IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 48 OF 2017

BETWEEN

MARTIN MAKHAKHA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Bungoma

(**Ali Aroni J**,) dated 16th May, 2016 in **H.C.C.R.A. No. 46 of 2016)**

JUDGMENT OF THE COURT

BACKGROUND

1. This is a second appeal by ***Martin Makhakha*** (the appellant) who was charged by the Senior Resident Magistrate's Court at Kimilili with three counts assault contrary to **Section 251** of the **Penal Code** and one charge of creating a disturbance in a manner likely to cause a breach of the peace contrary to **section 95 (1) (b)** of the **Penal Code**.

2. On the 1st count, the particulars of the offence were that on the 4th day of April, 2012 at Makunga Primary School in Bungoma County, the appellant unlawfully assaulted ***Emily Walubengo*** thereby occasioning her actual bodily harm; on the 2nd count, that on the same day and place, he assaulted Isaac Zacharia thereby occasioning him actual bodily harm; on the 3rd count, that on the same date and place, he unlawfully assaulted ***Phillis Simiyu*** thereby occasioning her actual bodily harm.

3. On the charge of creating disturbance, the particulars of the offence were that on the 4th day of April, 2012, at the same place and time, he created a disturbance in a manner likely to cause a breach of the peace by chasing pupils at **Makunga Primary School** while armed with a whip and a walking stick.

4. The appellant pleaded not guilty to the charges. The prosecution closed its case after calling seven (7) witnesses. In its ruling, dated 10th March 2015, the trial court stated as follows:-

> ***"The prosecution in support of their case called 7 witnesses and at the close of the prosecution's case I find that the prosecution has established a prima facie case against the appellant who shall be placed on his defence."***

5. Aggrieved by that decision, the appellant filed an appeal to the High Court on the grounds that the evidence before the trial court does not warrant the appellant to be put on his defence as no evidence supports the case; that the case be placed before another court for fresh trial as the trial magistrate was biased as he was the complainant's neighbor; that the evidence before the trial court is false; that the P3 form was filed by an unqualified person; and that the trial court failed to record questions and answers and the appellant is innocent.

6. The High Court heard the appeal, and after re-appraising the evidence adduced before the trial court, noted that the issue of bias and the issue regarding the P3 form were not raised before the trial court. The learned Judge agreed with the trial court that the appellant had a case to answer and found no reason to interfere with the trial court's decision.

7. The learned Judge took judicial notice of the fact that ***Mr. Sagero*** the Senior Resident Magistrate who delivered the impugned ruling was no longer at the station which was hearing the case against the appellant. Accordingly, the learned judge remitted the file back to Kimilili for

further hearing.

8. Aggrieved by that decision, the appellant filed this second appeal raising various grounds: that the High Court arrived at its decision to put him on his defence based on personal opinion rather than on the evidence before the court; that in doing so, the appellant was denied his fundamental rights to a fair trial; that based on the evidence before the court, the prosecution has not established a prima facie case; and that the evidence adduced does not warrant a defence.

SUBMISSIONS

9. When the appeal came up for hearing, the appellant was acting in person while the State was represented by ***Mr. Kwame Chacha***, the learned Prosecution Counsel.

10. The appellant relied on the grounds in his Memorandum of Appeal filed on 21st June, 2016. He submitted that the injuries sustained by the complainants were not assessed to the required standard; that the person who signed the P3 form is not the person who produced it; that none of the witnesses witnessed the appellant assaulting the complainants; and that all the witness statements are contradictory

11. ***Mr. Chacha***, opposed the appeal for lack of merit. He submitted that all the issues raised by the appellant were issues of fact and evidence and not matters of law; that this Court's jurisdiction on a second appeal are only on issues of law; that Section 211 of the Criminal Procedure Code (CPC) provides that a court will put an accused on his defence when a case is made out against him; that in this case there was sufficient evidence adduced by the prosecution to put the accused on his defence; that all 3 complainant's testified; that their teachers testified as did the doctor who examined and treated the complainants after the assault; that there were eye witnesses to the assault; that this appeal is frivolous and an abuse of the court process intended to delay the hearing of the case.

DETERMINATION

12. This being a second appeal, by dint of **section 361** of the Criminal Procedure Code, our mandate is to consider only issues of law. In **Martin Nyongesa Wanyonyi v Republic Criminal Appeal 661 of 2010**, this Court stated as follows:

> ***"It is trite law that in a second appeal the appellate court will not normally interfere with the concurrent findings of fact by the two courts below unless it is apparent that on recorded evidence no reasonable tribunal could have reached that conclusion – See M'Riungu V R [1983] KLR 455; and Karingo V R [1982] KLR 213. It is also trite law that an appellate court will not normally interfere with the findings by the trial court which are based on credibility of witnesses unless it be shown that no reasonable court could have made such findings – see Republic v Oyier [1985] KLR 353."***

13. As stated by the Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others [2014] eKLR** in **Supreme Court Petition No. 2B of 2014** the three elements of the phrase "matters of law" are characterized as follows:

> ***"a. the technical element: involving the interpretation of a constitutional or statutory provision;***
>
> ***b. the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record;***
>
> ***c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."***

14. The basis of putting an accused on his defence is founded on the prosecution establishing a prima facie case. The standard of proof as to whether the prosecution has established a prima facie case has been laid down in the case of **Ramanlal Trambaklal Bhatt -Vs- Republic (1957) E.A. 332** and stated with approval by this Court in the case of **Anthony Njue Njeru v Republic [2006] eKLR Criminal Appeal 77 of 2006** as follows: -

> ***"It may not be easy to define what is meant by a "prima facie case," but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."***

15. It is clear that the standard of establishing a case beyond reasonable doubt after the close of the prosecution's case is not required in determining whether or not the accused has a case to answer. This can only be done after an accused has been called to tender a defence. Only then can the court critically examine the evidence tendered under a microscope.

16. We have evaluated the evidence adduced by the prosecution witnesses and reviewed the exhibits tendered. Without delving into the merits of the case, we find that there is substantial evidence to warrant the accused being placed on his defence.

17. The High Court in its judgment reviewed the evidence before it and applied the *prima facie* test to the evidence on record stating:

> ***"I have considered the prosecution evidence and the record generally, I note that the issue of bias was not raised before the trial court nor the issues on the P3 forms. Having said the above, considering the evidence on record I am in agreement with the decision of the trial court and on my part I would have placed the appellant on his defence and therefore see no reason to interfere with the said decision."***

18. **Section 211** of the **Criminal Procedure Code** requires that the rights of an accused person be explained to him at the close of the prosecution case and when he is being put on his defence. These rights are:

> **(a) The right of remaining silent and saying nothing.**
>
> **(b) The right to make an unsworn statement from the dock in which event the accused is not liable to cross examination by the prosecution.**
>
> **(c) The right to give sworn evidence from the witness box in which event the accused becomes liable to cross examination by the prosecution if the prosecution wishes.**
>
> **(d) The right to call witnesses if the accused so wishes.**

19. The rights under section 211 of the CPC are crucial rights of an accused person in a trial that are meant to ensure fair trial. When they have been explained to an accused, he responds by electing to proceed as he wishes. His response ought to be taken down and ought to appear on the court record. The accused is then called upon to proceed in the way he has elected. The record before us indicates that the appellant was represented by counsel who filed written submissions at the close of the prosecution case maintaining that the appellant had no case to answer. Subsequently the trial magistrate delivered his ruling on 10th March 2015, in which he ruled that the prosecution had established a prima facie case against the appellant and that the appellant would be put on his defence. On the same day the appellant indicated his intention to appeal against the trial court's ruling and sought typed proceedings, and an order was duly made for him to be supplied with typed proceedings.

20. We are therefore satisfied that that there was no failure of justice, as the trial court did not proceed with the defence but ordered that since the appellant had filed an appeal the court would await the outcome of the appeal. The appellant's complaint that his rights under section 211 of the CPC were violated lacks merit as it was premature for the court to comply with section 211 of the CPC the defence hearing having been held in abeyance to await his appeal.

21. Finally, we turn to the question whether there is a right of appeal at the close of the prosecution's case.

22. In **Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR Criminal Appeal No. 116 Of 2007 (Cholmondeley case)** this Court gave a detailed explanation why it allowed an interlocutory appeal as follows:

> ***"In ordinary criminal trials, there is generally no interlocutory appeals allowed for section 379 (1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence. As far as we understand the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person; Muga Apondi, J ruled that the appellant had a case to answer and even if that order would be seen as being prejudicial that alone would not have entitled the appellant to appeal. But the basis of this appeal, as far as we are concerned is that the learned Judge made an order in the course of the trial which violated the appellant's fundamental rights guaranteed by section 77 of the Constitution.***

The Court went on to caution against an unfettered right of appeal as follows:

> ***"…We would, nevertheless, sound a caution against the exercise of the undoubted right of appeal under section 84 (7) of the Constitution. First the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused. The advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all… The trial before the learned judge will, however, resume and go on to its logical conclusion. We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practising at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We would add that in future if such appeals are brought the Court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court."***

23. As stated by the **Cholmondeley case** above, a determination that there is a case to answer does not and cannot mean that the Judge will inevitably convict. It is simply an opportunity for the accused to give his side of the story and poke holes in the prosecution's case. Under section 347(1)(a) of the Criminal Procedure Code, a right of appeal from a subordinate court to the High Court only arises where an accused person has been convicted. Therefore, the appellant had no right of appeal against the interlocutory ruling made by the trial magistrate. His appeal before the High Court was therefore incompetent.

24. For the foregoing reasons, we find that this appeal must fail, and we hereby dismiss it. Accordingly, we direct that **Kimilili Criminal Case No 581 of 2012** against the appellant shall proceed at the trial court before the same magistrate or any other magistrate under section 200 of the CPC.

25. Those shall be the orders of the Court.

Dated and delivered at Eldoret this 17th day of October, 2019.

E. M. GITHINJI

JUDGE OF APPEAL

H. M. OKWENGU

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR