



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 85 OF 2016

REPUBLIC.....APPELLANT

VERSUS

PAUL GICHERU MURINGI.....1ST RESPONDENT

BONIFACE GITONGA MURINGI.....2ND RESPONDENT

(Appeal against acquittal in Nyeri Chief Magistrates Court Criminal Case No. 275 of 2015

(Hon. D. Orimba, Principal Magistrate) on 30th March, 2016)

JUDGMENT

The respondents were charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code, cap. 63. It was alleged that on the 10th day of February 2015 at Kabendera sub-location of Nyeri County within the Republic of Kenya, they jointly, willfully and unlawfully assaulted David Kigwaini Wambugu thereby causing him actual bodily harm.

After hearing the evidence of four prosecution witnesses, the learned trial magistrate concluded that no case had been made out against the respondents as to require them to make their defence; he therefore acquitted them under section 210 of the Criminal Procedure Code, cap.75. That section states:

If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.

The state was dissatisfied with the decision of the trial court and therefore has appealed against it in this Honourable Court; in its petition of appeal dated 11th November, 2016 and filed in court on the same date, it raised the following three grounds of appeal:

1. The learned trial magistrate erred in law in making a ruling which was completely against the weight of evidence adduced by the prosecution;
2. The learned trial magistrate misdirected himself in law and acquitted the respondents despite the overwhelming evidence against them; and,
3. The learned trial magistrate misdirected himself in law in basing his decision on extraneous matters contrary to the law.

The complainant's testimony against the respondents was that he was confronted by the latter while on his farm on the morning of 10th February, 2015. The confrontation was apparently instigated by the complainant's complaint that the respondents' dogs had been destroying his maize crop. On that day, the respondents together with their mother, accosted the complainant and assaulted him before they ran away. The complainant's brother (PW2) testified that he witnessed the assault.

Dr. Martin Macharia (PW3) who was then engaged at Nyeri provincial general hospital produced the P3 form showing that the complainant had been referred to the hospital at the material time for treatment and his medical examination revealed that he had suffered soft tissue injury to his fingers; he classified the degree of injury as 'harm'.

The investigations officer (PW4) confirmed that indeed a report of assault had been made by the complainant at Kiawara police station and that he had been issued with the P3 form.

In analysing the evidence, the learned magistrate established that the respondents and the complainant were belligerent neighbours and at one point, the sour relationship between them had escalated to a criminal case against the complainant in which the respondents testified as prosecution witnesses. The complainant was subsequently convicted. Against this background, the learned magistrate was convinced that it was highly probable that the respondents had been framed because of the simmering grudge between him and the respondents. In his view, the complaint against the respondents and their subsequent prosecution was some sort of payback for their role in the trial and subsequent conviction of the complainant and to that extent the respondents' trial was ill motivated.

While the basis upon which the learned magistrate reached his conclusions may, on the face of it, be understandable, he may have been mistaken after all. I say so because although it is quite likely there may have been an existing feud between the erstwhile neighbours, there was yet uncontroverted evidence that the complainant had been hurt to such a degree that amounted to assault as known in law; as noted the injury he sustained was assessed as 'harm'. This evidence, in my humble view, corroborated the complainant's testimony that he was assaulted when the altercation between him and the respondents escalated into a physical confrontation. Further, there was at least one witness who witnessed the incident and testified as much.

A casual perusal of the ruling suggests that the learned magistrate himself was satisfied that the complainant had suffered some injury as a result of the confrontation. This is what he said in this regard:

I have looked at the P3 form produced and noted that the accused(sic) had a swelling on the lower back and suffered soft tissue injuries to the fingers. I am not ruling out the fact that there was a confrontation between these two parties. I further believe that if any injury was sustained it is (sic) due to the confrontation. The complainant told the court that he was pushed to the ground by one Mary Muringi and I believe that the injuries sustained were due to that push.

Having come to these conclusions, I find it a contradiction of sorts for the learned magistrate to effectively turn around and say that no *prima facie* case had been made out against the respondents. With the sort of conclusions that the learned trial magistrate reached, the evidential burden shifted to the respondents, to rebut the complainant's allegations about the origin of his injuries. Whether their testimony would have created a reasonable doubt in the prosecution case as to entitle them to an acquittal I cannot tell; however, I am convinced that there was evidence on record sufficient enough to require the respondents to give part of the story; in other words, they should have been put on their defence. For this reason, I am satisfied that the state's appeal against their acquittal under section 210 of the Criminal Procedure Code is merited and am inclined to allow it. Accordingly, the state's appeal is hereby allowed and the order of acquittal is hereby overturned.

The case is remitted back to the magistrates' court for hearing and to this end, I direct that it be mentioned before the Chief Magistrate on 18th October, 2018 for appropriate directions on its hearing. Since the learned trial magistrate who acquitted the respondents is no longer at the station it is not necessary for me to make the order relieving him the task of hearing this case.

Meanwhile, the respondents may be released on bond subject to the same bond terms meted out by the trial court on 23rd March, 2015 when they took their plea. It so ordered.

Signed, dated and delivered in open court on 12th October, 2018

Ngaah Jairus

JUDGE