



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 224 OF 2012

MUSA MUTURI MURIMIA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Senior Resident Magistrate's Court (J. N. Onyiego) at Kerugoya, Criminal Case No. 29 of 2006 dated 22nd October, 2007)

JUDGMENT

1. **MUSA MUTURI MURUMIA** is the appellant in this appeal. He was charged in **Kerugoya Senior Resident Magistrate's Court Criminal Case No. 29 of 2006** together with his wife **SUSAN MUTHONI MUTURI**, now deceased, with the offence of grievous harm contrary to **Section 234** of the **Penal Code**. The facts given on the charge sheet were that on 15th December, 2005 at Karia Village in the then Kirinyaga District which was then within the larger Central Province they jointly with another person not before court unlawfully did grievous harm to **LUCY WANJIKU GITARI** the complainant in the case. The appellant denied the offence together with his wife who was co-accused and the case proceeded for trial. After trial they were both convicted on a lesser offence of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code** and each sentenced to serve 2 years imprisonment with no option of fine. They both felt aggrieved and appealed against both the conviction and sentence but the appellant's wife later passed on and the appellant proceeded on his appeal where he raised 6 grounds.

2. Before I delve into the grounds and their merit I find it appropriate for ease of reference to outline the case against the appellant at the trial court.

The prosecution's case against the appellant and his late wife was supported by six witnesses called to testify.

3. The complainant, Lucy Wanjiku Gitari was called as P.W.1 by the prosecution and her evidence at the trial court was that on the material date which was the 15th December, 2005 at around 3 p.m. she was working on a farm which according to her belonged to one Joseph Njanja Mburia – who was her uncle. It was while working at the shamba that she told the trial court that the appellant's late wife (2nd accused at the trial) passed through the shamba she was working where she stopped her asking why she was passing the middle of the farm. A quarrel ensued followed up by a fight. She told the trial court that she was pinched and they wrestled to the ground. The rest of co-workers in the farm Eliud Mbogo (P.W.2), Simon Githinji and Charity Wanjiku (who was not called to testify) joined them and Charity Wanjiku used a stick to hit the appellant's late wife several times and ended the fight. It was her evidence that she went to a neighbour – Charity Wanjiku(P.W.4) to take some water and later the son of the appellant came

with the appellant and attacked her using a spear leaving her unconscious. She told the trial court that she was taken to hospital and admitted for 5 days. She later reported the incident at Kerugoya Police Station and a P3 was issued to her. The P3 was produced as Exhibit 1.

4. **P.W.2, Eliud Mbogo** a son to the complainant gave evidence which corroborated what her mother had told the court and this was also supported by the evidence of P.W.3 Simon Githinji who added that the two ladies that is the complainant (P.W.1) and the 2nd accused (appellant's wife) fought and tore each other's clothes leaving themselves naked in the process and that it was Caroline who helped the complainant in the fight by hitting the appellant's wife with a stick.

5. The evidence of **P.W.6 – James Wachira Murangi** – a clinical officer called to testify confirmed to the trial court that the complainant had injuries inflicted by persons known to her and classified the injuries as “harm” and produced the P3 as an exhibit in support of his findings.

6. In his sworn evidence in defence, the appellant told the trial court that at the material time he was away from the scene of crime. According to him, he only came home after 5.30 p.m. to find that his late wife had been attacked by the complainant and the people she was working with at the shamba. He told the trial court that she took his late wife to Kerugoya Police Station where a report was booked and they went to Hospital for treatment. The wife was later issued with a P3 which was duly filled and they returned it to the police for action. He denied attacking the complainant and connected the case against him with a land dispute over **INOI/KAMONDO/2013** which he claimed was a subject of a **Succession cause No. 57/96** at **Kerugoya Senior Resident Magistrate's Court**. It was his evidence that he got a grant that had been issued revoked but that his uncle Njanja Mburia had already sold the parcel in dispute to CYRUS MWENJE without his knowledge hence the source of the conflict. He produced the copy of order by Hon. Justice Kuloba (as he then was) revoking the grant as D. Exhibit 2 and a certificate of official search showing that the land in dispute **INOI/KAMONDO/2013** had as of 24th August, 2005 been registered in the name of CYRUS MUNENE MWENJE as D. Exhibit 3.

7. The appellant faulted the complainant's evidence in his defence telling the trial court that a different version of evidence had been given in a similar case facing his son – **NORMAN MURUMIA MUTURI** in **Kerugoya Senior Resident Magistrate's Court Criminal Case No. 970/06**. According to the Appellant, he was framed up by the complainant.

8. The evidence of **D.W.2, Susan Muthoni Muturi**, (appellant's late wife and co-accused) was different version from what the complainant had told the court. D.W. 2 told the trial court that she was passing what she considered their farm when the complainant confronted her and provoked her for a fight. She told the court that she did not respond but Simon Wanjohi slapped her and held her by the neck as other joined in and attacked her. She screamed and the neighbours came to her rescue and she left and went to her home. She further told the trial court that she was further attacked when she went to look for her water pump as her water connections had been disconnected. She screamed for help and the neighbours responded and chased the assailants away. She corroborated her husband's evidence on the issue of reporting to the police and being issued with a P3. She however, told the trial court that no action was taken against the people who had attacked her but instead she and her husband were arrested and charged. She told the trial court that she surrendered the P3 to the Police and the Police refused to give her when she demanded to be given one for purposes of the case facing her and it took the intervention of the trial court which issued an order for the Police to give her a copy.

9. **D.W.3 – James Mithamo Mutuku** was called as a defence witness at the trial and he confirmed the injuries inflicted on the Appellant's late wife by people known to her and classified them as “harm.” The P3 was produced as D. Exhibit 4.

10. The trial court upon evaluating the evidence found that the prosecution had discharged their burden of proving their case beyond reasonable doubt. The learned trial magistrate dismissed the Appellant's defence as a mere denial and also dismissed the 2nd accused defence on the basis that the complainant's injuries were more severe and it was beyond imagination that they could be self inflicted. He found the two guilty of lesser offence of assault in view of the degree of injuries established by P3 produced as P.

Exhibit 1 and convicted them and sentenced them to serve 2 years imprisonment each.

11. The Appellant and his wife felt aggrieved and separately preferred appeals. The Appellant's wife later passed on. The Appellant raised the following grounds in his petition of appeal.

(i) That the learned magistrate erred in fact and in law in convicting the appellant when the prosecution had failed to prove the case beyond reasonable doubt.

(ii) That the learned magistrate erred in fact and in law in holding that the 1st appellant's defence was a mere denial when his defence of alibi was not controverted.

(iii) That the learned magistrate erred in law and fact by failing to take into account the material contradictions in evidence tendered before him and the evidence tendered in criminal case No. 970 of 2007.

(iv) That the learned trial magistrate erred in law and fact by failing to reduce the charge to an affray.

(v) That the learned magistrate erred in fact and in law in convicting the appellant on contradictory medical evidence.

(vi) That the learned trial magistrate erred in law and fact by failing to take into account the malice and grudges over a land dispute that had caused the problem.

12. The Appellant at the hearing of this appeal relied on his written submissions which though unsigned shall be considered alongside what he orally submitted in court. He cited major differences which they have been having as a family as a main cause of him and his family tribulations in court. He pointed out a succession cause No. 157/96 and **Nairobi High Court Appeal No. 1185/97** as the cause of the family problems they had been having and submitted that part of the problems led to the criminal case which is the subject of this appeal. The state through Mr. Sitati responded that there was no substantiation of those differences at the trial and supported the finding of the trial court.

13. The Appellant faulted the Police for not taking action against the assailants who attacked his wife and inflicted injuries to her as per the P3 form which was produced as D Exhibit 4. He supported his submission on the existence of a grudge by pointing out that his son was charged vide **Kerugoya Senior Resident Magistrate's Court Criminal Case No. 970 of 2006** for the same reason.

14. I have looked at the grounds in this appeal and the arguments advanced both by the Appellant and the Respondent through Mr. Sitati and believe that this appeal can be disposed of by considering two aspects of the case at the trial or issues namely:

(i) Whether the case was proved against the Appellant beyond reasonable doubt.

(ii) Whether the trial court took the defence and its weight into consideration.

15. The two issues are so intricately intertwined that it is not easy to consider one in isolation without referring to the other. The weight of the evidence tendered by the prosecution at the trial has to be put on the scales of justice against the weight of the evidence tendered in defence in order to consider if the prosecution case was proved beyond reasonable doubt as required by law.

16. The duty of an appellate court in regard to the evidence and facts presented at a trial is now settled. This Court as an appellate court is under a duty to subject the evidence to fresh and independent analysis and make its own findings and conclusions. I am of course cognizant of my limitations given that I did not take the evidence first hand and therefore missed demeanor of witnesses as they testified. That is why it is important to take the evidence on record in its entirety and determine whether the evidence placed before the trial court was sufficient and proved beyond reasonable doubt that the Appellant did assault the

complainant as charged.

17. I have considered the evidence tendered by the prosecution and the P3 exhibited as Exhibit 1. There is no doubt that the complainant suffered some injuries which were clearly indicated on the P3 (P. Exhibit 1) by the clinical officer (P.W.6). I have however, noted some inconsistencies on the P3. The P3 indicates that the patient reported at the Police Station on 15th December, 2015 whereupon she was sent to hospital with the P3 the same day. The evidence of P.W.1 and P.W.5 – the investigating officer however, shows that the complainant booked her report at Kerugoya Police Station on 27th December, 2015. In fact the P3 clearly shows at the top that the Occurrence Book number is 26/27/12/05. So if the P3 was filled and signed on 27th December, 2005 as indicated on the said document, it is hard to explain how the medical officer found the patient with “blood stained clothes”. This may not be significant on a cursory look but the same may be significant when taken in the context under which the offence was said to have taken place.

18. The appellant contended that her late wife was assaulted by the complainant and other people known to her. At the trial a P3 was produced as D exhibit 4 and the same showed that the deceased indeed suffered some injuries. This was confirmed by D.W. 3 – James Mithamo Mutuku a clinical officer from Kerugoya District Hospital summoned to testify. He classified the injuries as “harm” the same classification given to the complainant’s injuries. (P. Exhibit 1). The defence exhibit or P3 shows that the patient was sent to Hospital on 15th December, 2015 and the number of the Occurrence Book appearing on the top of the said documents indicates No. OB/38/15/12/05 which supports the defence case that a report concerning the assault on the appellant’s wife was made the same day. The Police did not explain at the trial why no action was taken on the report made on 15th December, 2005 and also why the latter report made on 27th December, 2005 elicited quick response from the Police.

19. The apparent lack of impartiality by the Police was clearly manifested during the course of trial at the subordinate court. It took time for the Police to avail the P3 which the Appellant’s late wife had surrendered to them. It took numerous orders from court including summoning of the officer in charge of crime Kerugoya Police Station for the P3 to be given to the defence. No explanation was forthcoming from the Police on why the investigation and action was lopsided.

20. In its judgment, the trial court observed that the complainant had suffered far more serious injuries than the appellant’s wife and that on that basis the injuries could not have been self inflicted. Although the trial court did not find that the Appellant’s injuries were self inflicted, the learned trial magistrate fell short of saying so. This in my view and with due respect to the learned trial magistrate was a misdirection. The Appellant’s ground that the learned trial magistrate erred by failing to note that the complainant had also assaulted the appellant’s late wife is well taken and founded. The trial court should have interrogated more the evidence showing that there was an affray given that both the complainant and the accused each had a P3. At the very least, the learned trial magistrate should have noted the inconsistencies I have highlighted above on the P3 (Exhibit 1) and found that there were some doubts in the prosecution case particularly when taken in totality with the evidence tendered by the defence.

21. There are some very crucial facts which were clearly brought to light by the defence especially in the submissions made by Mr. Magee the then learned counsel representing the appellant and his wife at the subordinate court during defence hearing and submissions. The evidence by the appellant that there was a long standing family feud over a succession cause was evidently so weighty and important to be disregarded. There was evidence tendered showing that there seemed to be a grudge between the complainant’s family and that of the appellant which stemmed from **Kerugoya Senior Resident Magistrate’s Court Succession Cause No. 157 of 1996** where the court ordered that the property **INOI/KAMONDO/98** which belonged to MUTURI KARUMIA deceased be divided equally between Njanja Mburia (uncle to P.W.1 as indicated above) and Musa Muturi Murumia the appellant herein. The copy of the judgment was produced as D. Exhibit 1. The dispute appeared to have escalated as per D Exhibit 2 which is a revocation order from High Court in **Nairobi Succession Cause No. 1185 of 1997.** The issue of a family feud could be clearly discerned from the conduct of P.W.1 when she confronted the appellant’s wife who was passing the disputed land. The evidence of P.W.1, P.W.2, P.W.3 and D.W.2

shows clearly that the person who started the altercation that led to a fight between the complainant and the appellant's late wife was P.W.1. Her own son Eliud Mbogo – P.W.2 told the trial court that her mother (P.W.1) went and blocked the path used by the appellant's late wife and the fight ensued. P.W.3 told the trial court that the fight left the 2 ladies naked as they tore into each other's clothes and that it was a lady known as Caroline who stopped the fight by hitting the appellant's late wife severally with a stick. This in my view clearly showed that there was an affray and the Police had sufficient evidence to charge both of them with the said offence but for unknown reasons they decided to charge only the appellant's wife with her husband with the offence of causing grievous harm.

22. I have also looked at the proceedings in **Kerugoya Senior Principal Magistrate's Court Criminal Case No. 970/06** where the appellant's son Norman Murumia Muturi was charged with the same offence as his parents. He was inexplicably arrested much later on 11th July, 2006 and arraigned in court on 12th July, 2006. What is however, interesting is that the same witnesses who had testified in this case at the subordinate court, gave a totally different sequence of events and the descriptions of combatants. P.W.1 in the said case was the same Lucy Wanjiku Gitari, who was also P.W.1 in the case that faced the appellant. The witnesses told the trial court that Norman Murumia Muturi, the accused in the case went and attacked her with a panga and she fell unconscious as a result of the injuries inflicted by Norman Murumia Muturi. There was no mention of the presence of the appellant or his participation in the attack. Simon Wanjohi Githinji P.W.3 gave the same narrative. There was no mention of the appellant so when the appellant raised the defence of alibi at the trial in his case by telling the trial court that he arrived home at 5.30 p.m. after the incident he had evidence to back up the same. The evidence was through the production of proceedings of **Criminal Case No. 970/06** by D.W.4 – Stephen Njeru Gatana an assistant executive officer Kerugoya Law Courts who was called to produce the entire file containing the proceedings. The trial court was urged by the defence counsel in his submissions which I must say were well taken to take note of the inconsistencies in the two cases. The trial court however, disregarded it or failed to give due weight on the same and in the process fell into error when assessing and evaluating the prosecution case and in the end arrived at an erroneous conclusion that the prosecution case had been proved beyond reasonable doubt.

23. This court upon evaluating the defence evidence tendered that the defence case seriously poked so many holes in the prosecution case that in the end made it unsafe and erroneous to find a conviction based on the same. I find that though it is a legal requirement that any one raising a defence of alibi has an obligation to prove I find that the same was clearly established by the evidence tendered in **Kerugoya Senior Principal Magistrate's Court Criminal Case No. 970 of 2006**. The witnesses in that case did not mention that the appellant was present when the complainant was assaulted. I do find that the appellant's contention that he was framed due to a grudge that existed is valid and well founded. Under such circumstances, the prosecution case failed the requisite test. The case was not proved beyond reasonable doubt.

In conclusion I do find that this appeal has merit. The same is allowed. The appellant's conviction by the trial court on 22nd October, 2007 is quashed and the 4 years sentence imposed on him on 31st October, 2007 is hereby reversed and set aside. He shall be set free forthwith unless lawfully held. I further direct that the security deposited in this appeal be released to the depositor. It is so ordered.

Dated and delivered at Kerugoya this 6th day of April, 2016.

R. K. LIMO

JUDGE

6.4.2016

Before Hon. Justice R. Limo J.,

State Counsel Sitati

Court Assistant Willy Mwangi

Appellant present

Interpretation English

Sitati for State present

Musa Muturi Murimia appellant present in person.

COURT: Judgment signed, dated and delivered in the open court in the presence of Musa Muturi Murimia and Mr. Sitati counsel for the Respondent.

R. K. LIMO

JUDGE