muiri village in Gatundu North within Kiambu County, jointly with others not before the court unlawfully assaulted **Beatrice Waruguru Mburu** thereby occasioning her actual bodily harm.

2. In count two, the appellants were charged with the offence of **Malicious Damage to Property Contrary to Section 339(1) of Penal Code** in that they willfully and unlawfully broke house windows, doors and household items all valued at Kshs.700,000/= the property of Beatrice Waruguru Mburu.

Upon conviction, they were sentenced to a fine of Kshs.20,000/= each and in default to serve six(6) months in jail, on Count one(1).

On count two(2) each was fined Kshs.10,000/= in default three(3)months in jail, with the sentences to run concurrently.

3. The conviction and sentence are the subject of this appeal, upon grounds condensed as:

(a) Inconsistencies and contradictions in the prosecution case (Grounds No. 1,4, and 5)

(b) Trial magistrates mind set to convict and bias (ground Nos. 2, 7 and 8)

(c) Trial Magistrate's findings not supported by evidence. (Ground Nos. 2, 7 and 8).

4. Ms. Waithera Advocate for the appellants filed written submissions that she also highlighted.

The Director of Public Prosecutions represented by Ms. Ongaki also filed her submissions in opposition.

5. The offences were committed by and against family members who knew each other by names and issues of identification does not arise, although the offences were committed at night about 11.30p.m. and there was full moon and the attackers had torches. The complainant too had her lamp on, and testified that she identified the offenders both by sound and recognition.

The complainant is sister-in-law to the 1st, 2nd and 3rd appellants and aunt to the 4th appellant. They are therefore a family.

6. As the first appellate court, it is my duty to re-analyse and re-consider the entire evidence adduced before the trial court and come up with my own findings and conclusions – **George Anyango Anyang & Another -vs- Republic Cr. App. No.53 of 2016 (2016)e KLR.**

In my opinion, errors in names spellings should not be sufficient reason to fault the trial magistrates findings on identification.

7. **PW1** was **Paul Kimani**, a clinical officer at Igegania sub-district hospital. He examined the complainant, **Beatrice Waruguru** on the 30th January 2012, with a history of assault on the 21st January 2013 by people known to her.

He produced a **P3 form** – stating injuries to the head, lower lip, loose upper teeth swollen cheek, tender neck and chest as well as the abdomen. He further stated that she was treated with drugs and stitches. The injury was classified as harm.

He further stated that she had brought with her a blood stained T-shirt but it was not produced in court.

8. **PW2** was the complainant **Beatrice Waruguru Mburu**. She was in her house when the appellants and another, knocked and using metal bars broke the door to the house and entered. She testified that they all started beating her with crow bars and sticks while in her bedroom until she became unconscious.

She testified that they told her that whether she liked it or not they would kill her. At the time her children 14, and 6 years old (twins) were crying. It was her evidence that though it was dark, she could recognise who was talking and what was happening.

9. She further testified that when the public came, Kamere, not one of the appellants told them not to enter the house, and thereafter took her to her father in-law's place and room and told her to eat him since she is the one who had bewitched him. As all this happened, the complainant stated that her son was presented and saw what was happening and this she was covered in blood and totally naked.

She testified that she then ran to a friend's house **Wa-Gitau** who took her to the police after giving her first aid, then slept in her house.

10. It was her testimony that she was taken to hospital the next day by her husband who came from Nairobi after which they reported at the police station, and thereafter went back to their house. She testified that they found the house with no doors, no gate and windows as they were all broken, and everything inside was broken. She produced photographs of damaged house door and windows – MF 2a-2f and approximated the damage at Kshs.700,000/=.

She further testified that she was not close with the appellants and that she did not know what was wrong with her father in-law, but had no grudge with them.

11. Upon cross examination, the complainant denounced her statement recorded at the police station.– 1st page but admitted the rest. She stated that it was Mburu 1st appellant who cut her on the head and Kamere punched her teeth.

12. **PW3** was **Pauline Nyakinga Kiuro** who heard noise in the complainant's house and went to check. Her evidence was that she saw the appellants beating the complainant, that the 1st appellant cut her and Kamere hit her teeth. She went away and did not report to the chief or the police.

13. **Paul Kariuki Gitau**, son of the complainant testified as **PW4**.

His evidence was that the 1st appellant was breaking their house door with two others not in court. He testified that the 1st appellant picked a *panga* near the door and cut his mother on the shoulder while 3rd appellant assaulted her and Kamere punched her mouth and pulled her outside the house screaming “*witch, witch*” and beating her while the others damaged the house windows, but villagers came to their rescue. His evidence was that their relationship with the appellants was not good, but he had no grudge with any.

14. **PW6 Snr. Sgt Jestmore Malit** CID Thika visited the scene of crime and took seven photographs of the broken door and windows and prepared a report that he produced as MFI 2a-g, Ext 2a-2g – scene of crime. He confirmed that there was damage to where the door and windows were attached on cross examination.

15. In their sworn statements of defence, the appellants denied the offence.

The 1st Appellant Raphael Mburu (DW1) testified that as he went home around 7.00p.m on the material day, he met the complainant with a group of people shouting “thief of nappier grass” and others shouting that she had beaten a teacher. He went about his business upto 22nd January 2013 when he was arrested and charged, and thereafter the other appellants were arrested. He denied assaulting the complainant.

On cross examination, **DW1** stated that he did not have a good relationship with the complainant, nor did they use to speak.

16. **The 2nd Appellant (DW2)** too denied having assaulted the complainant and that she was not in good terms with her, that she was the problem in the family. Likewise **DW3 – 3rd appellant** denied the assault to the complainant and damage to the house, but both confirmed hearing noises coming from the complainant's home on the 21st January 2012 around 9.00p.m.

17. **Rose Njeri**, 4th appellant (**DW4**) too denied assaulting the complainant. She too said she heard noise from the complainant's home and saw people and PW2 running, and that 1st and 2nd appellants had left for the bar.

She testified further that on the next day, she saw two police administration officers and **Gitau (complainant's husband)** to go to complainant's house and removed the door, put in the car, and removed everything from the house and took away the cow. She was then arrested two weeks after.

18. **DW5 Regina Wamunene** testified that on the 22nd January 2012, while visiting **DW1's** father and mother, she saw a police lorry with Gitau and two administration police officer remove Gitau's house door and put it in the lorry they came with.

DW6 repeated evidence of **DW5** that it was Gitau (complainant's husband) who removed the door to his house and took it away including a cow.

19. It is upon the above evidence that the trial magistrate convicted the appellants. It shows a deep rooted family hatred wherein the appellants were not in good terms, nor could they speak to the complainant due to allegation of the complainant being a witch, and apparently said to have bewitched their father.

20. Inconsistencies and contradictions in the prosecution case

I have taken the liberty to analyse the entire evidence.

The commission of the offence was witnessed by the complainant's fourteen (14) years old son. No where did this witness (**PW4**) corroborate the complainant's evidence that she was beaten unconscious by the appellants nor that they took her to her father-in-law's home and room and told her to eat him. He did not state that his mother was covered in blood and totally naked when she ran out of her home. The complainant did not attempt to explain why if she was beaten so badly why she never sought medical intervention the same night.

Notwithstanding the above, **PW4** the complainant's son who saw everything that happened confirmed that the appellants assaulted her mother and his screams attracted villagers who came to their aid.

21. This evidence was corroborated by **PW3**, who upon hearing noise as she went home went to see what was happening. It was her evidence that she peeped through the window and saw the 1st appellant pick a *panga* and cut the complainant while Kamere punched her on the mouth as they held and pulled her. She also testified that she saw the door and windows of the house had been broken and at the time, no other people had come to the compound.

22. From the entirety of the evidence, though some contradictions are noted, it is evident that the appellants assaulted the complainant, as corroborated by **PW3** and **PW4**.

I do not see why the complainant's son, 14 years old would testify falsely against his aunts and uncles for no reason. It is also evident that there existed bad blood between the appellants and the complainant.

23. I find no sound submission by counsel for the appellants that the trial magistrate failed to analyse each witness evidence, and especially evidence of **PW3**. I have considered the trial magistrate's judgment. It is well analysed and reasoned, and clearly captures what each of the prosecution witnesses did and said while they attacked the complainant. I am of the opinion that the **PW3** and **PW4** sufficiently corroborated the complainant's evidence.

24. The clinical officer **PW1** in his P3 form captured the injuries the complainant sustained. They are in line with what the complainant, **PW3** and **PW4** stated as having seen the appellants beat and cut the complainant. Although the blood stained clothes were not produced in court, that alone cannot discredit the firm and cogent evidence that the complainant was injured during the attack.

25. The said contradictions were not of a material nature as to vitiate the prosecution evidence. They are not of a fundamental nature. In the case **Dickson Elia Nsamba Shapwata & Another -vs- Republic Cr. App. No.92 of 2007**, and quoted in, **Cr. App. No. 123 2014 – Thoya Kitsao -vs- Republic (2015) e KLR** the court of Appeal rendered that:

“In evaluating discrepancies contradictions and omissions, it is desirable for a court not to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

26. Also in the **Cr. App No. 58/2014 Cyrus Maina Gakuru -vs- Republic (2016) e KLR**, the Court of Appeal sitting at Nyeri stated that it is not every contradiction that warrants rejection of evidence and further that:

“it is settled law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected.”

27. Having had regard to the above principles, I come to the finding that the itemised contradictions by the appellants were taken in isolation, and could not, in view of the entire evidence, warrant a rejection of the entire prosecution case.

I reject that ground of appeal as without merit.

28. **Bias and mind to convict by the trial magistrate**

It is the duty of the court, when writing a judgment, to re-examine the evidence of all witnesses. I do not find anything wrong for a Magistrate to state witness's evidence. It is not in dispute that **DW3** stated that it would be easy to remove the door of the complainant's house, nor that the complainant's husband came to the home and removed the door and carried it away as testified by **DW5** and **DW6** who were independent witnesses.

That however does not contradict the evidence of **PW2**, **PW3** and **PW4** who saw the appellants break the door and windows of the complainant's house on the night of the attack. **DW5** and **DW6** evidence corroborates the evidence that the door and windows were broken after which the owner of the house (husband to complainant) came and carried them away.

29. It is trite that the duty of an accused person is to create a doubt in the mind of the court as to the credibility of the prosecution case either by cross examination or in the defence, and once that doubt is created, the verdict would be in the accused favour. - See **HCRA No.46 of 2011 Solomon M'rukaria -vs- Republic (2014) e KLR**.

Taken together, it cannot be said that evidence of **DW5** and **DW6** was to the effect that it was the complainant's husband who broke and took away the house doors and windows. I cannot find any intent to convict by the trial Magistrate nor any bias. None has been demonstrated.

30. To the contrary, the trial Magistrate very carefully analysed the prosecution evidence and considered the defence to arrive at the decision she did.

In **Misc. Cr.App. No.82 of 2013 Eldoret, Barnaba Kipsongok Tenai -vs- Republic (2014) e KLR** the court held that in deciding whether the court is biased, it ought to determine whether in the accused mind, there was apprehension that he may not have a fair and impartial trial. I have taken a tour through the trial court's proceedings. If the appellants had doubts on the trial magistrate impartiality, they ought to have raised it then, not an appeal. I have not seen any iota of such a suggestion.

31. I agree with the appellants submissions that it was not the appellants innocence on trial but their guilt had to be proved. That is what I find the trial magistrate did as opposed to assertion to the contrary by the appellants.

I find no basis for the contention and I dismiss this ground of appeal as well. - **DMV -vs- Republic(2016) e KLR and Solomon M'rukaria -vs- Republic (2014) e KLR**.

32. **Trial magistrates findings not supported by evidence**

The trial magistrate cannot be said to have not considered the prosecution evidence when she stated the motive of the attack upon the complainant. It was clearly stated by **PW2** and supported by **PW4** – **Section 169(1) Criminal Procedure Code**.

I have already stated that the prosecution evidence was collaborated and find nothing to suggest that the magistrate created her own evidence by moving into the arena of conflict. It is normal that while listening to evidence the court ought to look at the demeanour of a witness and make findings on such demeanour. Failure to state that in the proceedings but in the judgment does not vitiate the entire evidence – See **David Njoroge Macharia -vs- Republic (2011) e KLR**

33. I am persuaded that the appellants submissions as filed in the trial court were considered.

Nothing has been placed before the court to suggest that no consideration was given to the said submissions. It was not the court's fault that the investigating officer took too long to arrest the appellants nor visit the scene of crime. The court was only bound to consider the evidence adduced before it and other extraneous matters were none of the court's concern.

34. Had the appellants had issues with the mode of their arrest, they would have sought explanation from the investigating and arresting officers by cross-examination. They failed to do so.

They cannot now come to this court appellate to seek redress.

35. Having carefully interrogated the appellants grounds of appeal and their submissions and having regard to the law, I come to the conclusion that the trial court's judgment, conviction and sentence must be upheld.

Consequently I find no merit in the appeal. I proceed to dismiss it as baseless.

Dated, signed and Delivered at Kiambu this 20th Day of September 2018.

J.N. MULWA

JUDGE