



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 16 OF 2014

REPUBLICAPPELLANT

VERSUS

JACOB NYAKWA OJWANG.....RESPONDENT

From original conviction and sentence in Criminal Case number 68 of 2012 of the Chief Magistrate`s Court at Kisumu – Hon. H.Adika-RM)

JUDGMENT

1. The Appellant was charged with Assault Causing Actual Bodily Harm contrary to section 251 of the Penal Code, the particulars being that on the 3rd day November, 2011 at Kanyakwar village Dago sub-location Kisumu West District within Nyanza Province he assaulted Martin Oriya Odembo thereby occasioning him actual bodily harm.

2. The trial Magistrate after hearing four prosecution witnesses, the unsworn statement of the accused/Respondent and two defence witnesses found it a fact that the complainant had suffered injuries. He then made a finding that it was not clear how the complainant had sustained the injuries. He concluded that the complainant and the accused/Respondent may have collided and this could have resulted in the injuries. He therefore found the accused/respondent not guilty and acquitted him.

3. The state being aggrieved filed this appeal on the following three grounds.

(i) THAT the Learned trial Magistrate erred in Law by using conjecture and assuming that the complainant could have collided with the accused in the process of holding each other.

(ii) THAT the Learned trial Magistrate erred in Law and fact in failing to make a finding that it is the accused/Respondent who injured the complainant.

(iii) THAT the Learned trial Magistrate erred in law in treating the evidence on record in a casual and pedestrian manner.

4. The Respondent filed grounds of objection which read as follows:

(i) The petition of appeal as drawn and taken out is fatally defective and the reliefs sought cannot issue.

(ii) The appeal is incompetent, misconceived and cannot lie at law.

(iii) The appellant is a vexatious litigant; it is trying to create issues where there are no issues.

5. The appeal was canvassed orally with prosecuting counsel reiterating the grounds of appeal and submitting that there was sufficient evidence to prove the complainant was injured and that the evidence was corroborated by PW2- an eye witness as well as PW4- a clinical officer. He contended that the accused/Respondent ought to have been convicted and that the complainant is intention on seeing that justice is done in the matter.

6. The Respondent disputed the submissions by the Prosecuting counsel and stated that they were a distortion of what the witnesses had said in court. He contended that it was him who was beaten and that he had reported the assault to the police, and that he obtained a P3 form which was duly filled. He further contended that the case in which he is a complainant is still on going.

7. The first issue that came to my mind as I was hearing this appeal is whether the appeal is competent, and when I considered that issue I came to the conclusion that it is not. Prior to the Amendment of section 348A of the Criminal Procedure Code by Act No. 19 of 2014 it read as follows:-

“When an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge or an order dismissing a charge, has been made by a subordinate court, the Attorney- General may appeal to the High Court from the acquittal or order on a matter of law”.

The recent amendment however now allows the Director of Public Prosecution to appeal from the acquittal or order on a matter of fact and law. It will be noted that the accused/Respondent in this case was acquitted on 29th October, 2012 and that this appeal was filed on 19th February, 2013. Therefore, the law applicable is the old section 348A of the Criminal Procedure Code which provided that an appeal against an acquittal could only be on a point of law. The finding that the complainant and the Respondent could have collided and that it was difficult to conclude that the injuries sustained by the complainant were as a result of an assault were findings of fact. The trial Magistrate found it a fact that the complainant sustained injuries. He did not however, find it a fact that the injuries were inflicted by the Respondent. Having arrived at those facts he did not go into the law. The appeal by the state is on the findings of fact by the Trial Magistrate. Clearly, the state had no right of appeal and this appeal does not lie. It is dismissed.

Signed, dated and delivered in open court this 5th day of February, 2015.

E. N. MAINA

JUDGE

In the presence of:

Mr. Ruto for the Appellant

No Appearance for the Respondent

Moses Okumu Court interpreter