REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 220 OF 2011

CONSOLIDATED WITH CRIMINAL CASE NO. WITH 221 OF 2011

FREDRICK MIRITI .....1ST APPELLANT

DOMINIC MBOGO ……..……..... 2ND APPELLANT

VERSUS

REPUBLIC .....PROSECUTOR

From original conviction and sentence in Criminal Case No. of 1856 of 2009 at the Chief Magistrate's Court at Embu by Hon. L.K. MUTAI - PM on 4/6/2013

J U D G M E N T

FREDRICK MIRITI and **DOMINIC MBOGO** the Appellants herein were charged and convicted of the offence of assault contrary to section 251 of the Penal Code.

The particulars as stated in the charge sheet were as follows;

1. **FREDRICK MIRITI 2. DOMINIC MBOGO: On the 24th day of December 2008 at Karurumo trading centre, Runyenjes in Embu East District of Eastern province, jointly assaulted MOSES NDWIGA NJERU occasioning him actual bodily harm.**

They denied the charge and the matter proceeded to full hearing. They were both convicted and were each fined shs.30,000/= in default one (1) year imprisonment. They were aggrieved by the Judgment and filed this appeal against the conviction and the sentence. They raised the following grounds;

1. The learned trial Magistrate erred in law and in fact by convicting the Appellants without considering the fact that the charges were defective.
2. The learned trial Magistrate erred in law and in fact by failing to consider that the Prosecution's evidence was full of contradictions.

3. The learned trial Magistrate erred in law and in facts by convicting the Appellants while the Prosecution failed to prove that a report of assault made was made by the complainant to the police.
4. The learned trial Magistrate erred in law and in fact in failing to find that none of the officers from the DCIO Embu testified before the Court despite the fact that the charges were drafted by DCIO Embu.
5. The learned trial Magistrate erred in law and in fact by convicting the Appellants while the investigating officer who was a crucial witness never gave evidence in Court and remained unknown by the trial Court.
6. The learned trial Magistrate erred in law and in fact by failing to find that the plunk of wood alleged to have been used by the Appellants to assault the complainant was not produced as an exhibit before the Court.
7. The learned trial Magistrate erred in law and in fact by convicting the Appellants while none of the Prosecution witnesses with the exception of the complainant witnessed the alleged assault.
8. The learned trial Magistrate erred in law and in fact by dismissing the Appellants' defence that they knew nothing on the alleged charges.
9. The learned trial Magistrate erred in law and in fact by convicting the Appellants when the Prosecution had not proved their case beyond reasonable doubt.
10. The learned trial Magistrate erred in law and in fact by convicting the Appellants without considering the fact that the P3 form which was produced in Court as Prosecution exhibit No.2 indicates that the complainant went to the hospital two weeks after the assault which was on the 6th January 2009.

The case of the Prosecution was that the complainant (PW1) had in August 1999 been found at Karurumo bar taking alcohol when he was arrested by the 1st and 2nd Appellants. They later released him while offering no explanation. On 22/10/2008 at 10pm PW1 was attacked on his way home and injured by 3-4 people. Again on 24/12/2008 at 3.30pm he left home for the shops. He was arrested by 1st Appellant and another Administration Police Officer. The two telephoned the 2nd Appellant who came. When the 2nd Appellant arrived, him and the 1st Appellant started beating, kicking and punching PW1 all over. He was taken to the cells where the 2nd Appellant picked a plunk of wood and beat him badly on the legs and ribs injuring him. The 1st Appellant continued knocking him all over. The 2nd Appellant accused him of making a false report to the police against his colleague. He was bailed out by Simon (PW4) and he was taken to Karurumo Hospital. The 1st and 2nd Appellants were Administration Police Officers attached to Karurumo A.P. Post. The two Appellants were then arrested and charged. The 1st Appellant in his sworn defence denied the charge. He stated that on 24/12/2008 he was at the camp but was off duty. He never saw PW1 or the 2nd Appellant. He did not know who was on duty.

And the 2nd Appellant in his sworn defence also denied the charge. He was the Cpl Incharge of Karurumo AP Post and so the 1st Appellant worked under him. He stated that on 24/12/2008 he was at the camp when he learnt that a teacher had been assaulted and treated at Karurumo Health Centre. PW1 did not report to him but did so at a matatu stage. He saw PW1 for the 1st time on 24/12/2008 when he sent one of his officers to call him. He locked him up but the Deputy O.C.S. Runyenjes ordered for his release.

When the appeal came for hearing M/s Muthoni holding brief for Mr. Ithiga argued all the grounds jointly. It was his argument that the only report made by PW1 was on 29/10/2008. And that it was not clear who actually assaulted PW1 as his evidence and that of PW3 differed. And further he submitted that crucial witnesses were not called eg. Investigating officer from the CID Embu. She referred the Court to the case of ***JOSEPH ODHIAMBO OMONDI –V- REPUBLIC [2006] e KLR.*** The plunk of wood alleged used to assault him was not produced. She raised issues with the P3 Form which did not show when and where PW1 was treated.

M/s Ingahizu for the State opposed the appeal. She said the evidence of PW1 – PW4 and PW6 proved the case. And PW9 established the injuries while PW7 and PW8 investigated the case well.

This is a first appeal. It is the duty of this Court to re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses. I stand guided by the Court of Appeal when it stated thus in the case of ***MWANGI –V- REPUBLIC [2004]2 KLR 28;***

1. ***An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate Court's own decision on the evidence.***
2. ***The first appellate Court must itself weigh the conflicting evidence and draw its own conclusions.***
3. ***It is not the function of the first appellate Court merely to scrutinize the evidence to support the lower Court's findings and conclusions; 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 had the advantage of hearing and seeing the witnesses.***

I have considered the submissions of the Appellant's Counsel and those of the State. I have equally considered the grounds of appeal and the evidence on record. A perusal of the grounds of the appeal shows that they relate to the evidence adduced save for ground 1. I will therefore deal with all the grounds jointly save for ground 1.

Ground 1

Counsel for the Appellants did not make any submission on this. It was not shown to the Court how the Charge Sheet was defective and the nature of the defect and how the alleged defect impacted on the Appellants. On the issue of the evidence adduced I will first deal with the element of the assault itself. Was PW1 assaulted? PW1 himself stated so. His wife (PW2) arrived home on 26/12/2008 and found PW1 appearing beaten. PW4 was an eye witness to the beating. The medical evidence by PW5 and PW9 confirmed that PW1 was treated on 24/12/2008 and 26/12/2008 over the injuries complained of. Treatment cards were produced as (EXB3). PW9 examined PW1 for purposes of filling the P3 Form which he did and produced the same as (EXB2). All this evidence confirms that indeed PW1 was assaulted on 24/12/2008. And for purposes of clarity I wish to restate that the offence that the Appellants were convicted of was the assault of 24/12/2008 only and no other. So evidence relating to other brawls and assaults is not being considered by this Court.

The 2nd issue to be determined is whether it was proved that the Appellants are the ones who assaulted PW1. There is no dispute that during the period complained of both Appellants were serving APs at Karurumo AP Camp. The 2nd Appellant was the incharge while the 1st Appellant served under him. It was the evidence of PW3 that he was at his shop when PW1 came there and bought some sodas. While there both Appellants came and arrested him. The 2nd Appellant handcuffed him ad went away with him. He telephoned PW2 to inform her of PW1's arrest. Simon (PW4) was telephoned by PW2 about PW1's arrest. PW4 went to the APs Camp. He heard PW1's screams from the cell. He was being beaten. Both Appellants were at the camp. And the one beating PW1 was the 2nd Appellant who was with him in the cell. PW4 pleaded with the 2nd Appellant and PW1 was finally released. He took him to hospital. PW1 himself explained how he had been arrested and assaulted by both Appellants. PW7 and PW8 (Police Officers) testified on the assault of 22/10/2008. A report had been made incriminating an officer from the Karurumo A.P. Camp. The question is whether a report concerning the incident of 24/12/2008 was ever made. PW8 testified that indeed the 2nd Appellant called him on 24/12/2008 in respect of this matter. A report was made to the C.I.D. Embu on the same day hence the issuance of the P3 Form (EXB2).

The Appellants have raised an issue that crucial witnesses were not called e.g. the investigating officer. The Appellants do not deny that they were arrested and charged with this offence. Secondly it's not the flurry of witnesses called that establishes a case. The Court considers whether the witnesses called have established all the ingredients of an offence and whether the witnesses can be believed.

In the case of ***KIHARA –V- REPUBLIC [1986] KLR 473*** the Court of Appeal stated this about witnesses;

> ***"The Prosecution is not compelled to call as many witnesses as there could be as what matters is not the number of witnesses but the best sound evidence that can be given in Court. It would have been pointless to call witnesses who did not know what had happened between the Appellant and the deceased***."

And in ***KETER –V- REPUBLIC [2007]1 E.A. 135*** the same Court held;

> ***"The Prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt. Those who testified in the case clearly established that the Appellant killed the deceased; that he had no legal basis for doing so; that the Appellant when he killed her was of sound mind and discretion and possessed the necessary guilty intention. In those circumstances, the Appellant should not be heard to complain that certain witnesses were not called (Bukenya –v- Uganda [1972] EA 549 followed".***

The Appellants were Administration Police Officers and well known to the witnesses who hail from Karurumo. PW3 saw them arrest PW1. PW2 and PW6 sent PW4 to go to the AP Camp to find out where PW1 had been taken. When PW1 was finally released he was badly beaten and could not even walk. He was taken to the Health Centre for treatment. The treatment card Nol031580 for 25/10/2008 and the evidence of PW5 confirms that PW1 had the following injuries;

- Severe abdominal pains and lower limb pains
- He was limping as he walked
- Swollen and painful upper lip
- Swollen lower limbs

This clearly confirms that the assault was by those who arrested him as is evidenced by PW1, PW3 and PW5.

The 1st Appellant denied the charges saying he was off duty. Being off duty in itself cannot exonerate him. The evidence is he was seen arresting PW1. He was also at the camp when PW1 was being beaten and finally he is said to have participated in the beating of PW1. This incident took place during day time. The 2nd Appellant in his defence also denied the charge. He indicated that the 1st Appellant was on special duties on 24/12/2008. Which were these special duties when the 1st Appellant himself stated that he was off duty? He also stated that on 24/12/2008 he sent one of his officers to call PW1 and he locked him up. Why was he locking him up? PW8 did not support these allegations. The truth is that PW1 was at the AP Camp on 24/12/2013 and he was locked up by the 2nd Appellant and was assaulted because he had previously complained about one of the AP's at Karurumo AP Camp. The P3 (EXB2) produced by PW9 was signed by the witness. He has also indicated the names of those who had treated and attended to PW1. They are from Karurumo Health Centre and Kenyatta National Hospital. This P3 (EXB2) was issued by the DCIO's office Embu confirming that PW1 lodged this complaint there. PW9 explained that he was a Police Surgeon and he occasionally got cases to handle from Embu. The two authorities cited by M/s Muthoni applied to totally different circumstances.

The learned trial Magistrate properly analysed the evidence before her and she came to the correct conclusion. I have no reason to interfere with her findings. The result is that the appeal is dismissed.

Right of appeal explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 7TH DAY OF NOVEMBER 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ingahizu – State

Appellants

Njue- C/c

Mr. Ithiga for Appellants