REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 99 OF 2015

MWANGI CHARLES MAHINDA.....ACCUSED

VERSUS

REPUBLIC.....PROSECUTOR

(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon. J. N. Nthuku –Senior Resident Magistrate delivered on the 19th July, 2013 in CMCR Case No. 2607 of 2007)

JUDGMENT

The appellant **MWANGI CHARLES MAHINDA** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at the Nakuru Law Courts. The appellant had been arraigned in court on a charge of **ASSAULT CAUSING ACTUAL BODILY HARM CONTRARY TO SECTION 251 OF THE PENEL CODE**. The particulars of the charge were that

> ***"On the 5th day of May, 2009 at Rumwe Farm – Njoro in Nakuru District within the Rift Valley Province, unlawfully assaulted RAHAB WANGARI GACHIENGO thereby occasioning her actual bodily harm".***

The appellant entered a plea of **'Not Guilty'** to the charge and the matter proceeded for trial.

It is necessary at this stage to give a brief history of the case. The matter having been listed for trial proceeded to defence stage but could not be proceed any further as the entire court file went missing. A skeleton file was constructed and the matter began de novo before **HON. KOMINGOI**, magistrate (as she then was). Once again the trial proceeded to defence stage at which point the appellant wrote to the Chief Justice asking to have the trial magistrate disqualified as he alleged that she was treating him unfairly **'Hon Komingoi'** recused herself and the case began de novo a second time before **HON. MAYOVA**. This time the prosecution called five (5) witnesses at which point the trial magistrate was transferred to another station.

The matter was placed before **HON NTHUKU** for hearing and upon taking of directions under Section 200(3) of the Criminal Procedure Code the appellant demanded a de novo hearing. Thus the case began afresh a third time. In this trial the prosecution called a total of five (5) witnesses.

The genesis of the dispute is a land boundary dispute between the complainant an elderly lady said to be about 86 years and the appellant. The complainant **RAHAB WANGARI** told the court that on 5/5/2009 at about 10.00 am she was inside her kiosk when she heard screams from her shamba. She rushed there to find her daughter **JEDIDAH MUTHONI** engaged in an altercation with the appellant who was cutting a tree in her shamba. The complainant asked appellant why he was cutting down her trees yet their dispute was still before the court. The appellant then allegedly began to throw stones at the complainant. She was hit on the back and in the stomach.

Some neighbours came and removed the complainant from the scene and took her to her house. The matter was reported to police who came and arrested the appellant. The complainant was taken to a nearby clinic where she was treated and discharged. Upon completion of police investigations the appellant was arraigned in court and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. Ultimately the trial court convicted the appellant and on 19/7/2013 sentenced him to serve three (3) years imprisonment. Being dissatisfied with both his conviction and sentence the appellant filed this appeal.

MR. OBUTU Advocate argued the appeal on behalf of the appellant. **MR. CHIRCHIR,** learned State Counsel opposed the appeal.

The main ground of appeal was that the learned trial magistrate did not afford the appellant an opportunity to make a statement in defence

and to call his witnesses.

I have carefully perused the record and I note that on 17/7/2013 the trial court ruled that the appellant had a case to answer and he was placed onto his defence. The appellant indicated that he would give a sworn defence and would call 4 witnesses. The court then gave directions that the defence hearing was to proceed on 18/7/2013.

However on the date allocated for the defence hearing being 18/7/2013 the appellant was not in court. The learned trial magistrate proceeded to declare the defence closed and gave a date for her judgment. She thereafter proceeded to prepare and deliver a judgment without having heard from the appellant or his witnesses.

My own view is that the learned trial magistrate acted precipitately in marking the defence as closed without hearing the appellant's side of the story. From the records it is very clear that the appellant had been an active participant throughout the trial. At no time prior to 18/7/2013 had the appellant been recorded as absent and indeed he was representing himself. I have no doubt that the appellant appreciated the trial and was anxious to vindicate himself.

It is a fundamental principle of law that no man ought to be condemned unheard. Article 50(2) (c) of the Constitution grants every accused person the right **'to have adequate time and facilities to prepare his defence'.**

The appellant had regularly attended court since November, 2010 without fail. His absence on only one occasion did not warrant the trial magistrate invoking of Section 206(1) of the Criminal Procedure Code. The court ought to have acted more prudently by adjourning the matter and issuing a summons or a warrant of arrest for the appellant. The appellant was not a habitual absentee at his trial. The trial magistrate ought to have allowed the appellant an opportunity to explain his absence – he may have fallen ill or had travel problems or may have had problems securing the attendance of his witnesses.

As it turns out the appellant failed to attend court on 18/7/2013 due to ill-health. Upon being granted leave by this court, the appellant did avail medical documents from Valley Hospital in Nakuru indicating that he attended hospital and was treated on that day. He therefore had reasonable and valid reasons to be absent from court.

The appellant was never availed an opportunity to explain his absence. On the date scheduled for judgment 19/7/2013 the appellant was in court for delivery of the same. There is no indication that the trial magistrate sought for an explanation for his absence on 18/7/2013. The magistrate just proceeded to deliver the judgment and sentence the appellant. From the circumstances I find that the appellant was denied his right to defend himself. This rendered the entire trial a nullity.

The court after convicting the appellant sentenced him to serve three (3) years imprisonment. This was misdemeanour and the appellant was a first offender. The injuries to the complainant were minor. Indeed she was treated and discharged the same day. A fine or other non-custodial sentence would have sufficed. In the circumstances a custodial sentence was uncalled for.

Unfortunately the impression being given is that the trial court was hell-bent on convicting and sentencing the appellant to a term of imprisonment. The tenets of fair trial were not in my view adhered to. The appellant was convicted without being accorded his right to be heard. For the above reasons, I find this conviction to be unsafe and I quash the same. The attendant sentence is also set aside. This appeal is therefore allowed. The appellant is to be set at liberty unless he is otherwise lawfully held.

Dated and delivered in Nakuru this 2nd day of June, 2017.

Mr. Obutu for Appellant

Mr. Motende for DPP

MAUREEN A. ODERO

JUDGE