REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPENGURIA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 23 OF 2017

BETWEEN

REPUBLIC.....APPELLANT

AND

ISAIAH PKIECH.....RESPONDENT

(Being an appeal from the judgment of Hon. V. O. Adet SRM,

in Kapenguria PMCR Case no. 346 of 2016

delivered on 30.10.2017)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The respondent in this case was charged with the offence of assault causing actual bodily harm contrary to section251 of the Penal Code, the particulars thereof being that on the 25th day of February, 2016 at Senetwa Area within West Pokot County, he unlawfully assaulted Matayo Keren, thereby occasioning him actual bodily harm. In count II, the respondent was charged with cutting down trees contrary to ***section 334(1) of the Penal Code***, the particulars being that on 24th February, 2016 at Kolerach Village within West Pokot County jointly with another not before court, willfully and unlawfully cut down trees valued at kshs.38832.50/- the property of Matayo Keren. The respondent denied the charges thereby forcing the prosecution to call 4 witnesses in support of the charge against the respondent. The respondent is said to be a priest in the Anglican Church.

Judgment of the Learned Trial Court

2. After hearing both the prosecution and the defence, the learned trial magistrate carefully considered the evidence and the law and at the end of the analysis, he was satisfied that no adequate evidence had been placed before him to warrant a conviction of the respondent. The learned trial magistrate accordingly acquitted the respondent and set him free.

The Appeal

3. The appellant was aggrieved by the judgment and field his appeal premised on the following grounds:-

> **1. THAT the learned trial magistrate erred in law by acquitting the respondent in count 1 when the prosecution had proved the case beyond reasonable doubt.**
>
> ***2.*** **THAT the learned trial magistrate erred in law by not writing the judgment as required by *section 169 of the Criminal Procedure Code, Cap 75.***
>
> **3. THAT the learned magistrate erred by being biased in judgment towards the respondent instead of being an arbiter.**

REASONS WHEREFORE the appellant prays that the acquittal of the respondent be set aside and an order for conviction or retrial be made as the Honourable court may deem fit.

4. This being a first appeal, this court is under a duty to put the evidence on record under serious scrutiny with a view to determining whether the findings and conclusions of the learned trial magistrate were well grounded. Until this is done, this court would have no basis of either supporting or rejecting the findings of the learned trial magistrate. Generally see ***Okeno versus Republic [1972] EA 32, Ngui – versus – Republic [1984] KLR 729*** and ***Mwangi versus Republic [2004]2 KLR 28.***

The Prosecution Case

5. The prosecution case is brief. On 24th February, 2016, at around 9.00am, Christopher Kariangalou, PW2, was herding his animals when he heard the sound of a power saw coming from the direction of the shamba belonging to the complainant Matayo Keren who testified as PW1. PW2 telephoned the complainant and informed him of the gangs on PW1's shamba. PW1 rushed to the shamba and on arrival he found the respondent who on being asked what he was doing told PW1 that he (respondent) was cutting down trees. The respondent then picked the power saw and threatened to cut PW1 with it. PW1 got hold of the power saw as the respondent kicked and boxed PW1. The respondent also held PW1 by the throat, but at that moment, the area assistant chief, Samuel Kapelingorok arrived at the scene and finding PW1 and the respondent struggling with each other, he ordered the respondent to leave the scene. By then the respondent had cut down about 200 trees belonging to the complainant.

6. On the 25th February, 2016, PW1 went to Kapenguria County Hospital for examination and treatment. On examination, PW1 was found to have tenderness on the back, tenderness as well as swelling on the left thigh and foot. PW1 was examined by Danson Litole who testified as PW3. According to PW3, a blunt object was used to inflict the injuries upon PW1. The injury was classified as harm. It is clear from the evidence that no police officer was availed to testify in this case.

The Defence Case

7. At the close of the prosecution case, the learned trial magistrate put the respondent on his defence. The respondent gave sworn evidence and also called one witness. In his testimony the appellant told the court that on 24th February, 2016 he was cutting down some trees on his shamba when he saw PW1 running towards him. The respondent's shamba and that of PW1 are adjacent to each other. PW1 was armed with a stick and was accompanied by his wife. PW1 got hold of the respondent by the shirt before members of the public separated them. On cross examination, the respondent stated that the trees on the land were natural or indigenous trees and that the shamba was ancestral land. The respondent denied committing the offences.

8. DW2 was one Brian. He testified that on 24th February, 2016, he helped the respondent to cut down some trees. Then PW1 appeared on the scene, held the respondent on the back and pulled him back. DW2 was ordered to stop cutting the trees. DW2 also stated that the trees he was cutting were on the respondent's shamba.

Issues, Analysis and Determination

9. Since the appellant's complaints are that the learned trial court erred in acquitting the respondent in respect of count 1, this court must establish whether the evidence placed before the trial court proved the ingredients of the offence of assault. Under ***section 2 of the Penal Code***, harm, which is an ingredient of the offence of assault is defined to mean "***any bodily hurt, disease or disorder whether permanent or temporary***." Also see ***Ndolo versus Republic*** relied upon by the learned trial court. In the instant case, and according to the testimony of PW2, on examination of PW1, he was found to have tenderness on the back, swelling on the shoulders and on the left thigh and foot. The question here is whether it was the respondent who caused those injuries. In his judgment, the learned trial magistrate made a finding that the only evidence available before him was that PW1 and the respondent were pulling and pushing each other, and that in the absence of the evidence of the investigating officer, it was not clear why the respondent was singled out for the offence.

10. I have myself reconsidered the evidence and evaluated it afresh, and in my humble view what transpired between PW1 and the respondent was an affray and not an assault by the respondent. According to PW1, the two were holding onto the power saw as they pulled and pushed. Just like the trial court, it is not clear in my mind how the respondent also managed to kick and box PW1 as the two struggled over the power saw which they were holding between them. It is therefore not correct, as alleged by the appellant that the prosecution proved its case against the respondent beyond any reasonable doubt. Ground 1 of the appeal therefore fails.

11. The second ground of appeal is that the learned trial magistrate did not write the judgment in accordance with the provisions of ***section 169 of the Criminal Procedure code***. The section provides that every judgment, unless otherwise expressly provided under the code shall –

- ***be written by or under the direction of the presiding officer of the court in the language of the court;***
- ***contain the point or points for determination, the decision thereon and the reasons for the decision.***
- ***be dated and signed by the presiding officer in open court at the time of pronouncing it.***
- ***in the case of a conviction, 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.***
- ***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.***

12. During the submissions, appellant's counsel told the court that the learned trial magistrate failed to isolate the issues for determination and to give reasons for the acquittal. I have myself gone through the judgment of the learned trial magistrate and find that the learned trial magistrate not only isolated the issues, but he made a decision on each issue and gave the reasons for the decision. Upon delivery of the

judgment, the learned trial magistrate dated and signed the judgment in the presence of both the state and the respondent. In the light of the above, I do not find any merit in ground 2 of the appeal.

13. The third ground of appeal is that the learned trial magistrate was biased against the appellant throughout the trial. I have scrutinized the record of the trial court. I note that after the initial plea which was in relation to the offence under count 1, the prosecution applied for, and was granted leave to amend the charges. Counsel for the respondent did not oppose the application. This was on 28th June, 2016. On that same day, counsel for the respondent applied for adjournment on account of being indisposed. Although the record does not show whether the state was opposed to the application, the court granted the application for adjournment and fixed the case for hearing on 3rd August 2016. On 3rd August 2016, the court took the evidence of the only two witnesses who were present in court. The case was then fixed for further hearing after the state applied for adjournment. Thereafter there was another adjournment from 7th October, 2016 to 21st November, 2016, the reason for the same being defence counsel's indisposition.

14. I see nothing in the subsequent record to suggest that there was any bias by the court against the appellant. I only note that on two occasions, the appellant being unable to produce witnesses after getting two last adjournments voluntarily closed the prosecution case. The above synopsis shows that both parties were given equal and fair treatment by the court during the hearing of the case. This ground of appeal therefore has no basis and the same is accordingly dismissed.

15. The last issue in this appeal00 is the question of the prosecution's failure to avail the investigating officer to testify during the hearing. In ***Kiriungi versus Republic [2009] KLR 683,*** the Court held, *inter alia* that "***it was not mandatory for the investigating officer to be called, unless there was an allegation that he would have said something adverse to the prosecution case."*** Though there was no allegation in the instant case it is my considered view that the investigating officer should have been called to testify. As it turned out, there was no clear evidence on how the respondent was arrested and how he was arraigned before court. It was this omission which in my view was the undoing of the appellants' case. It may be that if the investigating officer had come to testify, he may have said something adverse to the prosecution's case.

Conclusion

16. From all the above, I find and hold that this appeal lacks merit on all the three grounds and the same is accordingly dismissed.

Orders accordingly.

Judgment delivered, dated and signed in open court at Kapenguria on this 19th day of September 2018.

RUTH N. SITATI

JUDGE

In the Presence of

Miss Kiptoo for Appellant

Miss Chebet for Respondent

Mr. Juma Barasa – Court Assistant