



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYAMIRA**  
**CRIMINAL APPEAL NO. 55 OF 2017**

ODPP.....APPELLANT

=VRS=

1. JOYCE BONARERI MOGAKA.....1<sup>ST</sup> RESPONDENT
2. NAOMI KEMUNTO MOGAKA.....2<sup>ND</sup> RESPONDENT
3. PAUL ONYIEGO OGITO.....3<sup>RD</sup> RESPONDENT

*[Being an Appeal from the Ruling of Hon. N. Kahara – Resident*

*Magistrate delivered on the 16<sup>th</sup> day of October 2015*

*in Keroka PM Criminal Case No. 492 of 2015]*

**JUDGEMENT**

This is an appeal by the State against the acquittal of the respondents by the trial court. The respondents were charged on three counts of Assault causing actual bodily harm contrary to Section 251 of the Penal Code. It was alleged that on 10<sup>th</sup> April 2015 they jointly with others not before court assaulted Sara Moraa (count 1), Abel Manoti (count II and Amoth Nyangera (count III) at a place called upper Mwangori village in Borabu sub-county, Nyamira County.

After hearing and considering the evidence of the prosecution witnesses the trial magistrate found there was no prima facie case established against the accused persons sufficiently to warrant them to be put on their defence and acquitted them under Section 210 of the Criminal Procedure Code.

Being aggrieved, the State preferred this appeal. Its grounds of appeal are: -

- “1. That, the learned trial magistrate erred in law and fact, by not considering the evidence of the prosecution.**
- 2. That, the learned trial Magistrate occasioned a miscarriage of justice by importing an erroneous assessment of the facts presented by the prosecution.**
- 3. That, the learned trial magistrate erred in law and fact, by blatantly ignoring the expert evidence of the clinical officer without giving any considerable reasons thereof.**

**4. That, the learned trial magistrate erred in law and fact by purporting to introduce her own version of events, different from the facts presented in court by the prosecution.”**

Counsel for the State prayed that the appeal be allowed and the matter be remitted to Keroka Principal Magistrate’s Court for re-hearing.

Although Counsels for the parties agreed to canvass this appeal by way of written submissions, only those of Mr. Abobo, Learned Counsel for the respondents were received. It is not clear whether the State abandoned the appeal. Be that as it may as the first appellate court I have, as is my duty, considered and evaluated the evidence in the lower court so as to arrive at my own conclusion. I have done so bearing in mind that I did not have the opportunity of observing the demeanour of the witnesses and given provision for it. I have also considered the submissions of the Learned Counsel for the respondents. I agree with the trial magistrate that the prosecution did not establish a prima facie case against the respondents to warrant them to be put on their defence. Indeed, no reasonable tribunal directing its mind properly would have convicted the respondents on the evidence on record were they to exercise their right to remain silent. The complainants testified that they were pelted with stones by a group of people and could not tell which member of the group threw the stone that hit them. There was no evidence of common intention adduced. The prosecution did not offer any explanation as to why out of 10 assailants they only arrested the respondents. It is likely as submitted by their Counsel, that they were framed because of a land dispute between them and the complainants.

This appeal has no merit. The same is dismissed and the order of the lower court to acquit the respondents under Section 210 of the Criminal Procedure Code is upheld.

It is so ordered.

**Signed, dated and delivered in Nyamira this 25<sup>th</sup> day of October, 2018.**

**E. N. MAINA**

**JUDGE**