



IN THE COURT OF APPEAL

AT KISUMU

(CHESONI C.J. OMOLO & SHAH J.J.A.)

CRIMINAL APPEAL NO.59 OF 1996

BETWEEN

IBRAHIM OPAKA OSURI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kisumu (Justice Wambilyanga) dated 10th May, 1996

in

H.C.C.R.A. NO. 82 OF 1996)

JUDGMENT OF THE COURT

The appellant was convicted of the offence of assault causing actual bodily harm, contra section 251 of the Penal Code. The particulars of the charge were as follows:

"On the 17th day of February, 1995 at Manyatta Estate in Kisumu District of Nyanza Province unlawfully assaulted Esther Ouma thereby occasioning her actual bodily harm."

The appellant was, at the material time, the Chief of Kondele sub-location. The complainant knew the appellant. She was an assistant mid-wife. She had received information to the effect that her husband was arrested by the chief and so she went to one Francis Mwaniki for assistance and both proceeded to Migori police post first and then to central police station but could not establish, from there, the whereabouts of her husband. Her version of events thereafter is that they proceeded to the chief's camp and found the chief there. The chief shouted at her and told her to leave ordering her to obey him. When the chief was told by her that she wanted to see her husband the chief became angry, went inside his house, returned with a whip and lashed her with it all over the body. She said she was then in the company of Mwaniki (P.W.3) Issa (P.W.4) and Peter Otieno (P.W.5). No one intervened for her. She then reported the matter to Kisumu Police Station. She was, on the 1st March, 1995, examined by Dr. Tarlok Singh (P.W.2) who confirmed that she had a minor laceration on the left corner of the mouth, bruise on the left side of the chest, above the breast, back of the upper chest and back lumbar area, left arm on the front side thereof, a deep bruise on the right and left thighs in front. P.W.2 estimated the age of the injuries as being approximately twelve days.

The evidence of P.W.2 was confirmed in material parts by P.W.3, P.W.4 and P.W.5. What is not in doubt is that the complainant was injured in several parts of her body. Whilst the doctor described the injuries as having been caused by a blunt instrument (to which description Mr. Menezes objected saying that a whip is not a blunt instrument) there can be no doubt that the nature of injuries suffered by the complainant could well have been inflicted by a whip.

The appellant, who made an unsworn statement denied having assaulted the complainant and said that after he gave her the information regarding why her husband was arrested she left the compound. The witness called by the appellant, one Paul Francis Kangima (D.W.2) confirmed the appellant's version that there was no fracas and that there was no assault and that the group left peaceably after the appellant explained to them the cause of the complainant's husband's arrest.

The learned magistrate dealt with the defence version as follows:

"The accused's defence, which was a mere denial of the offence is untrue. I do find that the truth is with the prosecution and is absent from the defence. I am satisfied that the accused herein did unlawfully assault P.W.1 causing actual bodily harm on that day."

It is with the above paragraph that Mr. Menezes took the greatest exception. The gravamen of his complaint is that the learned Judge in the superior court (Wambilyanga J.) did not consider such treatment of the defence version so that he could not find that the learned magistrate misdirected himself in treating, first, as believable the prosecution version and then making a short shrift of the defence version as being untrue. But have the two courts below gone wrong in coming to the conclusion they came to? The answer to this lies in considering several factors. Three witnesses confirmed the assault on the complainant. The complainant's conduct thereafter is important. She reported the incident immediately to the police. The medical evidence is corroborative of the complainant's version that she was injured as opposed to the defence version of events.

It is in view of the obvious truth of the complainant's version of events that the defence version becomes incredible. Whilst the learned magistrate did not say so in so many words it can be seen that he did not believe the appellant and his witness.

However, the learned Judge, on the first appeal gave due consideration to the appellant's version of events. Having set out the version the learned Judge came to the conclusion that the four witnesses for the prosecution could not have fabricated such a long and detailed story against their assistant chief. The cardinal factor is that the four prosecution witnesses and the assistant chief were at the chief's camp at the material time and that the complainant was inquiring as to the whereabouts of her husband. The injuries could not have come out of the blue, so to speak. It must, of necessity, be this factor that led to the conviction.

Mr Menezes submitted that the learned Judge did not re-evaluate the evidence and that he simply made a re-hash of the same. He argued that an exhaustive scrutiny of the evidence which was required of the Judge was missing, and that there was no finding as to the demeanour of the defence witness. We have already set out the two differing version. We do not see how the two courts below could come to any conclusion other than the one they came to. The inherently believable version of the prosecution witness showed up the inherent improbability of the defence version.

Mr. Menezes argued that the evidence of D.W.2 was not challenged and he therefore relied on the case of Macharia v. Republic 1970 EA. 210 to say that if material evidence by the defence goes unchallenged the prosecution is deemed to have accepted it. D.W.2 is on record as saying under cross-examination:

"I have told the court what I heard"

Obviously this witness was being challenged as regards the veracity of his version. As we have pointed out the strength of the prosecution case showed the improbability of his evidence. The Macharia case turned on a different consideration. In that case the accused person was not at all cross-examined on his

own testimony. If such is the case then the prosecution is deemed to have accepted his version. But such was not the case in the instant appeal.

In the case of Pandya v. R. [1957] E.A. 336 which Mr. Menezes relied on the issue was that the first appellate court had not treated the evidence in such a way as to amount to a fresh and exhaustive scrutiny which the appellant was entitled to expect and, as a result of its error affirmed a conviction resting on evidence which, had it been duly reviewed must have been seen to be defective as to render the conviction manifestly unsafe.

Whilst Mr Meneze's complaint of "mere denial" as found by the learned magistrate may sound attractive at first blush the facts of this case are such that the learned magistrate was entitled to his interpretation. The fact that he did not expound on it does not amount to an irregularity that would vitiate the conviction.

The upshot of all this is that this appeal is dismissed.

Dated and delivered at Kisumu this 27th day of March, 1998.

Z.R. CHESONI

.....

CHIEF JUSTICE

R.S.C. OMOLO

.....

JUDGE OF APPEAL

A.B. SHAH

.....

JUDGE OF APPEAL

I certify that this a true

copy of the original.

DEPUTY REGISTRAR