REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 48 OF 2008

JAMES WAMAE KARIITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's Court at Karatina

in Criminal Case No. 1122 of 2005 dated 12th February 2008 by B. M. Kimemia –R.M.)

J U D G M E N T

James Wamae Kariithi, hereinafter referred to as "*the appellant"* was on 8th December 2005 arraigned before the Senior Resident Magistrae's Court at Karatina on one count of Assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars given were that on 4th August 2005 at Mutindwa village in Nyeri District of the Central Province, the appellant unlawfully assaulted Michael Kariithi Wanjiru thereby occasioning him actual bodily harm. The appellant entered a plea of not guilty and he was tried.

In brief the prosecution case was that on 4th August 2005 at 7.15 a.m., Kareithii Wanjiru, (PW1) hereinafter referred to as the complainant left home in search for fodder for his cow. When he returned, he found someone digging where he had tethered his sheep in the morning. That person was his uncle, the appellant. His mother told him to untether the sheep. As he was untying the sheep, the appellant suddenly hit him with a jembe and he fell on the ground. He continued hitting him with the jembe but he resisted with his right hand near the elbow. He then stood up and held the appellant who then threw down the jembe. In the process he fell. However he continued boxing him on the chest. That the appellant's wife came and joined the fray. She picked the jembe and hit the complainant on the face. He was all along screaming. His mother too joined in the screaming. The appellant's daughter also came along with a panga. At this juncture people came. Thereafter they went to police station enroute to hospital for treatment. At the hospital he was ex-rayed and his right hand put in a plaster cast.

PW II at about10.00 a.m. heard screams and went to the scene. There he found that it was the complainant's mother who was screaming and there was an ongoing fight involving the complainant and appellant. In fact the appellant was on top of the complainant and his wife and daughter were present as well. The wife had a jembe whereas the daughter had a panga. He forcibly took away those weapons. As the complainant was injured, they took him to hospital after passing through the police post. The appellant later followed and found them at the police post as well as at the hospital.

PW III is the mother of the complainant. She was in the house when she heard noise and went out to check. She found the appellant digging where her son had tethered the sheep. The appellant was with one, Wachira and when she asked them what they were doing they did not answer and she went back to the house. When the complainant came back she told him to remove the sheep and she soon thereafter heard screams. She went out and found the appellant on top of the complainant. However Wachira wasn't there. It was then that she started screaming. She however saw the appellant box the complainant. His wife had a jembe whereas the daughter had a panga.

PW IV the clinical officer treated the complainant and later the appellant. He thereafter issued the combatants with respective P3 forms which he had duly filled.

PW V came to look for the complainant and didn't find him and as he was leaving, he saw the complainant coming. When he got near, he saw the appellant suddenly hit him with a jembe.

PW VI received both reports and recorded the statement of the complainant as well as the appellant. The complainant had fractured his hand while appellant had bruises. He also retrieved the jembe and panga. He later charged the appellant with the offence.

PW VII was in his shamba when PW V went to look for complainant. As they were there, they saw the complainant. At the scene there were also wazees digging behind the house. When he got closer, the appellant hit him on the leg and he took the complainant's bicycle to his home. The wazees were the appellant and one, Wachira. When the complainant was hit as aforesaid, he held on to the appellant and they fell down.

Put on his defence the appellant elected to give a sworn statement of defence and called no witnesses. He stated that he went to cultivate on a portion of land with one Wachira. The complainant came and asked him why they were doing so and simultaneously attacked him by hitting him on the ribs. After flooring him, he lay on him. He defended himself with the jembe. He was later charged with the offence when all that he was doing was to defend himself against the complainant's attacks.

Having considered the evidence on record the learned magistrate was persuaded by the evidence led by the prosecution which he believed. She therefore returned a guilty verdict against the appellant, convicted him and sentenced him to a fine of Kshs.20,000/= in default to serve 2 years imprisonment. It must be clear at once that the default sentence imposed was illegal. Under Section 28 of the Penal Code, the maximum default sentence that can be imposed is 12 months. A fine of Kshs.20,000/= can only attract a default sentence of 6 months and no more.

Be that as it may, the appellant was aggrieved by the conviction and sentence. Through Messrs Njuguna Kimani & Co. Advocates he lodged the instant appeal. In the petition of appeal dated 25th February 2008, he faults his conviction and sentence on the following grounds:-

"1. The learned Resident Magistrate erred in law in failing to appreciate that both the appellant and the Complainant fought and injured each other as evidenced by their respective P3 forms and this was indeed a case of Affray and both should have been charged accordingly. Prejudice and miscarriage (sic) justice was occasioned to the Appellant.

2. The learned magistrate erred both in law and in fact in failing to appreciate that there was no independent witness called yet the incident occurred in broad day light. Miscarriage of justice was occasioned to the appellant.

3. The learned Reside Magistrate erred in law and in fact by shifting the burden of proof to the appellant. Prejudice and miscarriage of justice was occasioned to the Appellant.

4. The learned Resident Magistrate erred in law and in fact by convicting the appellant on insufficient evidence. Prejudice was occasioned to the appellant."

At the hearing of the appeal, Mr. Kimani, learned advocate for the appellant submitted that there was no nexus between the charge sheet and the evidence of the complainant. That it is apparent that the appellant and complainant fought. They ought therefore to have been charged with affray. There was a grudge between the appellant's family and that of the complainant over land. Finally the learned advocate submitted that the learned magistrate kept shifting the burden of proof to the appellant.

On his part, Mr. Orinda, learned Senior Principal State Counsel submitted that he had a problem with the way the judgment had been crafted. Apparently the magistrate did not indicate in her judgment the offence charged. However the omission may not be fatal after all. He conceded that there was a fight between the appellant and complainant. However it was his view that the complainant fought back in self-defence. Thus it was not a case of affray. There was also clear medical evidence.

This court as a first appellate court has a duty to re-appraise the evidence and come to its independent finding. In doing so I have to appreciate that I did not have the advantage enjoyed by the trial court of seeing and hearing the witnesses and have to make due allowance for that – Kimeu v/s Republic (2002) 1 KLR 756 and Soki v/s Republic (2004) 2 KLR 21.

It is common ground that a fight ensued between the appellant and the complainant. The question for determination is who was the aggressor, whether the complainant fought back in self-defence or whether this was merely a case of affray involving both the appellant and the complainant.

However before I can address the above issues, I must state here and now that the learned magistrate's judgment left a lot to be desired. The learned magistrate did not indicate at the commencement of the judgment what charge(s) the appellant was answering to. Indeed when she convicted the appellant, she did not also indicate on which charge she had convicted the appellant. The judgment as crafted was accordingly not in tandem with the provisions of section 169 of the criminal procedure code. However, I do not think that, that omission is fatal as this court being a first appellate court is mandated to review the proceedings of the trial court and come to its own conclusions. This notwithstanding, it will do no harm if magistrates and indeed any judicial officer were to comply with the strict provisions of Section 169 of the Criminal Procedure Code when crafting judgments and or rulings.

There is no doubt at all that there was a fight involving the appellant and the complainant. The fight it would appear was sparked of by the long standing dispute over the land involving the complainant's and appellant's families. Apparently, the appellant was a brother to the complainant's mother. In other words the complainant was a nephew to the appellant. The two families have had several disputes regarding the partition of the family land between them. Some of the disputes are still pending before the local chief and even in the police stations. To my mind therefore this fight was a perpetuation of those disputes. Much as it would appear that the appellant was the aggressor as he had gone behind the complainant's mother's house and was digging, the complainant's approach to the issue was not innocent either. There must have been some exchange of words with the appellant that led to the fight. I cannot belief his story when he testifies that "..... my uncle James Wamae Kariithi was digging there. When I was untying the sheep my uncle hit me with a jembe around the tail base....." The appellant would not just have hit the complainant out of the blue and for no apparent reason. He must have been provoked by the complainant either by word or deed. The appellant is not a madman who just takes pride in attacking people unprovoked. Going by the evidence on record, the fight it would appear was fast and furious. It involved members of both families. For the appellant, his wife and daughter were sucked in. For the complainant his mother entered the fray. As a result, both the appellant and complainant were all injured going by the evidence of the clinical officer who attended to both of them and filled their respective P3 forms. They both filed complaints with the police for assault. It does however appear that the appellant was charged with the offence merely because the injuries sustained by the complainant were more serious than the appellant's. In my view this was a wrong approach to the issue by the police. The evidence of the fight between the two was further supported by the evidence of PW6 who was the investigating officer. As correctly pointed out by Mr. Njuguna, the fairest course that the police should have taken was to the charge those involved in the fight with the offence of affray contrary to section 92 of the Penal Code. All the ingredients of the offence were all there for the investigating officer to see. As Kasango J pointed in a case of similar nature as this one "..... It ought to be noted that both parties had a grudge with each other

relating to a land issue. It is probable that with that grudge both parties were fighting each other. As can be seen the appellant did also lodge a complaint and did obtain a P3 form ....." See Mwangi v/s Republic, Nyi Cr. Appeal No. 285 of 2004 (UR). The same situation obtains here.

The complainant testified that the appellant's wife also hit him with a jembe on the face. However the appellant was not charged with another person(s) not before court. The evidence of the complainant was that the appellant's wife also assaulted him. If that be so, the injuries resulting therefrom cannot be visited upon the appellant. It is here that the nexus between the charge sheet and the evidence of the complainant is lost. Much as Mr. Orinda submitted that considering the manner in which the offence was committed, failure to include the words ".... with others not before court" in the particulars of the charge sheet was not fatal, I am however persuaded that indeed that omission was fatal. The appellant cannot be held accountable for the injuries inflicted on the complainant if at all, by another person. Indeed considering the circumstances of the offence, and the fact that the combatants were relatives and the fight being about the ownership of land, it was prudent that the police frame the charge correctly to avoid accusations of a frame up and to be seen to be fair to both sides of the divide.

Except in very rare instances, the burden of proof in criminal cases never shifts to an accused person. It always remains with the prosecution throughout a trial. It is a hallowed principle of criminal justice. However it was not the case with the learned magistrate herein. There are various instances in her judgment where she has deliberately and intentionally shifted the burden of proof to the appellant. Sample this "..... I note that the accused didn't call any evidence or witness to support his case ..... I do note that the appellant has only interchanged the story to fit his circumstances and I do not believe that the appellant's defence has any truth in it. The prosecution witnesses have called (sic) overwhelming evidence and the accused did not call any witness to support his statement and the fact that he was injured....." Under the law, an accused is not obligated to call any witnesses to prove his innocence. Indeed he can elect to keep quiet throughout the proceedings and no adverse inference ought to be drawn by the trial court in the event of such eventuality. The above comments by the learned magistrate were unfortunate and therefore gross misdirection in law.

The totality of what I have been saying is that if the trial court had evaluated the evidence on record properly and in its entirety and bearing in mind the circumstances under which the offence was committed, I am certain that it would have arrived at a different conclusion. This appeal thus has merit. It is allowed, conviction quashed and the sentence imposed set aside. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 3rd day of June 2009

M. S. A. MAKHANDIA

JUDGE