REPUBLIC OF KENYA

Court of Appeal at Nyeri

Criminal Appeal 177 of 2009

LUCY WANGITHI MUGAI.....APPELLANT

AND

REPUBLIC…….....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nyeri (Makhandia) dated 31st July, 2009

in

H.C.CR.A NO.5 OF 2006)

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JUDGMENT OF THE COURT

1. Lucy Wangithi Mugai (appellant) was charged with another with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code before the Resident Magistrate's Court at Kangema. The particulars of the charge were that:

"On the 27th day of January, 2005 at Kiawambogo Village in Muranga District within Central Province, jointly and unlawfully assaulted Elizabeth Wanjiru Ndungu thereby occasioning her actual bodily harm."

After trial, the appellant was found guilty and upon conviction, she was sentenced to a fine of Kshs.7,000/= or three months imprisonment. The Judgment of the trial court was delivered on 17th January, 2006.

2. Being dissatisfied with the conviction, the appellant appealed to the High Court at Nyeri vide Criminal Appeal No.5 of 2006. The learned Judge Makhandia J. (as he then was), carefully reviewed the evidence before the trial court and taking into account the principles that guide the first appellate Court as set out in the cases of; ***Sokhi v Republic [2004] 2KLR 21*** and ***Kimeu v Republic [2002] 1KLR 756*** the learned Judge concurred with the judgment of the trial Magistrate. The learned judge however pointed out a few discrepancies in the judgment but in conclusion, he observed that they did not go to the root of the weight of the evidence and the judgment was well grounded in law.

3. This is what the learned Judge posited in part of his judgment:

"However, it was unfortunate that in arriving at the decision, the learned magistrate misdirected himself here and there. For instance it was not for the appellant to provide the motive as to why she

thought that the complainant pushed her. Motive is irrelevant in Criminal Cases. Secondly, it was not necessary that following the encounter the appellant should have sought some sort of redress elsewhere and finally it was not upon the appellant to avail independent witnesses to corroborate her testimony. In my view, these misdirection were not as grave as to cloud the learned Magistrate's final decision. They did not go to the root of the prosecution case. On my part, having carefully re-appraised the evidence, I think that the appellant's conviction was inevitable."

4. The appellant has now lodged this second appeal, which by dint of the provisions of Section 361 of the Criminal Procedure Code, only issues of law falls for our consideration. The appellant's appeal raised three main grounds which were highlighted in her written submissions and were adopted by Mr. Gichuki learned counsel when he presented the appeal before us. In his submissions, Mr. Gichuki faulted both courts below for ignoring the defence by the appellant. The two courts also failed to evaluate the evidence by the prosecution witnesses which left doubts on whether the appellant was identified as the perpetrator of the assault or the victim. Finally the learned Judge was faulted for failure to re-evaluate the entire evidence and to arrive at his own independent conclusion of the matter.

5. On the part of the prosecution, this appeal was opposed; Mr. Kaigai learned Acting Assistant Deputy Public Prosecutor supported the judgment by the two courts below who were concurrent in their findings. The learned trial magistrate was the one who heard and saw the witnesses, he believed their evidence especially John Mugo (PW3) who was an independent witness. There was medical evidence to support the allegation that the complainant was assaulted and sustained some injuries. The learned Judge re-evaluated the evidence and arrived at the same conclusion and found the defence by the appellant was misplaced by the prosecution's evidence.

6. Before we analyze the points raised in the arguments for and against this appeal, we wish to set out briefly the essential background of the matter. The prosecution's case before the subordinate court was supported by evidence of five (5) witnesses. Elizabeth Wanjiru Ndungo (PW1) testified that on 27th January, 2005, she had delivered her tea leaves at Kireto Tea buying Centre; she however forgot her card inside the centre, which prompted her to return to the Centre. As she made her way, the appellant alleged that PW1 had pushed her, and a fight ensued. The appellant was joined by her son who was the co-accused before the trial court. Jane Wangari (PW2) testified that she saw the fight between the appellant and PW1 whereby PW1 was thrown on the ground and sustained injuries. John Mugo (PW3) separated the fight and he also saw the injuries sustained by PW1. The matter was reported to PC Ayub Kiriinya (PW4). He issued PW1 with a P3 form which was completed by Daniel Gikonyo (PW5), a Clinical Officer attached to Kangema Health Centre.

7. After the prosecution's case, the appellant was found to have a case to answer. She opted to give sworn evidence. In her defence, she contended that it was PW1 who pushed her while waiting on the queue at the Tea Buying Centre. She fell over sacks of tea and when she demanded to know from PW1 why she had pushed her, PW1 slapped her and a struggle ensued and both fell down but they were separated by members of public. During cross-examination the appellant admitted that PW1 sustained some injuries.

8. Based on this evidence the learned trial Magistrate was satisfied the prosecution had proved the case to the required standards. The learned Judge of the High Court after carefully re-evaluating the matter and after pointing out some misdirections on some conclusions made by the trial magistrate, nonetheless arrived at a similar conclusion that the case against the appellant was proved.

9. We now turn to the grounds of appeal which we examine against the set out principles that guide a second appeal. See ***Karingo v Republic [1982] KLR 214*** where this Court stated:

"A second appeal must be confined to points of law and the Court of Appeal will not interfere with concurrent findings of fact of the two lower Courts unless they are shown to have not been based on evidence."

10. The appellant's submissions that the two Courts failed to consider the evidence of PW2 and PW3's

evidence is without basis because the two witnesses testified that they saw the fight between the appellant and PW1. Indeed PW3 is the one who separated the fight. There is no contention at all that PW1 did not sustain the injuries; the trial magistrate who heard and saw the witnesses testify, believed the evidence of PW1 that it was the appellant who pushed her and started the fight and soon she was joined by her son who was the co-accused.

11. The trial court rejected the defence by the appellant; and on re-evaluation of the whole evidence by the High Court, the learned Judge found the appellant's defence lacking in credibility.

In our considered view the three grounds of appeal do not raise any new legal point that were not properly dealt with in the first appeal.

We find no merit in this appeal which is dismissed.

Dated and delivered at Nyeri this 6th day of February, 2013

ALNASHIR VISRAM

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR