REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCR NO.73 OF 2009

LESIIT, J

JANET NYOROKA.…….…….....….....APPELLANT

V E R S U S

REPUBLIC……RESPONDENT

(*From the original conviction and sentence in criminal case no. 2948 of 2008 of the Senior Resident Magistrate Court at Maua.)***.**

JUDGMENT

The Appellant was the 2nd Accused at the trial before the lower court. She had been charged together with her husband and daughter with one count of Assault causing actual bodily harm contrary to section 251 of the Penal Code. After a full trial the co-accused were acquitted. The Appellant was found guilty of the offence of affray contrary to section 92 of the Penal Code. The learned trial magistrate invoked section 179(2) of the Criminal Procedure Code to substitute the charge against the Appellant from assault contrary to section 251 of the Penal Code to Affray contrary to section 92 of the Penal Code. The Appellant was then fined Ksh.30, 000/- and in default 12 months imprisonment.

1. The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. In the Petition of Appeal the following six grounds are citied:

a. **The learned trial magistrate erred in fact and law in convicting the appellant on the evidence before him.**

b. **The learned trial magistrate erred in law and fact in finding that the prosecution had proved the case beyond reasonable doubts in view of glaring contradictions in the evidence of the prosecution.**

c. **The learned trial magistrate erred in law in failing to dismiss the prosecution case in view of his finding that the prosecution case was full of contradictions and inconsistencies.**

d. **That the learned trial magistrate erred in law in not acquitting the appellant in view of his finding that it is the appellant who had been assaulted by PW1.**

e. **The Judgment of the learned trial magistrate is against the weight of the evidence.**

f. **The sentence is manifestly excessive.**

3. Mr. Kiambi argued the appeal on behalf of the Appellant. His main contention was that it was an error for the trial court to convict the Appellant for the offence of Affray yet she had not been charged with that offence. He argued that the only circumstances under which the Appellant could have been convicted of affray was if the the appellant and the complainant in the case were charged for the offence of affray. The second contention was that the incident took place in the Appellant's home which was not a public place as envisaged under section 92 of the Penal Code. Finally Mr. Kiambi urged that the learned trial magistrate made an error to invoke section 179 (2) of the Criminal Procedure Code to convict the Appellant of affray on the basis that that offence was a minor offence of assault.

4. Mr. Murage the learned prosecution counsel began by opposing the appeal. After submitting that the prosecution evidence was consistent and well corroborated through the evidence of PW1 and 2 and that the offence was proved, the learned Prosecution Counsel made a retreat and conceded the appeal. Counsel urged that he was conceding the appeal based on what he claimed were the grounds raised by the Appellant.

5. I am a first appellate court and have subjected the evidence adduced in the lower court to a fresh evaluation and analysis and have drawn my own conclusions, while bearing in mind that l neither saw nor heard any of the witnesses. I have been guided by the principles set out in **Okeno Vs. Republic 1972 EA 32** where the Court of Appeal observed:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vs Sunday Post [1958] E.A 424."**

6. The facts of the case were controversial. According to the prosecution case the Appellant knocked at the gate of PW1 and when PW1 opened, the Appellant attacked him causing him serious cuts. According to the Appellant, she was at home when the complainant visited and attacked her with a panga injuring her.

7. The learned trial magistrate, at page 2 and 3 of the judgment found:

> **"I find there is a lot of contradiction and inconsistencies in the prosecution case herein. Whereas PW1 was cut with a panga, the panga belonged to him and he was cut as he fought with A2(Appellant)… I find A2 ought to have been charged with affray and not assault against A2 alone."**

8. The appeal challenges the bases upon which section 179(2) of the Criminal Procedure Code was invoked in order to substitute the offence charged. Section 179 of the CPC provides:

> **"179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.**
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> **(2) When a person is charged with an offence and facts are proved which reduce it to a minor**

offence, he may be convicted of the minor offence although he was not charged with it."

9. The Appellant had been charged with Assault causing actual bodily harm contrary to section 251 of the Penal Code. The learned trial Magistrate came to the conclusion that the prosecution had not proved assault. He found that the offence proved was Affray contrary to section 92 of the Penal Code. He then invoked the provisions of section 179(2) of the CPC to substitute the charge from assault to Affray.

10. Before invoking the provisions of section 179 of the Criminal Procedure Code to substitute one charge with another the court must be satisfied first of all that the evidence tendered does not disclose the offence charged but instead it proves the commission of a lesser offence of the same genus. In other words the substituted offence must be both a minor and cognate offence to the one charged. The question is whether the offence of affray is of the same genus as the offence of assault.

11. Section 251 of the Penal Code stipulates as follows:

251. Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

11. For the offence of assault, affray is not a minor and cognate offence. To establish the offence of Assault, one needs to prove that the person charged assaulted another one and caused them actual bodily harm. The only minor and cognate offence to the offence of Assault causing actual bodily harm contrary to section 251 of the Penal Code is common assault which is contrary to section 250 of the Penal Code and whose sentence is 12 months imprisonment. The sentence for the assault under section 251 is five years.

12. The offence of affray is a totally different offence falling under Part 2 Chapter IX of the Penal Code. These are offences relating to unlawful assemblies, riots and other offences against public tranquility. The ingredients for the offence of affray are that the person must have taken part in a fight, which means that it is more than one person involved. That fight must have taken place in a public place and should have threatened public tranquility. Section 92 of the Penal code provides as follows:

92. Any person who takes part in a fight in a public place is guilty of a misdemeanour and is liable to imprisonment for one year.

13. The learned trial magistrate misdirected himself when he came to the conclusion that the offence of affray contrary to section 92 of the Penal Code was a minor and cognate offence to that of assault contrary to section 251 of the Penal Code. The offence of assault does not in itself consist of any particulars that would constitute affray as a complete minor offence. There was no way in which the learned trial magistrate would have found the offence of affray a minor offence to the offence of assault. Consequently the court correctly directing itself could not have substituted the offence of assault to that of affray as was done in this case. That substitution was misguided and cannot stand.

14. In conclusion I find that the learned trial magistrate came to the correct finding that the prosecution did not prove the charge of assault contrary to section 251 of the Penal Code. Having so found, the learned trial magistrate should have proceeded to acquit the appellant alongside her co accused. Consequently the substitution of the offences which was made in this case was irregular. Accordingly I allow the appeal, quash the substitution of the offence and the convictions entered and set aside the sentence. If the appellant paid any part of the fine imposed of Ksh. 30,000/- the same should be refunded.

15. Those are my orders.

DATED SIGNED AND DELIVERED AT MERU THIS 3RD DAY OF JULY, 2014

LESIIT,J.

JUDGE