



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 50'A' OF 2009

JULIUS KIPKOECH BITOK 1ST APPELLANT

EUNICE JEPKETER 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an Appeal from the Original Conviction and sentence by Hon. Jacinta Owiti (Resident Magistrate) in the Chief Magistrate's Court in Criminal Case No. 5810 of 2007 dated 15th July, 2008)

JUDGMENT

Both Appellants are a brother and sister respectively. They were jointly charged in Count I with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code.

Particulars of the charge were that on the 8th day of May, 2007 at Beshiobor Village in Uasin Gishu District of the Rift Valley Province, jointly and unlawfully assaulted David Kipsongok Rono thereby occasioning him actual bodily harm.

In Count II the 1st Appellant was charged with being in possession of offensive weapons contrary to Section 89 (1) of the Penal Code.

Particulars of the same were that on the 8th day of May, 2007 at Beshiobor Village in Uasin Gishu District of Rift Valley Province without reasonable excuse carried offensive weapons namely one bow and fifteen arrows in circumstances which raised reasonable presumption that the said bows and arrows were intended to be used in a manner prejudicial to public order.

The prosecution called a total of five witnesses. After close of its case, the 1st Appellant was acquitted in Count II under Section 210 of the Criminal Procedure Code on ground of insufficient evidence. Both Appellants were however put on their defence in respect of Count I. Each one of them gave a sworn statement of defence. In a Judgment delivered on 15th July, 2008 both were convicted. The 1st Appellant was sentenced to pay a fine of Ksh. 5,000/= in default serve six (6) months imprisonment. The 2nd Appellant was sentenced to six (6) months probation.

The appeal was canvassed before me on 25th February, 2014. Learned Counsel Mr. Miyianda appeared for the Appellants while Mr. Munene, learned state counsel appeared for the Respondent. Mr. Miyianda relied on the Petition of appeal dated 29th July, 2008 which lists four grounds of appeal as follows:-

1. The Honourable learned Magistrate erred both in law and fact by holding that the Appellants assaulted the complainant.

2. The Honourable learned Magistrate erred both in law and fact by convicting the Appellants on the face of contradictory prosecution evidence.

3. The Honourable learned Magistrate erred both in law and fact by convicting the 2nd Appellant in particular in the absence of any evidence implicating her.

4. The Honourable learned Magistrate erred both in law and fact by convicting the Appellants in the absence of corroborating evidence.

All the grounds of appeal crystallized together argue only one point, that both Appellants were convicted on the face of insufficient and contradictory evidence.

On his part, Mr. Miyienda submitted that the complainant did not cross over to any body's land and that he was on the land of one Samuel Saurei while the Appellants were on the land No. 164 belonging to Henry Samoei, their father. He said that the complainant had admitted cutting down trees on the Appellant's land. He stated that in view of this evidence it was not clear at what point the parties met and where the complainant was assaulted.

Mr. Miyienda submitted that the 1st Appellant threatened to shoot the complainants with arrows which were never produced in court.

He also submitted that it was wrong for the trial court to convict the 2nd Appellant when the complainant had not at all implicated her.

He also submitted that all other witnesses (except the complainant) were not at the scene and could not therefore confirm that the Appellants assaulted the complainant. He stated that, in any case, the medical report did not confirm that it is the Appellants who assaulted the complainant.

Mr. Miyienda submitted that although the Appellants have served their respective penalties, they pursued the appeal because the complainant filed a civil suit for recovery of general damages arising from the alleged assault. According to the Appellant, the dispute is over a parcel of land their father left behind for them. That this parcel of land is larger than that of their father's brothers. That the latter now intend to disinherit them as they are the only heirs of their father.

Mr. Munene, learned state counsel, on the other hand submitted that the prosecution proved its case beyond any doubts. He submitted that both Appellants in their respective defences admitted they got into a quarrel with the complainant and that PW1 was categorical that the 1st Appellant cut him with a panga while the 2nd Appellant beat him with sticks.

Mr. Munene further submitted that the evidence of the complainant was corroborated by that of PW3, 4 and 5. He stated that no law permitted a person to assault another merely because there exists a land dispute. He also stated that a party has a right to sue another party and a civil suit cannot be used as a ground of appeal. He urged the court to dismiss the appeal.

I have accordingly considered the respective submissions.

I now evaluate the evidence on record as follows. The complainant testified as PW1. His testimony was that on the material date, the 8th May, 2007 at about 9.00 a.m., he received information that there was a person in his farm who wanted to cut trees. That when he went to his farm, the 1st Appellant came with a panga and also started cutting trees and gave them to the 2nd Appellant. That it is then a confrontation ensued and the 1st Appellant told him that he had disturbed them for a long time. He said the 1st Appellant attempted to cut him with a panga but he got hold of it. 2nd Appellant then beat him with sticks. He fell down and the 1st Appellant cut him

with a panga on the head and both hands. He said he was treated at Turbo Health Centre. The matter was reported at Turbo Police Station where he was issued with a P3 form.

PW2, Julius Kiprotich Sitienei, a neighbour to the Appellants testified that on the same date at about 11.00 a.m., he was informed by a neighbour that there was a problem at home. He said he went to Turbo Health Centre and confirmed that PW1 had been injured. He thereafter reported the matter at Turbo Police Station.

In corroborating the testimony of PW1, PW3 Christopher Gari said that he saw the 1st Appellant hit PW1 on the legs with a panga and also cut him (PW1) on the head with a panga. He also said he saw the 2nd Appellant hit PW1 with a stick. He confirmed there existed a land dispute between the parties and that the assault arose after the 1st Appellant found somebody cutting trees on his father's land. That is when he started chasing PW1 with a panga culminating into the assault.

PW4, Gabriel Kurui, a Clinical Officer from Eldoret District Hospital examined PW1 and filled his P3 form on 9th May, 2007. According to him, PW1 had a deep cut on the head which was bleeding. In addition, PW1 had bruises on the occipital region, swelling on the biceps and right thigh. On cross-examination, he confirmed PW1 was treated on 8th May, 2007 but the P3 form was filled on 9th May, 2007.

PW5, Police Constable Benson Obuya of Turbo Police Station summed up the evidence of PW1 – 4. He stated that after receiving the report of assault, he and other police officers proceeded to the scene. They found the 1st Appellant armed with a bow and arrows while the 2nd Appellant was armed with a panga and a rungu. He then visited PW1 at the hospital where he found him unconscious, but was treated and discharged. He produced as exhibits the bow, arrows, panga and a rungu which were recovered from the scene. He also received a blood stained coat, trousers, a sleeveless jersey and a red shirt from PW1 which he also produced as exhibits.

The analysis of the above evidence clearly demonstrates that the prosecution tendered consistent and cogent evidence against the Appellants. It is factual that apart from PW1, PW3 also witnessed the Appellants assaulting PW1. Indeed PW3 corroborated the testimony of PW1 with respect to how the assault was executed, the weapons used and the location of the injuries on PW1's body.

Moreso, PW4's evidence is also consistent with that PW1 and PW3. He confirmed the nature of the injuries which was consistent with the oral evidence of PW1 and PW3 as well as in regard to the weapons used.

In his sworn defence, the 1st Appellant confirmed that there was a confrontation between himself and PW1 after the latter confronted him while demanding to know why he was cutting down trees. It was his defence that as he quarrelled with PW1, one Isaac Kiptanui went to where they were aiming a jembe at him and that it is this jembe that hit PW1. He said that Jacob and Solomon also joined them and that Jacob and Isaac chased him away with a club. He said the 2nd Appellant was not at the scene but away herding cows. He denied ever assaulting PW1 or threatening to kill him.

The 2nd Appellant also gave a sworn statement of defence. She said that in the morning hours she was herding cows. That she heard noises and on checking what was happening saw Julius (1st Appellant), David (PW1) and others. That she went to the scene where she saw Kipsongok attempting to hit the 1st Appellant with a walking stick. That Isaac then went to where they were whilst holding a jembe with which he aimed at Julius (1st Appellant) but unfortunately it hit PW1. She said she raised alarm and the 1st Appellant ran away from the scene while being followed by Solomon.

The testimonies of the Appellants are a total departure from what the defence counsel submitted in attempting to exonerate the 2nd Appellant. Although counsel submitted that the 2nd Appellant was not at the scene, her own evidence squarely placed her at the scene. The 1st Appellant also attempted to say that the 2nd Appellant was grazing cows at all times when the confrontation was

taking place. But according to the 2nd Appellant, she only briefly herded the cows but proceeded to the scene when she heard noises. And at the time when the confrontation took place, she was present.

In effect, both Appellants cannot divorce themselves from the events of the scene. Prosecution witnesses gave consistent testimonies of what exactly transpired at the scene which strong evidence was not dislodged by the defence testimonies. I am convinced therefore beyond any doubts that both Appellants jointly assaulted PW1 and their defences were mere denials which cannot bail them out in the circumstances.

The assertion too that they appealed because a civil case was filed by the complainant has no nexus with issues for determination in this appeal. It is a party's right to pursue redress when he/she is aggrieved. This court would not be concerned with what parties decide to do beyond a criminal trial. Therefore, PW1 exercised his right to seek redress in a civil suit which suit will be determined separately from this appeal.

In the end, upon evaluating all the evidence on record, I am persuaded that the prosecution proved its case beyond all reasonable doubts. This appeal has no merit and I dismiss it in its entirety.

DATED and DELIVERED at ELDORET this 15th day of May, 2014.

G. W. NGENYE - MACHAIRA

JUDGE

In the presence of:-

Mr. Miyianda for the 1st and 2nd Appellant

Miss Mwaniki for the State/Respondent