



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEAL NO.141 OF 2011**

**BETWEEN**

**BENARD MUKABWA .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(Being an appeal from the original conviction and sentence in Kakamega Chief Magistrate's Court criminal case no.902 of 2010 delivered by J.M. Githaiga P.M on 4/7/2011)**

**J U D G M E N T**

**Introduction**

1. The Respondent Benard Mukabwa was charged in Kakamega Criminal Case No.902 of 2010 with 2 counts of the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. In Count 1, the particulars of the offence were that on the 3<sup>rd</sup> day of May 2010 at about 18.30 hours at Iyala village, Eshisiru sub location in Central Butso location of Kakamega District Western Province unlawfully assaulted Judith Ambo Khalumi thereby occasioning her actual bodily harm. In count 11 the particulars of the offence were that on the 3<sup>rd</sup> day of May 2010 at about 18.30 hours at Iyala village Eshisiru sub location in Kakamega District within Western province he unlawfully assaulted Peter Maina thereby occasioning him actual bodily harm. He denied the charges before the trial Court and after hearing both the Prosecution and defence the trial Court found him not guilty of the offence and acquitted him under Section 215 of the CPC on both counts.

**The Appeal**

2. The Republic being aggrieved and dissatisfied with the judgment as pronounced by J.M Githaiga P.M on the 4<sup>th</sup> July 2011 appealed against the said acquittal on the following grounds:-
  1. THAT the learned trial Magistrate erred in law in failing to give any consideration to the Prosecution evidence.
  2. THAT the learned trial Magistrate erred in law by holding that the accused was assaulted without any evidence.
  3. THAT the learned trial Magistrate erred in Law in disregarding the medical evidence produced by the Prosecution.
  4. THAT the learned trial Magistrate erred in law in not giving due consideration to the contradictions that were apparent in the defence evidence.

5. THAT the learned trial Magistrate erred in Law in arriving at a wrong conclusion and acquitting the Respondent.
3. The appellant prays that the appeal be allowed, the judgment set aside and the order of acquittal be altered or reversed and the respondent be duly convicted or with such directions and orders as befits the opinion of this Honourable Court. At the hearing of the appeal, Mr. Ngetich for the Appellant relied on the grounds as set out in the petition of appeal filed on 15/07/2011. He submitted that the Prosecution discharged its duty by calling six (6) witnesses out of whom three (3) were eye witnesses and whose evidence corroborated each other. He added that though the defence called three (3) witnesses those witnesses did not address the case against the Respondent.
4. Counsel further submitted that the appellant did not agree with the judgment of the trial Court and now he is asking this Court to quash the same and the order of acquittal be reversed to enable this Court to hand down a conviction and appropriate sentence.
5. M/s Rauto for the Respondent in response opposed the appeal. She submitted that the learned trial Magistrate did not err and that his analysis of the evidence on record befits this case and was in accordance with the law. She also submitted that the evidence of the eye witnesses (Prosecution witnesses) did not tally.
6. Regarding the defence case M/s Rauto submitted that the burden of proof in any criminal case lies on the Prosecution whose duty it was to prove their case against the Respondent and that the Respondent had no obligation to prove his innocence.
7. On ground two (2) of the Petition of Appeal she submitted that PW6 the Investigating officer admitted that the Respondent reported that he had been assaulted but he (PW6) refused to issue him with a P3 Form. That the Respondent was later issued with a P3 Form by another officer who was more senior to PW6, and that this fact alone was a sure indication that indeed the Respondent was injured. She asked the Court to uphold the decision of the trial Court.
8. This is a first appeal and as such this Court is under a duty to re-evaluate the evidence on record and come up with its own conclusion bearing in mind that it neither saw nor heard the witnesses as the trial Court did. See **Okeno -vs- Republic [1972]E.A.32.**

### **The Prosecution Case**

9. The Prosecution called 6 witnesses and from their testimonies, the case for the Prosecution is as follows:- On 03/05/2010 at about 6.30pm, Judith Amambo Khalumi, PW1 was in the kitchen at her home in Iyala village when she heard a dog barking. On going out to check, she saw the respondent inside her compound beating a big dog. The respondent who is a neighbour then asked PW1 to say what it was she had done to his dog since the dog was not going home. The respondent also told PW1 not to answer him in the manner her husband had answered him when the two met along the road, but before she could answer, the respondent who was armed with a stick hit PW1 on the right shoulder before kicking her on the back. PW1 fell down and got injured. She screamed and two people who were in the compound namely Nipha Khamati PW5 and Chitwah Maina, PW3 also screamed. PW3, who is mother-in-law to PW1 was pushed to the ground by the respondent and just then PW1's husband Peter Khalumi Maina PW2 arrived in the home.
10. As soon as PW2 arrived in the compound the respondent jumped at him and attacked him with the stick. A struggle ensued. Some relatives of the respondent arrived and separated the two, taking away the respondent. In the process, the respondent left his sandals and the stick in PW1's homestead. PW1 identified the stick, PMF1 – I and the sandals PMF1 – 2. The matter was reported to the Police that same evening and on the following morning PW1 was treated at Makunga Health Centre. In cross examination, PW1 denied a suggestion from the respondent that it was her and her husband PW2 (Peter) who assaulted him. She also denied that the respondent's dog had been detained at her home for 1 ½ weeks. She also denied a suggestion that she had bribed the Police.
11. PW2 Peter stated that: On 03/05/2010 at around 6.30pm, he met with the respondent as he (Peter) was going to Eshisiru trading centre who asked him about the missing dog. That the respondent also warned him that he would see fire. Some 20 minutes later Peter arrived back home and found PW1, PW3 and PW1's sister in the compound. The respondent tried to hit Peter with the same

- stick he had hit PW1 with, but Peter managed to hold the stick before it landed on him. The respondent however hit him on the chest before he (respondent) was taken away by his grandmother and another relative. Thereafter Peter made a report to the AP camp at Eshisiru before being treated at Makunga Health Centre. Peter denied detaining the respondent's dog in his compound. He also denied that he and PW1 injured the respondent. He also denied as did PW1 that the two of them asked the Police to allow them settle the case out of Court.
12. Chitwah Maina testified as PW3. She stated that at about 7.00pm on 03/05/2010, she arrived home from the farm and found the respondent beating PW1 with sticks on the pretext that his dog had stayed in her compound for 9 months. During cross examination, PW3 stated that she did not see Peter being beaten nor did she know how many times PW1 was beaten by the respondent. She also denied that she PW1 and PW2 attacked the respondent.
  13. Nipha Khamati was PW5. Her testimony was that upon hearing screams from PW1's home, she rushed there only to find the respondent kicking and punching and beating PW1. She started screaming. The respondent was later taken away by his relatives. On cross examination PW5 also stated that the respondent also kicked and punched Peter and that when she arrived the respondent had hit the complainant with a stick. She also stated that the respondent used a stick to hit both PW1 and Peter.
  14. PW4 was Wycliffe Wesichelele, the Mumias District Clinical Officer. He examined PW1 who was found to have a tender right arm and tender right lateral chest. He classified the injuries as harm. The P3 form of PW1 was produced as PExhibit 3. PW4 filled the P3 form using the treatment notes dated 04/05/2010 from Makunga Health Centre.
  15. PW4 also examined Peter who had tenderness on the anterior chest. He testified that the injury had been caused by a blunt object. The P3 form in respect of Peter was produced as PExhibit 4. PW4 also told the Court that he filled a P3 form for the respondent after the respondent was referred to him by the Police on 03/05/2010.
  16. The Investigating Officer in this case was number 83192 Police Constable Thomas Kikwai from Makunga Patrol Base. He testified that on 04/05/2010, he received a report from both PW1 and Peter that they had been assaulted by the respondent on allegations that they had stolen the respondent's dog. After booking the report, he issued the complainants with P3 forms. He later visited the scene from where he collected some sandals, PMF1 – 2 and a stick, PMFI -1.
  17. According to the Investigating officer who testified as PW6 the first report about the incident was made at about 2.15pm on 04/05/2010, PW6 also stated that the respondent made a report that he had been assaulted by PW1 and Peter, though he did not issue the respondent with a P3 form. According to him, the P3 form for the respondent was issued by his boss. He also said he did not record statements of witnesses brought by the respondent. He denied being paid kshs.12000/= to hush up the case against PW1 and Peter.

### **The Defence Case**

18. At the close of the Prosecution case, the trial Court found that the respondent had a case to answer and put him on his defence. The respondent testified as DW1. He stated that he went to the complainant's home to look for his dog and not to fight. That his dogs had been stolen by the complainants.
19. The respondent called 2 witnesses: DW2 was Charles Makokha; the village elder of the area. He only received a report from the respondent that he had been beaten by the complainants when he went to look for his dog. He also said that he and other elders recovered the respondent's dog from the complainants home and handed it over to him (respondent). DW3 Labert Kombo another village elder supported the testimony given by DW2. Neither DW2 nor DW3 witnessed the assault incident.

### **Judgment of the Trial Court**

20. Upon a careful analysis of the evidence on record, the learned trial magistrate made a finding that the Prosecution had not proved its case against the respondent to the required standard and went ahead to dismiss the case. The respondent was acquitted under Section 215 of the CPC, Cap 75 Laws of Kenya.

## **Analysis and Findings**

21. As the first appellate Court, this Court is under a duty to reconsider and evaluate the entire evidence afresh with a view to reading its own conclusions in the matter, only remembering that it is only the trial Court which had the singular advantage of seeing and hearing the witnesses. In the case of **Arum –vs- Republic [2006] 2 EA 10**, the Court of Appeal held that “*a Court hearing the first appeal has a duty imposed upon it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same, but always observing that the trial Court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate Court would give allowance for the same.*” **Okeno –vs- Republic [1972] EA 32** followed.”
22. I have myself carefully reconsidered and evaluated not only the evidence on record, but I have also carefully considered the judgment of the learned trial Magistrate. From the said evidence, it is not in dispute that on the evening of 03/05/2010, the respondent went to the complainant’s home. It is however not clear whether he went there to fetch his missing dog or to fight the complainants. According to the respondent, he went to that home to look for his dog which he said had been detained at the complainant’s home for 9 months (according to PW3) or 1 ½ weeks (according to PW1). There is also evidence that there was altercation between PW1 and the respondent and later between Peter and the respondent. Though the respondent denied assaulting the complainants, PW1 stated that the respondent hit her with a stick on the right shoulder and also kicked her on the back.
23. According to the testimony of PW3, the respondent hit PW1 with sticks and also punched her. On the other hand, PW5 stated that the respondent not only beat PW1 but he also punched and kicked her. A close look at the whole of the above evidence brings out glaring contradictions in the Prosecution case regarding the attack on PW1. Pw1 never said the respondent punched her. So my finding on count 1 is that the evidence was too contradictory to support the charge in count 1. In my considered view, the trial Court was right in dismissing the case against the respondent on count 1.
24. Regarding count 11, Peter testified that as soon as he got home, the respondent jumped at him and attacked him. Though he initially stated the respondent hit him the record shows that the respondent merely attempted to hit him with a stick. PW5 did not witness the incident while PW3 says nothing about the assault on Peter by the respondent. It is my humble view that if there was any crime committed by the respondent, it was one of affray, and not one of assault.
25. I have also considered the medical evidence given by PW4, and especially the evidence touching on Peter and find the same to be inconsistent with what the complaints told the Court.

## **Conclusion**

26. In conclusion, I do find and hold that the grounds of appeal set out in the Petition of Appeal do not have any merit. The whole appeal is therefore lacking in merit and it accordingly dismissed. I confirm the judgment of the learned trial Magistrate delivered on 04/07/2011.
27. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 14<sup>th</sup> day of October 2015.

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Mr. Omwenga (present) for Appellant

M/s Rauto (absent) for Respondent

Mr. S. Lagat - Court Assistant