



**Mwambia v Director of Public Prosecutions (Criminal Appeal
E086 of 2023) [2024] KEHC 5521 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5521 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E086 OF 2023
TW CHERERE, J
APRIL 25, 2024**

BETWEEN

CISTO TUTA MWAMBIA APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

*(Being an appeal against judgment, conviction and sentence in Maua Criminal
Case No. 2351 of 2018 by Hon. C.Obara (SPM) on 06th April, 2023)*

JUDGMENT

Background

1. Cisto Tuta Mwambia (Appellant) was charged under section 251 of the [Penal Code](#) for assaulting one Sarafina Njeri.

Prosecution case

2. Sarafina Njeri, wife to Appellant's deceased brother stated that Appellant had given her no peace since her husband died. She recalled that on 22nd November, 2018, Appellant found her in her shamba and without any provocation set upon her with kicks and slaps causing her injuries. Millicent Kanana stated she was with her mother in the shamba when Appellant set upon her mother injuring her for no apparent reason. Margaret Mukoiti who had gone to buy bananas from complainant also stated she witnessed Appellant slap and kick complainant.
3. Upon examination by a clinical officer on 22nd November, 2018, complainant was found with tenderness on her face and head which injuries were assessed as harm as shown on the P3 form marked PEXH. 2. Complainant reported the matter to police and Appellant was arrested and charged.



Defence case

4. Appellant in his sworn defence denied the offence and accused complainant of assaulting him. His son Antony Thurania stated that complainant and get daughter assaulted Appellant by pelting him with stones.
5. After the trial, Appellant was convicted and sentenced to 12 months' probation.

The Appeal

6. The conviction and sentences provoked this appeal mainly on the grounds that:
 1. There were contradictions in the prosecution case
 2. Medical evidence did not support the charge
 3. Defence was not considered

Analysis and determination

7. This being a first appeal, the court's duty is as was stated by the Court of Appeal in *Mark Oiruri Mose v Republic* [2013] e KLR that:

“It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.”
8. I have considered the appeal in the light of the grounds of appeal and submissions by the DPP and I will deal with the grounds as hereunder.

1. Whether there were contradictions in the prosecution case

9. Complainant and two other witnesses stated Appellant assaulted the complainant and caused her injuries.
10. Complainant specifically stated that she was injured on the cheeks, right leg and buttocks. Upon examination, the clinical officer found that complainant had injuries on her face and head.
11. This court's duty is to determine whether there were contradictions and inconsistencies in the prosecution evidence to the extent that a reasonable person would be left in doubt as to whether the charges were proved, or whether the contradictions (if any), are so material that the trial court ought to have rejected the evidence. As was held in *Twebangane Alfred v Uganda* Crim. App. No 139 of 2001, [2003] UGCA, it is not every contradiction that warrants rejection of evidence. It subtly stated: -,

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”



12. Inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. (See *Uganda v Rutaro* {1976} HCB; *Uganda vs George W. Yiga* {1979} HCB 217). The question to be addressed is whether the contradictions (if any) are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. In this regard, we stand to benefit from the definition by the Court of Appeal of Nigeria in *David Ojeabuo v Federal Republic of Nigeria* {2014} LPELR-22555(CA), where Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA. stated that: -

“Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.”

13. Having considered the evidence of the Appellant and two witnesses, I am persuaded as was the trial court that the inconsistencies in the manner the injuries were inflicted did not affect the credibility of witnesses and more particularly their well corroborated evidence that it was the Appellant that assaulted the complainant and caused her injuries.

2. Whether medical evidence supported the charge

14. A the P3 form marked PEXH. 2 reveals that complainant suffered tenderness on her face and head which injuries were assessed as harm as shown on. Cheeks are on the face and the contention by the Appellant that medical evidence did not support the charge is therefore unfounded.

3. Defence was not considered

15. A trial court has a duty to weigh the evidence adduced in court by all the parties in totality and make a finding on the culpability or otherwise of the accused. Choosing to analyse the prosecution evidence and leave out that of the accused defence is a fatal mistake. It's a duty bestowed in every court to weigh one set of evidence (prosecution) against another (defence) before arriving at a conclusion.

16. In a South African case *S v Chabalala* 2003 (1) SACR 134 (SCA) at paragraph 15 Heher JA found:

“(15) The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.”

17. Paragraph 16 and 17 of the judgment of the trial court discloses that Appellant's defence was duly analyzed, evaluated and rejected.

18. From the foregoing analysis, I find that the Appellant was properly tried and convicted. The appeal is thus dismissed.

DELIVERED AT MERU THIS 25TH DAY OF APRIL 2024

WAMAE. T. W. CHERERE

JUDGE



Appearances

Court Assistant s - Kinoti/Munene

Appellant - Present in person

For Appellant - Mr. Gitonga Advocate

For the DPP - Ms. Rotich (PC-1)

