



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO.15 OF 2016

JAMES NKONYA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal from the conviction dated 29th day of April 2016 and sentence of Hon. Munyendo Sitati (Resident Magistrate) dated and delivered on the 13th day of May 2016 in the Original Kilgoris SRMCR NO.465 OF 2015)

JUDGMENT

1. James Nkonya was charged with the offence of Assault causing actual bodily harm contrary to Section 251 of the Penal Code. It was alleged that, “On the 19th of April 2015 at Ololngwal village in Transmara west District of Narok county, the appellant unlawfully assaulted Lesaru Sayanga occasioning him bodily harm. A total of 4 witnesses testified during the prosecution case. The appellant gave an unsworn statement in his defense. The appellant was convicted on the 29th April 2016 and sentenced on the 13th May 2016. He was placed on probation for a period of one (1) year.

2. At the hearing of the appeal the appellant was represented by Mr. Oguttu and the State by Mr. Otieno. The appeal was filed on the 15th May 2016. The appellant’s grounds of appeal are as follows;

i. The Learned trial magistrate misconceived and/or misapprehended the evidence on record and thereby failed to discern and/or decipher the apparent and evident contradictions, in the evidence tendered by the prosecution witnesses and in particular, the evidence of PW1 and PW3, respectively.

ii. The Learned Trial Magistrate erred in law in finding and holding that the Prosecution (read the Respondent), had proved her case beyond reasonable doubt, notwithstanding the contradiction(s) and/or variation between the evidence tendered and the charge sheet, which variation negates and/or affects proof of the Prosecution’s case.

iii. The Learned Trial Magistrate erred in law in finding and holding that the alleged injury, (sic) suffered and/or sustained by the complainant, was caused and/or occasioned by an assault at the instance of the Appellant herein, in the absence of any Credible Evidence to warrant and/or anchor such a finding.

iv. The Learned Trial Magistrate erred in law Disregarding and/or Disbelieving the evidence of the true eye witnesses to the events and hence proceeded to rely on and/or adopt the concocted and/or manipulated evidence of PW3, whose presence and testimony was at variance with that of the complainant and who in any event, was never present at the Locus in quo.

v. The Learned Trial Magistrate failed to address her judicial mind to the requisite standard of proof, over and in respect of Criminal matters and thereby proceeded to render a Conviction on the basis of evidence replete with grave and material doubts, which doubts ought to have been given in favour of the Appellant.

vi. The Learned Trial magistrate erred in law in dealing with the Prosecution case separately and in believing same, prior to and/or before venturing to analyze the evidence of the Defence. Consequently, the Learned Trial magistrate arrived at and/or reached an Imbalance Judgment, coloured with pre-meditations.

vii. The Learned Trial magistrate failed and/or neglected to subject the totality of the evidence, to through and exhaustive scrutiny and/or analysis and hence adopted a perfunctory approach. Consequently, the judgment, conviction and the resultant sentence, are contrary to and in contravention of the evidence on record.

viii. The learned trial magistrate erred in law in disregarding and/or ignoring the defense case and/or disbelieving same, without assigning any credible reasons and/or explanation, for such disbelief, contrary to the provisions of Articles 47 & 50(1) of the Constitution, 2010.

ix. The judgment and/or decision of the Learned Trial Magistrate is contrary to the provisions of Section 169 of the Criminal Procedure Code, Chapter 75 laws of Kenya. In the premises, the judgment of the Trial Court is vitiated and hence invalid.

x. The judgment, conviction and sentence of the Trial Learned Trial Magistrate is wrought and/or fraught with illegalities.

The appellant seeks that:-

(i) The Appeal herein be allowed and the Conviction and Sentence dated 13th day of May 2016, be quashed, varied and/or set aside.

(ii) Consequent to prayer (1) above being granted, the Appellant be set at liberty forthwith

(iii) Such further and/or other relief as the Court may deem necessary.

3. This is the first appeal and I am required to review the evidence before the trial court independently to conclude whether or not I should uphold the conviction and sentence.(see **Okeno vs Republic [1972] EA 72**).I also take note of the fact that the trial Court had the advantage of seeing and hearing the witnesses

4. The complainant testified that on the 19/4/2015 at 7.30am he saw the appellant's bull in a place he has reserved for his bulls. He took it to the appellant's home. He found the appellant outside his house and informed that his bull was consuming grass he had reserved for his bull. The appellant did not talk he threw his masai shuka picked up his walking stick and approached him and held him by the shoulder and pushed him, he fell on a small hilly place. The appellant wanted to hit him his children screamed and his daughter who was herding cattle took him away. He did not fight the appellant. His worker who was cutting trees heard the screams and he came. He met him his worker with his three wives and they went home. He took a motor cycle and went to hospital. He sustained some injury on his left hip bone. He felt pain he was treated at Logorian hospital and was given a P3 form.

5. Pw2 testified that he examined the complainant on the 19/4/2015 at Logorian sub district hospital. The

complainant informed him that he had been assaulted by a person known to him. He sustained an injury on the back and left hip. The injury was about 3 hours old. He saw swelling and tenderness which in his conclusion was harm secondary to the assault. He filled the complainant's P3 form.

6. Pw3 testified that he is employed by the complainant. On the 19/4/2015 he was at work. He saw a bull. The complainant took the bull and then he heard screams. He followed his employer. He did not hear their conversation. Between the appellant and his boss. He saw the appellant push the complainant from his shoulder and the complainant fell on his side. The appellant's family members stooped him from assaulting the complainant. A child and a lady stopped him. He escorted his employer away who left for hospital. During cross examination he recalled that he was 20 meters away when he saw the complainant push the complainant. Pw4 was the arresting officer.

7. The appellant in his defense gave an unsworn statement. He called two witnesses. He testified that on the 19/4/2015 at 8am the complainant took his bull he had found. He was with his wives. The complainant told him that his bull had trespassed and grazed on his land. He informed the complainant that the bull had passed through the fence a place in their boundary yet to be fenced. The complainant told him to control his bull so that it does not go to his land again. He told the complainant that they should fence the place as the complainant's cows too enter his land. They parted ways and on Sunday of the following week he was called by P.C Ochieng and he went to Logorian police station. He was informed that the complainant had reported that he had pushed him and he fell. He denied saying he never even went 100 meters close to the complainant.

8. Dw2 the appellant's wife testified that on the 19/4/2015 the complainant went to their home and told her husband to take care of their bull. Her husband told the complainant that they go and close the place the bull trespassed. The complainant refused saying the bull had destroyed the fence. She told her husband to leave the confrontation. The complainant left for his home they left for church. Dw3 testified that the complainant told her husband to take care of their bull. They started a confrontation. She asked them why they were arguing and why they were fighting. The confrontation was verbal not physical. He asked the complainant to calm down. The complainant left threatening to take away her husband's job. She left for church.

9. At the hearing of the appeal Mr. Oguttu consolidated Grounds 1, 3 & 4 and canvassed grounds 5, 6 and 8 separately. The appellant abandoned grounds 2, 7 and 9. On grounds 1, 3, and 4 it was submitted that the conviction by trial Magistrate premised on the evidence of Pw1 and Pw3 is manifestly unsafe because of the apparent contradictions in the evidence of the said witnesses. That the evidence was not reconciled. That the evidence of Pw1 does not show that at the material time of assault, the assault occurred by way of the appellant pushing Pw1 the complainant. That the evidence does not show that Pw1 was in the company of Pw3. That the evidence of Pw3 paints a different picture where he contends he was present at the locus quo and that he witnessed the appellant push Pw1, that he was 20 meters but states at the same time that he did not hear any conversation between the Chief and the complainant. It was submitted that if the said witness was at the locus quo he would have heard the verbal conversation which was confirmed by Dw2. The next contradiction between Pw1 and Pw3 evidence when he states that Pw1 states in re-examination when he was leaving the appellant's home it is when his workman came. That this means that he met Pw3 as he left the home of the appellant, therefore Pw3 could not have been at the appellant's home to witness what happened. That the trial Magistrate made a serious error of analysis when he stated that the worker and 3 wives arrived. That the arrival is deemed to be at the appellants home. That had the trial Magistrate addressed his mind objectively to the variances in the evidence of Pw1 and Pw3 he would not have found that the Prosecution proved their case. The contradiction is that the investigating officer states that the assault took place at the complainant's home yet the witnesses' state it happened at the appellant's home. On ground no. 5 it was submitted that the trial Magistrate failed to address her mind to the issue of burden and standard of proof. That the trial court wanted the appellant and his witnesses to dislodge the Prosecution evidence and to go one step being truthful and therefore to the trial Magistrate the veracity of the evidence of the defense was paramount. That in criminal matters the law is that the defense is to give a reasonable explanation that may not be truthful but creates a reasonable doubt.

10. It was further submitted by Mr.Oguttu that the trial Magistrate found that Dw2 and Dw3 were

uneconomical with the truth in their evidence. That the Prosecution had no questions for Dw2 and therefore his evidence was unshaken. The same applies to the evidence of Dw3. That since the evidence of Dw2 and Dw3 was unshaken the trial Magistrate cannot say that their evidence was not truthful. That the judgment was founded on hypothesis and it negates the burden of proof. On ground 6 it was submitted that the trial Magistrate analyzed the evidence in a slanted and bias manner as a result she believed the prosecution evidence beforehand and she then turned to consider the defense case, that by the time she did so the court's mind was colored and the appellant stood convicted and the burden shifted to the appellant. That this was erroneous and contrary to the provisions of Section 169 of the Criminal Procedure Code. On ground no. 8 it was submitted that trial Magistrate paid scanty attention to the issues raised by the defense. One of the said issue was the existence of the boundary issue between the complainant and the appellant. That the impact and effect of such a dispute could inspire mischief yet the same was not addressed. That the evidence of Dw2 and Dw3 who were placed at the locus said the verbal exchange did not result into any pushing. That no reason was stated why they were not believed. That the appellant's defense was not justly considered.

11. Mr. Otieno for the State opposed the application. He submitted that the case was proved beyond reasonable doubt. That the complainant testified that the appellant pushed him and caused him the injury and this evidence was corroborated by Pw3 who stated that though he did not go to the appellant's home where the incident happened he was 20 meters away and the incident happened at 7.30am. That Pw3 testified that he knew the complainant and the appellant and that he saw the complainant injured after the confrontation after hearing screams. That the medical officer confirmed that the complainant was injured on examining the complainant 3 hours after the incident. That the defense was considered and the trial Magistrate stated she did not believe their theory. That the appellant stated that he was not even 100 meters close to the complainant yet his own witnesses testified of a confrontation. That Dw3 called it a fight and this defense led the trial Magistrate to say that Pw2 and Pw3 were economical with the truth. That the mere fact that the defenses were sworn it was expected that they would be telling the court the truth and the court after hearing them and after weighing the prosecution evidence would conclude that the prosecution witness were truthful which is the duty of the trial court. That the threshold of the evidence is beyond any reasonable doubt and not beyond any doubt. That the defense did not create any reasonable doubt. He urged the court to dismiss the appeal. In reply Mr. Oguttu for the appellant submitted that whereas it is the duty of the trial court to appraise the evidence and discern the truth the ascertainment of the truth.

DETERMINATION

12. I have carefully considered the evidence and the submissions. On the grounds 1, 3 & 4 that the trial court based its conviction on contradictory evidence I find as follows; It was the evidence of Pw1 that he went to the appellant's home alone. Pw3 testified he was in the complainant's compound and followed him to the appellant's. Pw1 testified that the appellant pushed him and he fell. The injury on his hip was as a result of the fall. Pw1 stated he met Pw3 with his wives as he left the appellant's home. Pw3 said he saw the appellant push the complainant. He was about 20 meters away. This incident happened at about 8am. The appellant was known to Pw3. Pw3 testified further that he saw the relatives stop the assault and described them as one child and a lady. It was the evidence of the complainant that the appellant's daughter who was herding pulled away the appellant. I find no contradiction in this evidence each witness narrated what happened in the sequence the incident happened on what they saw. The fact that Pw3 did not hear the conversation between the complainant and appellant did not weaken the prosecution evidence at all. Pw3 testified that the complainant was injured from the way he walked. Pw2 examined the complainant 3 hours after the fall, PW1 had injuries on the back and left hip. Pw4 the arresting officer evidence was on the arrest and not the events of the material day. The report was that the complainant was assaulted by someone known to him that the complainant drove the bull back to the appellant's home. During re-examination though he stated that the assault took place in the complainant's home, he went further to indicate that the complainant fell on the left side on a small anthill within the compound of the appellant. Pw2 and Pw3 who witnessed the assault corroborated the complainant's evidence. There was no contradiction in the evidence of Pw1 and Pw3.

13. On ground no 5, 6 and 7, I have read the proceedings and I find that the trial Magistrate did address

herself to the required standard of proof, she analyzed the evidence and stated the issues she concluded that she was persuaded by the prosecution version, considered the defense and concluded that the prosecution had proved their case beyond reasonable doubt. She had the benefit of hearing and seeing the witnesses she states as follows;

“The only important question for consideration is whether the assailant was the accused. The prosecution witnesses have identified the accused as person who assaulted the complainant. The accused in his defense has denied committing the offence. He placed himself at the scene and in his version stated that after the complainant presented the bull to him he suggested that they should jointly repair the fence where the cattle cross. That complainant went away. Dw2 and Dw3 wives of the accused gave a similar version save that the accused and complainant engaged in a verbal confrontation and they were able to calm down the parties herein.’

Her analysis shows that she considered both sides and stated her findings having heard and seen the witnesses. Nothing in the judgment shows that the trial magistrate’s mind was colored and that the burden shifted to the accused. Her conclusion was after she considered all the evidence. The trial magistrate considers, evaluated the evidence and made a decision that was well thought. The conviction and sentence was proper. The appellant’s appeal has no merit and is dismissed.

Dated signed and delivered this 17th day of **October 2018**.

R.E. OUGO

JUDGE

In the presence of;

Mr. Otieno For the State

Appellant in person

Mr. Mainga h/b Mr. Ochwangi For the Appellant

M/s Rael Court clerk