



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 3 OF 2016

BETWEEN

MILKA MORAA NYANG'AU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. J. Mitey – RM dated 3rd June 2014 at the Senior Resident Magistrate's Court at Keroka in Criminal Case No. 1168 of 2011)

JUDGMENT

1. The appellant was charged and convicted of the following two counts:

COUNT I

Assault causing actual bodily harm contrary to section 251 of the Penal Code (Chapter 63 of the Laws of Kenya)

It was alleged that on 13th October 2011 at Nyabiema Village Nyansiongo/Gesima Sub-location in Borabu District within Nyanza Province she unlawfully assaulted RONALD MOGENI OMBACHI occasioning actual bodily harm.

COUNT II

Malicious damage to property contrary to section 339(1) of the Penal Code

It was alleged that on 8th October 2011 at Nyabiema Village in Borabu District within Nyanza Province she willfully and unlawfully damaged a barbed wire fence valued at Kshs. 35,000/- the property of RONALD MOGENI OMBACHI.

2. She was fined Kshs. 5,000/- in default 3 months' imprisonment on Count I and Kshs. 10,000/- in default 6 months' imprisonment on the Count II with both sentences to run concurrently. She now appeals against conviction and sentence. The thrust of the appeal as urged by counsel for the appellant is that the prosecution failed to prove its case and that the evidence was contradictory and inconsistent and unbelievable and could not support a conviction. He pointed out that the case was motivated by an existing land dispute between the appellant and complaint and that the trial magistrate did not take into account the appellant's defence. The position of the respondent was that the prosecution proved all the elements of the offence.

3. As this is a first appeal I am required to re-appraise all the evidence afresh and reach a conclusion bearing in mind that I neither heard or saw the witnesses testify. It is for this reason that I shall now outline, albeit briefly, the evidence that emerged from the trial court.

4. On 8th October 2011, Robert Mogeni Ombachi (PW 2) had sent Raphael Mista Monari (PW 3) to go to his shamba and organize some farmwork. When PW 3 went there, he was confronted by a lady who was complaining and saying, "You shall not live in this land as long as I am alive." She was uprooting and cutting the fence. He went and reported to PW 2 what had happened. After receiving the information, PW 2 did not do anything on that day but returned to the land on 10th March 2011 where he found that the fence he had put up had been removed.

5. On 13th October 2011, PW 2 decided to go the shamba with his other workers in order to repair the fence. When they started fencing, the appellant appeared and started shouting at him while calling him a fool, a thief and a liar. As he feared what would happen, he asked his workers to leave. In the meantime, the appellant threw a stone at him which injured him on his elbow. He immediately left and went to report

the incident at Manga Police Station after going to Kijauri Level 4 Hospital for treatment. He was later issued with a P3 form. The police officers came to the land and took photographs of the fence that had been damaged.

6. One of the people who accompanied PW 2 to the shamba was John Momanyi Mose (PW 4) who recalled that on 13th October 2011, he proceeded with other workers to PW 2's shamba to repair his fence. As he was working, he heard the appellant screaming and raising alarm and accusing PW 2 of being a thief and a land grabber whom she did not recognise as the owner of the land. He stopped what he was doing to see what was happening and that is when he saw the appellant throwing stones at PW 2. He testified that she hit PW 2's left elbow with a stone. They took PW 2 to Nyansiongo Hospital and made a report to the police.

7. The investigating officer in the matter, Corporal Jonathan Chepkonga, testified that on 13th October 2011, while at Manga Police Station, he received a report by PW 2 that he had been assaulted by the appellant and that she had maliciously damaged his property. He issued him with a P3 form and recorded statements. He arranged for the scene to be photographed and the same were produced by Corporal Robery Okalo of Crime Scene Support Services (PW 5).

8. A clinical officer, Arisi Jephther (PW 1), testified that on the material day she was working at Kijauri Hospital. She attended to PW 2 at about 2.00pm. He had a tendred swelling below the left elbow joint posteriorly and he complained that he had been assaulted with a stone. James Ongaro (PW 7), a Clinical Officer at Kijauri Hospital, produced the P3 form after examining him on 13th October 2011. He ascertained that PW 2 had a swollen elbow joint 6 hours after the incident.

9. When put on her defence, the appellant (DW 1) told the court that she had been injured on the right hand in an accident and would normally use the left hand following a road accident. She produced documents form Kenyatta National Hospital to confirm that she had been treated at the hospital. She denied assaulting PW 2 on the material day and countered that it is PW 2 and a group of people who came to her land to destroy the fence. She told that court that there was a land dispute between them.

10. I have reviewed the evidence and I find that the testimony of PW 2 and PW 3 on what transpired on 8th October and 13th October 2011 is credible. PW 3 found the appellant destroying the fence while PW 2 was assaulted. Their testimony was corroborated by other evidence, PW 2 went to hospital immediately where he was treated by PW 1 and examined later in the day by PW 5 confirming his injury. The fact that he was attacked was also confirmed by PW 4 who witnessed the appellant throwing stones. The investigating officer visited the scene and caused photographs to be taken and also recovered the damaged fence posts and wire. All this evidence points to the felonious acts of the appellant.

11. The appellant raised the issue that she could not throw stone because she had an injury which made it impossible for her to use her arm. The trial magistrate observed her use her arm in court and considering that the accident took place in 2007, the trial magistrate discounted the defence particularly in view of the direct testimony of PW 2 and PW 4 who saw her throw stones.

12. Counsel for the appellant suggested that the case was motivated by a land dispute but the evidence is clear that the appellant assaulted the deceased and maliciously damaged his property.

13. For the reasons I have set out and having reviewed the evidence, I affirm the conviction and sentence. The appeal is dismissed.

DATED and DELIVERED at KISII this 13th day of DECEMBER 2018.

D.S MAJANJA

JUDGE

Mr Bosire Gichana, Advocate for the Appellant.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.