REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 157 OF 2012

REPUBLIC..... APPELLANT

VERSUS

1. S K G.....1ST RESPONDENT

2. R N G.....2ND RESPONDENT

(Appeal for the Judgment Hon S. Mungai, Chief Magistrate against the Order of acquittal in Criminal Case No. 89 of 2012)

JUDGMENT

Being aggrieved by the Judgment of the Chief Magistrate Hon. S. Mungai in Nakuru CMCC No. 89 of 2012 delivered on the 27th July 2012, the Republic preferred this Appeal on two grounds:

1. That the Learned trial Magistrate erred in law in finding that the *alibi* defence displaced the prosecution evidence.

2. That the Learned trial Magistrate failed to evaluate the prosecution's evidence in its entirety thus arriving at an erroneous decision.

A brief background leading to the appeal is that on the 4th December 2010 at Piave farm Njoro in Nakuru County, the Respondents who are son and mother respectively were alleged to have assaulted the complainant who is the father and husband of the Respondents. They were arrested and charged with the offence of causing actual bodily harm contrary to Section 251 of the Penal code.

The prosecution called three witnesses and the respondents called one witness. In his Judgment the trial magistrate after analysis the evidence found that the prosecution's evidence had failed to establish beyond any reasonable doubt that the Respondents committed the offence as charged and acquitted them under Section 215 of the Criminal Procedure Code.

As the first appellate court, I am obligated to re-evaluate the evidence before the trial court and come up with my own findings and conclusion. See **Selle -vs- Associated Motor Boat Co. Ltd (1968)** 123. This principle was also reiterated in **Njoroge -vs- Republic(1987) KILR 19** and applied in **Michael -vs- R (2005) KLR.**

The complainant's evidence before the trial court was brief. That he asked his wife the 2nd

Respondent not to sell the milk from their cow, and a quarrel ensued as to who was the owner of the cow and who feeds the cow, and the wife, the 2nd Respondent went ahead and sold the milk, then his son the 1st Respondent came from his compound and hit him on the chest and kicked him. He then went and reported at the police station and later went to the hospital.

A police officer PW3 testified that he was forced by the OCS of the station to charge the two with the offence.

The 1st Respondent's defence was one of *alibi* . He testified that on the 3rd December 2010 he had slept in the church preparing for a wedding for the following day the 4th December 2010 when the offence was alleged to have taken place. He denied assaulting the complainant as he was away in church on the 4th December 2010, a fact collaborated by DW3 Jane Wanjiru whose testimony was that, the 1st Respondent, herself and others spent the night in church preparing for the wedding and was with him the whole day on the 4th December 2010.

The Second Respondent testified that she did not assault the complainant who was her old, husband and that he had framed her due to a quarrel over milk.

I have evaluated the above evidence, and also the trial courts judgment. What comes out clearly is that the complainant and the 2nd Respondent had a quarrel over sale of milk from their cow, being husband and wife. The couple had differences as confirmed by the 1st Respondent and the complainant was against him as he sided with his mother. The complainants evidence was nothing but washing dirty linen about his differences with his wife (2nd Respondent) before the police officers and no wonder they refused to charge the 2nd Respondent, tried reconciliation but the complainant was not ready for conciliation. This explains PW4 (police) officer that after they failed to charge the Respondent, the OCS phoned there to charge them.

The trial magistrate, in my view captured the whole evidence and evaluated the same adequately and arrived at a well analysed finding. My re-evaluation confirms that all there was, was a quarrel between the complainant and his wife the 1st Respondent as he told the court that he indeed wanted to divorce her but she refused that all the property including the cow was his. The second Respondents *alibi* defence was adequately corroborated.

I have looked at the charge sheet. It does not indicate what time the alleged offence took place. None of the prosecution witnesses referred to the time of the alleged offence. I am of the same opinion with the trial court that it is doubtful whether the alleged assault indeed took place.

In his submissions, Learned State counsel Mr. Kibellion faulted the trial Magistrate in arriving at the conclusion he arrived at, and wrongly acquitted the Respondents. Issue of identification never rose as these were people known to each other. The prosecution would have called an eye witness to collaborate the complainant's evidence, the man named Maina who had gone to buy the milk, he was not called to testify. The 2nd Respondents *alibi* evidence was not materially shaken. The 2nd respondent corroborated the 1st respondents *alibi* defence that he was in church at the material day offence was alleged to have taken place. This again was not shaken.

It is my finding that trial Magistrate evaluated the evidence tendered by both the prosecution and the defence and rightly found that the prosecution failed to establish beyond reasonable doubt that the Respondents committed the alleged offence.

The appeal lacks merit and it is dismissed.

Delivered, Dated and Signed and in open court this 9th day of July 2015

JANET MULWA

JUDGE

In the presence of:

Ms Ragut for the DPP

Respondents in person

Court clerk – Linah.