Case Number:	Criminal Appeal 89 & 90 of 2013 (Consolidated)
Date Delivered:	11 Dec 2014
Case Class:	Criminal
Court:	High Court at Kerugoya
Case Action:	Judgment
Judge:	Robert Kipkoech Limo
Citation:	John Murimi Kigoru & another v Republic [2014] eKLR
Advocates:	Mr Ngangah holding brief for Muriithi for the appellants Mr Sitati for state
Case Summary:	-
Court Division:	Criminal
History Magistrates:	D.A. Ocharo
County:	Kirinyaga
Docket Number:	-
History Docket Number:	Criminal Case 691 of 2010
Case Outcome:	appeal partly succeeds
History County:	Kirinyaga
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO.89 OF 2013 CONSOLIDATED

WITH NO. 90 OF 2013

JOHN MURIMI KIGORU.....1ST APPELLANT

BERNARD MIANO NDINWA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 691 of 2010

in the Resident Magistrate's Court at Wang'uru HON. D.A. OCHARO (RM)

JUDGMENT

This is an appeal by **BERNARD MIANO NDINWA AND JOHN MURIMI KIGORU** both charged with the offence of assault causing actual bodily harm contrary to **Section 251 of the Penal Code** in Wang'uru Senior Resident Magistrate's court Criminal case NO. 691 of 2010 where they were found guilty and convicted to serve 24 months imprisonment. They both felt aggrieved and preferred this appeal each listing five grounds as the basis of their appeal. The petitions of appeal lodged in this court indicate that their trial and conviction was at Resident Magistrate at Embu which is erroneous because the record clearly indicated that the appellant was tried and convicted at Senior Resident's court at Wang'uru. So technically there is no appeal against the decision of the Senior Resident Magistrate at Wang'uru. However looking at the submissions filed and oral submissions made it is evident that the appellant's counsel erroneously indicated Embu in the petitions filed instead of Wang'uru where the matter was handled. I am inclined to determine the appeal on the merit without undue regard to the technicality in exercise of my discretion under **Article 159 of the Constitution** for the interest of justice .

Both the appellants have listed similar grounds of appeal which are as follows:

1. That the Learned Magistrate erred in law and fact in convicting the appellants on a charge of assault.

2. That the Learned Magistrate erred by ignoring the defence of the appellants.

3. That the Learned magistrate erred by justifying the burden of proof to the appellants.

4. That conviction of the appellants was against the weight of evidence.

5. That the sentence was harsh, excessive and wrong in law.

The office of Director of Public Prosecution through Mr Sitati did not oppose the appeal. I am nevertheless obligated to consider the grounds of appeal pointed out and re-evaluate the evidence tendered at the trial court and determine whether or not the same was sufficient to sustain conviction and hence the sentence meted out against the appellants.

I shall begin with the first ground of appeal which I will combine with the fourth ground as both relates to the weight of evidence adduced by the prosecution at the trial court.

The brief background of the case is the trial court appears to be centred on an apparent land dispute a rice holding NO. 2165B which measures 2 acres. Both the complainant on one hand and the 1st appellant claim ownership rights over the said parcel . Apparently, it is because of the dispute that the complainant was assaulted as he prepared the disputed land for planting. Both appellants do admit that they found the complainant on the farm on 27th July 2010, the material date of the offence and that a fighting ensued after they tried to work on the same parcel that the complainant was working on. There is no dispute therefore that there was a fight on the material day. The question that need answers is whether the trial court found enough evidence from what was adduced by the prosecution to conclude that the complainant was assaulted as a result of the said fight.

Weight of the evidence adduced

The appellants have contended that the evidence presented was not sufficient to convict them on the offence of assault. The evidence of PW1 the complainant in the subordinate court is brief. He told the court that as he was working on the rice holding when the appellants went in and started assaulting him using a panga and stones in an attempt to chase him from the disputed plot. The complainant told the court that he sustained injuries which was confirmed by a clinical officer (PW1) who signed the P3 form. I find the same evidence quite consistent with the evidence of PW3 who was also at the scene at the material time. The P3 (exhibit 1) shows that the complainant suffered harm and was treated by the same witness (PW1) who filled the P3 form. In my view there was sufficient evidence tendered by prosecution at the trial court particularly when the same is viewed against the defence offered. The appellants as indicated above clearly admits that there was altercations that led to a fight the only difference being that the 1st appellant alleges that he was injured. He, however but offered no evidence to proof the allegations. I do find that the Learned Magistrate evaluated the evidence tendered correctly in finding both the appellants guilty.

The appellants have submitted that their defence was ignored at the subordinate court. I have looked at the proceedings and I am not persuaded that the defence case was ignored. I do not find anything weighty in the defence put forward by the appellants which in any event was merely unsworn statements that gave slightly a different version of what took place after the altercations over the rice holding NO. 2165. The 1st appellant told the court that he was called to the scene when the 2nd appellant (hired by the 1st appellant to go and work on the said plot) met resistance from the complainant. The 1st appellant actually went to the holding well knowing that there was a problem and appears to have taken matters into his hands instead of looking for lawful avenues to resolve their dispute. I am not at all persuaded by the appellants that they were attacked by the complainant. The 1st appellant told the trial court that he reported the matter on 29th July 2010 at Wang'uru police station. If it is true that he was assaulted, the 1st appellant did not tell the court why it took him 2 days to report to the police and even then, there is nothing to show that he indeed reported the alleged assault at the police if at all. I do not see how the appellant expected the trial magistrate to place any weight upon such statements which as I have indicated was unsworn and I do find that the same was unsubstantiated and carried no legal weight. I am not persuaded by the appellants submissions that the trial court should have found that the appellant's acted in self defence. Self defence is a not a defence to a charge of assault by any stretch.

The appellants' action in taking the law into their hands despite the sentiments expressed were ill advised. The same has no place in a country that cherishes the rule of law. If unchecked such actions is a recipe for chaos and the trial court was correct to try to put a stop to such practices in order to have law and order particularly in the management of rice holdings at Wanguru.

On the issue of burden of proof, although the counsel for the appellant submitted that the trial court erred in shifting the burden of proof, there was no demonstration shown to prove that the trial court shifted the burden which is always on the prosecution. I do not find much relevance on the issue of ownership of the rice holding under dispute. Such an issue can only be handled through civil proceedings .

What was before the trial court was a charge of assault causing actual bodily harm and the trial court was obligated to try the appellants upon being arraigned in court to face the said charges. The issue of the dispute in my view could only assisted the trial court to establish the motive , the cause for the assault and the mitigating circumstances.

In view of the above reasons I find that the grounds cited in the appeal are devoid of merit in so far as conviction is concerned . After re-evaluating the evidence tendered before the trial court I am satisfied that the Learned Magistrate made the correct decision by convicting the accused persons . I have considered the authorities cited by the appellants and find them only relevant and valuable to the appellants in so far as their fifth ground of appeal is concerned.

The appellant have appealed against the sentence stating that the same is excessive and harsh. The appellants were charged and convicted pursuant to **Section 251 of the Penal Code** which provides for 5 years imprisonment. The appellants were convicted and sentenced to serve only 2 years so though the sentence may not appear excessive on the face of it, I am persuaded by the decision of Justice **S. Okong'o** in the case of **NYAMOHANGA PAUL GATI -VS- STATE (2013) E KLR** , cited by the appellant's counsel which held that an appellate court can only interfere with the discretion of a subordinate court where it is shown the court took into account an irrelevant factor or failed to take into account a relevant factor or that a wrong principle was applied or short of those the sentence itself is so harsh and excessive that an error in principle must be inferred . I have also considered the decision in **MERCY CHELANGAT TANUI-VS- REPUBLIC (2014) e KLR** which also supports this view . In view of the authorities I am persuaded that the appellants being 1st offenders should have treated differently. Furthermore the surrounding circumstances of the offence and the land dispute was a relevant factor which ought to have been considered as a mitigating circumstance especially given the fact that the 1st appellant claims to have leased the disputed plot from the brother of the complainant . It was of course wrong and unlawful for the 1st appellant to take the law into his own hands as I have already stated but it is my considered view that the appellants deserved a non-custodial sentence to give them a second chance of considering lawful ways/options open to settle disputes.

In view of the foregoing it is my finding that conviction of the appellants must be sustained. In however find the sentence for reasons aforesaid excessive. The appeal therefore succeeds only on this score. I hereby set aside the sentence of 24 months imprisonment imposed on them and substitute it with a fine of kshs 25,000/- each or 1 year imprisonment each in default.

R.K. LIMO

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 11TH DAY OF DECEMBER 2014 in the presence of :

Mr Ngangah holding brief for Muriithi for the appellants

Mr Sitati for state

Mbogo Court Clerk