REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 48 OF 2017

(From Original Conviction and Sentence in Kakamega

Criminal Case No. 2296 of 2016 of 4th May 2017

by B Ochieng, Chief Magistrate)

LILIAN KHAKAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by B Ochieng, Chief Magistrate, Kakamega, of causing grievous harm contrary to Section 234 of the Penal Code, Cap 63, Laws of Kenya, and of illegal grazing of a pig on a maize plantation contrary to section 52(1) of the Forest Act, 2005. She was found guilty on both counts, and accordingly sentenced to three (3) years imprisonment on the assault charge and six months on the illegal grazing charge. The particulars of the assault charge were that on 15th June 2016 at Shinyalu Village Shiralu Sub-Location Khayega Location in Kakamega East District within Kakamega County she had unlawfully caused grievous harm to Catherine S Ingoi by cutting her with an axe on both hands. The second count alleged that she had, at Virambuli Village within Kakamega County, been found illegally grazing a pig in a maize belonging to Catherine S Ingoi.

2. She pleaded not guilty to the charges before the trial court, and the primary court had to conduct a trial. The prosecution called five (5) witnesses.

3. Catherine Shiwanze Ingoi, the complainant, testified as PW1. She explained how on 15th June 2016 she saw a pig belonging to the appellant grazing on her maize plantation and when she asked the appellant to remove it, the latter came and attacked her with an axe fracturing her right forearm and severing her left hand fingers. She made reports to the police and was treated. She also had her farm visited by an agricultural officer for the purpose of him assessing damage to her crop. Chrispinus Alusa Ashihundu testified as PW2. He was the first person to whom PW1 reported the assault. He recovered the assault weapon and took it to the police. Don Boss Mbohi Emoja testified as PW3. He was the clinical officer who prepared the Police Form 3 which was put in evidence. According to the treatment records that he saw, PW1 had a fracture of the left ulna and right radius and a cut on the right side of the chest. He classified the injuries as grievous harm, caused by a blunt and sharp object. Peter Pisakho was the agricultural officer testified as PW4. He stated that he had noted that some 384 maize plants had been destroyed. He assessed the value of the destroyed crop at Kshs. 3, 840.00. The last state witness was Corporal Eric Ngetich of Shinyalu Police Station, who testified as PW5. He was the one who booked PW1's assault report, issued her with a Police Form 3 and sent her to PW4 for assessment of the damage to her crop. The appellant was put on her defence. She gave an unsworn statement. She denied that she had assaulted PW1, saying that they were neighbors who had differences but who never resorted to resolving their disputes physically.

4. The appellant being dissatisfied with the convictions and sentences appealed to this court and raised several grounds of appeal-

a) That the learned trial Magistrate had erred in holding that the prosecution had proved its case beyond reasonable doubt;

b) That the learned trial Magistrate had erred in convicting on the evidence of a single witness;

c) That the learned trial Magistrate had erred in holding that the complainant's evidence had been corroborated, yet it had not been in material particulars;

d) That the trial court had failed to take the appellant's defence into account;

e) That the trial court is faulted for having carried proceedings in a manner that caused injustice to the appellant and which reduced the proceedings to a mistrial; and

f) That the sentence meted out was harsh.

5. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that:-

"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

6. Directions were taken on 7th June 2018. The appellant opted for written submissions, while the state chose to make oral submissions.

7. The appellant put in her written submissions on 6th June 2018. She collapsed her grounds of appeal into two, which she headed standard of proof and proof of the second charge. Under standard of proof she raised three arguments. The first and second heads were on the substitution of the charges. She argues that she was not given an opportunity to object to the proposed substitution, and further, relying on section 214 of the Criminal Procedure Code, Cap 75, Laws of Kenya, she was not given opportunity to have the witnesses who had already testified recalled so that she could cross-examine them. She complained that the constitutional requirement that an accused person be informed of the charge with sufficient detail to answer it were not adhered to. She points to alleged contradictions in the testimonies as related to the injuries sustained by the complainant in the testimonies of PW1, PW2 and PW3. Under proof of the second charge, it is submitted that the said charge was not tenable for section 52(1) of the Forest Act did not provide for any offence. It is also submitted that the said statute protected government forests and not private maize farms.

8. The appeal was canvassed on 24th September, 2018, and the appellant relied on written submissions that she placed before the court, Mr. Juma, Prosecution Counsel, addressed the court orally. On the substitution of the charges, he submitted that the altered charges were read to the appellant and she pleaded to them. On recall of witnesses, he submitted that the court did not have to recall witnesses who had testified as section 214 of the Criminal Procedure Code does not require it, and in any event none of the witnesses had so far testified. On the contradictions, he submitted that the same are a matter of life, and in any case if there were any contradictions then the same were minor did not go to the root of the matter. In any event, he submitted, mere contradictions alone should not affect a verdict unless it is demonstrated that the witnesses contradicting each other were lying. He submitted that the testimonies of the prosecution witnesses were consistent and their evidence unshaken. On the sentence, he submitted that it was not high, saying that it was even lenient taking into account the grave injurious sustained by the complainant.

9. On the alteration of the charge, I have read through section 214 of the Criminal Procedure Code, and noted that where such alteration is made the trial court is required to call upon the accused person to plead to the altered charge. That was done in the instant case, the appellant pleaded not guilty. Section 214(ii) says that after the accused has pleaded to the altered charge he may

demand that witnesses who had already testified be recalled to give evidence afresh or be cross-examined. It is this aspect of the provision that the appellant has issue with. She argues that she was not represented at the trial and the court should have endeavored to ensure that the requirements of the provision were followed. She asserts that the fact that she did not object nor request for a recall of the witnesses did not matter, what the court ought to have done was to either recall the witnesses for cross-examination or explain to the appellant her right to call such witnesses. She states that two witnesses were recalled alright, but again the court did not follow the right procedure.

10. When the appellant was first arraigned in court on 24th June 2016, she was charged with one count of unlawfully causing grievous harm by cutting the complainant's both hands with an axe. That charge was substituted on 11th October 2016 with a charge accusing her of having cut the complainant with an axe fracturing both her hands. She pleaded to the new charge and the complainant, PW1, was recalled the same day, ostensibly to identify an axe that had been put in evidence. The record before me does not state whether the complainant objected to the amendment of the charge nor wished to have PW1 recalled for cross-examination, neither does it indicate whether the trial court explained to her the right accorded to her by section 214(ii).

11. I have looked at the charge that was before the court on 24th June 2016 and that substitution introduced on 11th October 2016. The new change did not introduce anything new. It was more of a change in the language of expressing the charge, probably to bring a bit more of elegance. The old charge says the appellant '… unlawfully did grievous harm to Catherine S. Ingoi by cutting her hands with an axe;' while the substitute states that she '… unlawfully did grievous harm to Catherine S. Ingoi by cutting her with an axe fracturing both hands.' In my view alteration was a matter of saying the same thing but in different words. It was a minor amendment which did not go to the core of the charge. The said amendment was introduced after the PW1 and PW2 had testified. However, as the changes introduced were not fundamental there was no reason why it would have been necessary to recall the witnesses for cross-examination as the amendment did not introduce anything material.

12. The record before me does not state whether or not the trial court invited the appellant to say anything about the proposed amendment, neither does it indicate whether she was informed of her right to recall any of the witnesses for further cross-examination. Whereas the prosecution is entitled to apply to amend its pleadings before the close of its case, and the court has discretion to allow alteration of the charges at any stage of the hearing prior to close of the prosecution's case, and the Criminal Procedure Code is silent on whether the accused is entitled to a say on the proposed amendments, if the said amendments are being sought after trial has commenced, the accused should have a right to raise any issue he might have thereon. Issues of a right to fair trial arise here. The accused should expect that he is informed of the case he is to face in advance, and any changes in the prosecution's case, as stated in the charge, in the course of the trial through amendment or alteration or substitution of the charges can be disruptive and may affect the quality of the defence to be offered by the accused. The trial court should, therefore, before it allows the amendment, hear from the accused, and after it has allowed the amendment and caused him to plead to them inform him of his rights as set out in section 214(ii) of the Criminal Procedure Code. That would go a long way to ensure that the accused gets a fair trial and is afforded opportunity to challenge the case and evidence presented by the prosecution.

13. The issues stated above are critical. Indeed the Constitution, at Article 50, has stated the fair trial principles that a trial court should adhere to. Some of these relate to what I have alluded to above. It was stated by the court in *Republic v Subordinate Court of the first Class Magistrate at City Hall, Nairobi and another, ex parte Yougindar Pall Sennik and another Retread Limited* [2006] 1 EA 330, that the infringement of any of the constitutional fair trial principles seriously jeopardizes the right to fair trial and also the right to the presumption of innocence. The court also addressed the issue of a right to equal treatment at the trial, which is also one of the issues flagged in this appeal by the appellant. It stated that an accused person is entitled to the right to equality of arms and adversarial proceedings. It was emphasized that the right to equality of arms or the right to truly adversarial proceedings forms an intrinsic part of the right to a fair trial. Equality in the context of criminal proceedings means that the prosecution and the defence ought to be accorded identical treatment throughout the trial. The omission by the trial court to accord the appellant an opportunity to say something to the prosecution's application to substitute a charge in my humble view, points to a differential treatment of the parties before the court, and to evidence of unequal arms in the hands of the adversaries that were before the court.

14. The next question then would be whether the failure to observe the fair trial principles mentioned above, or omission to accord the appellant in this case the rights referred to, fundamentally rendered the trial fatally flawed, and therefore prejudiced the appellant. I have already noted that the amendment effected minor changes to the charge. It did not go to the core or heart of the charge. It did not change the information that was material to the charge. It did not make much of a difference. That then would mean that any infringement of the fair trial principles arising from the said proceedings relating to that amendment did not fundamentally prejudice the appellant. The said proceedings cannot be invalidated on the basis of the alleged infringements. In any event, PW1 was recalled, and the appellant was accorded opportunity to cross-examine her.

15. On the issue of contradictions and inconsistencies regarding the injuries sustained by PW1, the appellant alleges that the complainant in her evidence in chief talked of an injury to the head rather than to the hands. This would be fundamental for the charge does not refer to injury to the head. In her evidence in chief, from my reading of the handwritten notes of the trail court, PW1 said -

‘ … She then hit me on my right hand with the axe and my mobile phone fell … She fractured my right forearm and the left hand fingers were severed … The P3 form I was issued with and which was completed by the doctor is before the court – PMFI 2; as well as x-ray film showing fractured arm – PMFI 3 … ‘

During cross-examination she said -

‘ … You assaulted me in the shamba. I suffered fracture on my right arm.’

From what is on record, there is no contradiction or inconsistency between the testimonies of PW1, PW2 and PW3 so far as the injuries suffered by PW1 are concerned. Nothing turns on this ground.

16. The appellant raises two issues concerning the second count, that of illegally grazing a pig on maize farm belonging to PW1 contrary to section 52(1) of the Forest Act. The first issue is with the manner in which the new charge was introduced, while the second issue is on whether the said charge is feasible or not.

17. The charge of illegal grazing was introduced after the fourth prosecution witness had testified. The appellant was not called upon to state whether or not she objected to the addition of the charge. She pleaded not guilty to it. The witnesses who had testified previously were not recalled, neither did the trial court inform the appellant of her rights under section 214 (ii) of the Criminal Procedure Code. I reiterate what I have stated above in connection with amendment of charges and the processes around that. The fair trial principles ought to be applied. There is no doubt in my mind that there were infringements in this case of those principles. This was a new charge, totally unrelated, in terms of the facts, to the charge in the first count. The witnesses whose testimonies were relevant to that illegal grazing charge ought to have been recalled to afford the appellant opportunity to cross-examine them on the aspect of illegal grazing. At the time they testified that charge did not exist or was not before the court, and the appellant was therefore not obliged to cross-examine them on the matter of the subject of that charge. The failure to recall the said witnesses was a fundamental flaw that ought to render invalid the trial on that charge.

18. On the second issue, the appellant is charged with an offence under the Forests Act, relating to grazing an animal on maize crop. The charges brought under section 52(1) of the Forests Act. The appellant argues that that provision does not create an offence. I have perused section 52 of the Forests Act, indeed section 52(1) does not create any offence, it merely lists prohibited activities in forests. The offence is created in section 52(2) of the Forests Act. The appellant should therefore have been charged under section 52(2). The said offence can only be committed in connection with prohibited activities in a state, local authority or provisional authority, according to section 52(1).

19. The law under which the charge is founded relates to forests, yet the grazing was on a farm. A farm and a forest cannot possibly sit together. According to the *Concise Oxford English Dictionary*, OUP, 12th edition, a farm refers to an area of land and its buildings used for growing crops and rearing animals. The same dictionary defines forest as a large area covered chiefly with trees and undergrowth. The *Black’s Law Dictionary*, Thomson Reuters, 10th edition, has similar definitions. A farm is described as land and connected buildings used for agricultural purposes; while forest is said to be dense growth of trees and underbush on a large tract of land. It goes without saying that the law enacted to regulate forests cannot possibly be designed to regulate agriculture, or create offences relating to grazing on crops growing on a farm. The offences created in section 52 of the Forests Act cannot possibly form a basis for the charge of illegal grazing that was brought against the appellant.

20. Even if the provision were to be taken to create an offence to which the facts of the case before me applied, which in my humble view it does not, the evidence placed before the trial court could not have provided sufficient basis to convict the appellant of the alleged offence. The charge alleges that the illegal grazing happened on a farm belonging to the complainant. These are criminal proceedings, where every element of the charge ought to be proved, to satisfy the standard of proof in criminal prosecution, beyond reasonable doubt. It ought to have been proved beyond doubt that the maize farm on which the alleged grazing happened belonged to the complainant. No evidence of ownership of the subject farm was adduced, noting that practically all private land within Kakamega County has been brought under registration by the state.

21. On the whole, it is my finding that the appeal herein fails so far as the charge in the first count is concerned. There is ample evidence that the offence in question was committed by the appellant. There were infringements of the fair trial principles, but the same were not prejudicial enough to vitiate the proceedings. I shall therefore uphold the conviction of the appellant in Kakamega CMCCRC No. 2296 of 2016 of the offence of causing grievous harm contrary to section 234 of the Penal Code and I do hereby confirm the sentence imposed by the trial court of three years (3) imprisonment.

22. Regarding the second count, of illegal grazing, it is my holding that the charge as framed does not disclose an offence under the Forests Act. The Forests Act does not create an offence of the nature charged. The appellant ought not, therefore, to have been subjected to a trial under the said charge. The proceedings relating to that charge were therefore faulty. I shall accordingly allow the appeal with respect to the second count, and I do hereby quash the conviction of the appellant in Kakamega CMCCRC No. 2296 of 2016 of the offence illegally grazing a pig in a maize plantation contrary to section 52(1) of the Forest Act and set aside the sentence imposed upon her of six (6) months imprisonment.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS.....24th.....DAY OF.....DECEMBER.....2018

W MUSYOKA

JUDGE