



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**CRIMINAL APPEAL NO.45 OF 2017**

**(Appeal Originating from Nyahururu CM's Court Cr.No.301 of 2014 by: Hon. V. A. Ochanda – R.M.)**

**JOSEPH NDUNG'U WANYOIKE.....APPELLANT**

**- V E R S U S -**

**REPUBLIC..... RESPONDENT**

**J U D G M E N T**

The appellant, **Joseph Ndung'u Wanyoike** was convicted by **Hon. Ochanda** for the offence of giving false information to a person employed in the Public Service Contrary to Section 129(a) of the Penal Code.

The particulars of the charge are that on 10/1/2014 at Kirengero Police Station, Joseph Ndungu informed PC.34621 PC Joseph Emukule, a person employed in the Public Service, that he had been assaulted by two area chiefs **Stephen Kinyanjui Munyambu** and **Joseph Thuo Njuguna**, which information he knew to be false intending thereby to cause PC Emukule to use his lawful power to arrest the two chiefs, which the officer ought not to have done if the true facts had been known to him.

Upon conviction, the appellant was sentenced to serve 15 months imprisonment. He was aggrieved by the conviction and sentence.

He filed an amended petition of appeal through the firm of **Ochweri Ngamate & Co Advocates** citing seven grounds of appeal which are as follows:

- 1. That the evidence of the prosecution was contradictory;***
- 2. That the court relied on hearsay evidence to convict the appellant;***
- 3. That the court failed to consider the appellant's defence;***
- 4. That the court failed to consider the treatment card produced in evidence by the defence;***
- 5. That the court erred in finding that there was sufficient evidence to support the charge;***
- 6. That the conviction went against the weight of the evidence.***

The appellant therefore prays that this court do quash the conviction, set aside the sentence and set him at liberty.

**Mr. Bosire Advocate** appeared for the appellant and submitted that there was allegation that the appellant gave false information over 500 trees having been cut but none of the 8 witnesses called by the prosecution proved that the trees or the land in question was not the appellant's. Counsel also argued that the appellant was intimidated and got confused as he was unrepresented in the trial court. Counsel urged that the prosecution needs to prove the false information and to whom it was given.

In opposing the appeal Mr. Mutemei, counsel for the State, submitted that the appellant gave false information to the police that he had been assaulted by 2 chiefs; that he was forced to sign an agreement and his phone was taken by force; that there however was a dispute between the appellant and his father and that PW1 – 6 went to establish the damage caused by the appellant and decided to take the appellant to the police station but along the way, they agreed to enter into an agreement and the appellant was released but went to make a false report at the police station that two chiefs had assaulted him and taken his phone; that when he was referred for medical check-up, he was found not to have any injuries.

This is a first appeal and it is the duty of this court to re-examine all the evidence tendered before the trial court, analyze it and make its own findings. This court must give allowance to the fact that it did not have the opportunity to see and assess the demeanor of the witnesses, which opportunity the trial court had. See *Kiilu v Republic (2005) KLR 175*.

The prosecution called a total of 8 witnesses. **PW1 Stephen Kinyanjui Munyambu**, assistant chief Lugongo sub-location recalled 9/1/2014 when somebody complained that the appellant had destroyed his trees; earlier that day the accused's father had also complained that the appellant destroyed his trees and he was ordered to leave the father's land. PW1, his colleague assistant chief, PW2 and Joseph Thuo elders went to the appellant's home where the appellant showed them the trees he had cut. They decided to take him to Kirengero Police Station but on the way, the appellant and PW5 agreed and prepared an agreement whereby the appellant agreed to plant 500 trees for PW5 during the rains and also deposited his Techno phone with PW5 and he was released. PW1 denied that him and PW3 Mokeira beat PW1. He was surprised to learn that the appellant had reported to the police on 10/1/2014 that they assaulted him.

**PW2 Joseph Thuo Njuguna**, Assistant chief Baraka Sub-Location was with PW1 when they got a report of the appellant destroying his employer's trees and they went together with Mokeira PW3 and elders; that PW5 showed them the trees that were pruned badly and dried up. They found 3 freshly cut logs in the appellants home and on the road to the police station, the complainant and appellant agreed and wrote an agreement whereby the appellant agreed to replace the trees and gave his phone as security. Later, he got a report from the police that he had beaten the appellant. He identified the agreement that the appellant and PW5 wrote (P.Exh.No.1). He denied that anybody beat up the appellant.

**PW3 Daniel Mokeira Njenga** recalled that Kuria (PW5) complained that things were being stolen from his farm. They went to the appellant's home with to assistant chiefs and found the appellant had used the trees he had cut and they decided to take the appellant to the police station but he begged to be forgiven by promising to plant 500 seedlings and left his techno phone as security.

**PW4 Mariko Maragu Nganga** was with PW1-3 on the 9/1/2014. Kuria (PW5) called and informed him that the appellant had cut his trees. He corroborated PW1-3's testimonies. He denied that anybody ever beat the appellant but was not present when the agreement was made.

**PW5 Isaac Kuria Muhia** had employed the appellant as a caretaker of his farm. He went to his farm at Kabazi on 9/1/2014, found trees had been destroyed; that the farm had been under the care of the appellant for 3 years; he informed the assistant chiefs and they went to the farm together with some elders; that the appellant arrived later and they went to view the farm where trees had been cut, while others badly pruned. That the appellant had not planted all the tree seedlings given by PW5; that some of the tree seedlings that the appellant was supposed to plant on his land were planted in the appellant's land and those the appellant had cut from his farm were also in appellant's home; that on the way, the appellant begged him to forgive him and he agreed to plant 500 trees and that they signed an agreement to that effect.

**PW6 James Kiarie Ndegwa** was called to the home of PW5 where the assistant chiefs had been called by PW5 to see the damage that the appellant had caused to PW5's trees. PW6 said that some of the trees were found in the appellant's home and he persuaded PW5 not to take him to the police station. PW6 denied that the appellant was ever beaten by anybody.

**PW7 Isaac Gitonga**, a Clinical Officer at Kabazi Health Centre produced a P3 form in respect of the appellant. He said that the appellant complained of chest pain for which he was given brufen injection for pain.

**PW8 PC Joseph Emukule** of Kirengero police station recalled 10/1/2014 which received a report from the appellant that two assistant chiefs and other people had assaulted him at Kabazi farm; that he had been hurt on the head and other parts of the body. He also reported that his techno phone was taken by Kuria – PW5. PW8 issued him with a P3 form and recorded a statement.

**PW9 PC Denis Akelo** the investigating officer in this case took up the report made by the appellant, visited the scene and summoned the 2 assistant chiefs, Kuria and Mokira who had allegedly assaulted, the appellant and interrogated them. He recorded their statements and decided to charge the appellant for this offence. He produced as exhibit the techno phone that the appellant had allegedly left with PW5 as security for damaged trees. PW9 also found that the report the appellant had made to the police station about his injuries were different from what he told the doctor. PW9 decided to charge the appellants for giving false information to PW8.

The appellant gave unsworn evidence in his defence. He stated that on 9/1/2014, the employer went to the farm and said that he had destroyed his trees and denied him access; then he asked for his 8 year's salary; that he left and came back with 2 more people at 10.00 p.m., Mokeira PW3, Kuria PW5 and 2 chiefs (PW1 & 2) and the chief said he should be beaten and he called his neighbor; they went to the farm and that Mokeira hit him on the head three times, was slapped twice by Munyambo PW1; that Mokira pulled his nose and ears and pulled his private parts 3 times; that they asked him to sign an agreement and Thuo snatched his phone and gave it to Kuria and pushed him out of the police car.

**DW2 Peter Kamau Kihuria** stated that DW1 called him from his house on 11/1/2014 where he found a vehicle with occupants; that Mokeira (PW3) called him and informed him that the appellant had cut trees from the land he cares for and that he should not defend DW1; that the appellant was ordered to enter into the car; that they went to the farm which DW1 used to care for; that DW1 denied destroying any trees; that Mokeira hit DW1 with a stick twice and the chief intervened; that Kinyanjui slapped DW1; that later DW1 told him that Mokeira had hit his head, pulled his private parts and forced him to sign some papers which he did sign and was freed. He escorted DW1 to report at the police station but he was later arrested and charged.

I have considered the evidence on record, the grounds of appeal and submissions of counsel.

Mr. Bosire submitted that the 8 witnesses called by the prosecution never proved that the trees in question did not belong to the appellant. However, this was not the issue before the court. I think that the defence counsel totally missed the point.

The issues for determination are:

- 1. Whether the appellant made any report to PC Emukule;**
- 2. Whether indeed the appellant had been assaulted;**
- 3. Whether the report made to PC Emukule was true.**

From the evidence on record, it is not in doubt that there was an issue of whether the appellant had destroyed/stolen his employer's (PW5) trees. The appellant admitted to that fact that is why PW5 Kuria, appellant's employer had called people to deliberate on the issue.

It is also not in dispute that the two chiefs, PW1 & 2, PW3, PW4, 5 and 6 were all present at PW5's home to see the trees allegedly destroyed and thereafter, they proceeded to the appellant's home where they found some of the destroyed trees. PW9, the investigating officer who went to the scene confirmed that some trees had been destroyed and that is why PW5 intended to take the appellant to the police station. All the witnesses present were quite consistent, that the appellant and PW5 recorded an agreement (P.Ex.No.1). The appellant never really challenged the said agreement.

According to the appellant, PW3 hit him 3 times on the head, pulled his nose and ears; while PW1 slapped him twice and that PW3 pulled his private parts three times. Contrary to the appellant's evidence, DW2 saw PW3 hit the appellant with a stick 2 times. The appellant never mentioned PW3 having used a stick to hit him. PW7, the clinical officer was informed that the appellant was slapped and hit on the head but no stick was mentioned. Further to the above, DW1 told PW8, PW9 that his private parts were pulled. However, when he went to hospital for examination, he never revealed this serious allegation that his private parts had been pulled. Contrary to what DW1 had told the court, the appellant told PW7 that he was injured on the chest which he never told the court nor did DW2 see it. Whereas the appellant had no duty to prove his innocence, yet I find the defence evidence was contradictory as to whether indeed the appellant was assaulted.

The injuries allegedly sustained by the appellant were not visible and the clinical officer could only fill the report based on the appellant's report. The evidence on the injuries allegedly sustained were totally at variance and therefore doubtful. Having analyzed the whole evidence, there is doubt in my mind as to whether the appellant was ever assaulted as alleged.

The assault report was made to PW8, a public officer who was on duty. PW8 acted on the report, issued the appellant with a P3 form and PW9 then took up the investigations, something that should not have happened had PW8 known the true facts.

Mr. Bosire further submitted that the witnesses were still holding the appellant's phone but that is not the correct position. The phone was produced in court in evidence by the investigating officer.

Having reviewed all the evidence on record, this court is satisfied that the appellant did make a false report to PW8, a police officer causing PW8 to act on it and PW9 to investigate. The evidence of the prosecution was consistent but that of the defence as to what happened at the time of arrest was totally at variance. I am satisfied that the trial court arrived at the correct finding.

In the end, I find that the appellant was properly convicted. The appeal lacks any merit and is hereby dismissed.

Before considering the issue of sentence, I will call for a Probation Officer's Report.

**Dated, Signed and Delivered at NYAHURURU this 2<sup>nd</sup> day of November, 2018.**

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**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Ms. Rugut – Prosecution Counsel

Soi - Court Assistant

Appellant – Present