



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 45 OF 2014

WILLY MUASYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. S.K. Mutai Ag. Principal Magistrate delivered on 6/3/2014 in Mutomo Resident Magistrate Sexual offence No. 187 of 2013)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **Willy Muasya**, was charged with the offence of assault causing actual bodily harm contrary to section 251 of the penal code.

The particulars of the charge were that on **30th** day of **August 2013** at about **9.00 a.m** at **Kasaala Market, Kasaala** location of **Ikutha** District within **Kitui county**, assaulted **Nzou Musyoka** thereby occasioning him actual bodily harm.

2. The Appellant pleaded not guilty. The case proceeded to a full trial.

3. The prosecution case was that at the material time, the complainant who is a trader at **Kasaala** Market went to the shop of the Appellant to demand payment for goods taken from his shop by the Appellant. The goods taken included cement, white wash, brush and nails all valued at kshs. 6,940/=. That Appellant said he would only pay for the cement and the white wash. The Appellant then stood up, took a club and asked the complainant to leave. That the Appellant then hit the complainant at the back with a club and bate him on the neck.

4. The two were separated. The complainant reported the matter to the police. The complainant was issued with a p3 form and referred to hospital for treatment. The Appellant was later arrested and charged.

5. In his defence, the Appellant stated that he was at his shop when the complainant went there and demanded money. That the complainant attempted to take away the Appellant's weighing machine. The Appellant got hold of the machine. The Complainant then held the Appellant's right hand. The hand had been previously bitten by a cat. The hand bled. The Appellant screamed. The Appellant's wife, daughter and one other person responded to the screams. The Appellant denied having assaulted the complainant.

6. At the conclusion of the trial, the Appellant was convicted and sentenced to pay a fine of kshs.

10,000/= in default 24 months imprisonment.

7. The Appellant was aggrieved by the conviction and appealed in this court on grounds that can be summarized as follows:

- a. **That the charge sheet was defective.**
- b. **That the medical evidence by the clinical officer was hearsay.**
- c. **That the defence of use of reasonable force and justification was not considered.**
- d. **That the conviction was against the weight of the evidence.**

8. During the hearing of the appeal, both the Appellant and the Respondent relied on written submissions which I have duly considered.

9. The complainant's evidence that the Appellant hit him with a club and bit him was corroborated by the evidence of **Pw2 Joel Kasimu Peter**. Pw2 was at the material time digging a borehole for the Appellant. It was pw2's evidence that he saw the complainant emerging from the Appellant's shop, then saw them quarrelling before the appellant took a club, hit the complainant, then bit him on the neck.

10. The evidence of **Pw3 Stephen Moki Ikuthu** further corroborated the complainant's evidence. It was pw3's evidence that he heard screams and rushed to the scene and saw the appellant bite the complainant before they were separated.

11. The clinical officer, Pw5 **Daniel Mulwa** gave evidence that confirmed that he examined the complainant and found him with a bite mark and a swollen and tender back region. The clerical officer produced a P3 form that he filled and described the probable type of weapon used as blunt. The clinical officer's evidence further corroborates the complainant's evidence. The clinical officer is the one who examined the complainant and filled in the p3 form. His evidence cannot therefore be termed as hearsay.

12. **Pw4 PC Haron Yator**, the investigating officer gave evidence that confirmed the making of the report by the complainant and the investigations carried out.

13. The defence by the accused blames the complainant as the one who wanted to take away the weighing machine and for holding his (Appellant's) injured arm which was bandaged thereby causing it to bleed. The Appellant denied that he hit the complainant with a club and bit him. With the Appellant having denied assaulting the complainant, it is rather strange that one of the grounds of appeal is that of justification and use of reasonable force. The said ground of appeal must be an afterthought

14. **Dw2 Kungu Mwathi** testified that he was at the scene and saw the complainant and the appellant struggling over the weighing machine. It was Dw2's evidence that the Appellant did not hit the complainant with a club or bit him. The evidence of **DW3 Lola Mwende Willy** a wife to the appellant and **DW4 Kamene Willy** a daughter to the Appellant is to the same effect. Although the evidence of these three defence witnesses is that there was no assault, the same is not believable. The complainant sustained real injuries which were confirmed by the Clinical Officer. The evidence of the eye witnesses (Pw2, Pw3) is that they saw the said injuries being inflicted on the complainant by the appellant.

15. The trial magistrate who had the advantage of seeing the witnesses testify and observed their demeanor believed the prosecution evidence. I have no reasons to differ with the findings of the trial magistrate. The trial magistrate however ought to have given the correct default sentence for a fine of kshs. 10,000/=. The same should not have exceeded three months imprisonment (*See Section 28 Penal Code*).

16. On whether the charge sheet is defective or not, I am guided by the following dicta from the court of appeal in **Sigilani –vs- Republic (2004) 2 KLR, 480** where it was held that:-

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and

unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.

On the other hand, Section 134 of the Criminal Procedure Code provides for what the components/ingredients of the charge sheet constitute as follows:-

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”.

The charge sheet clearly spells out the offence the Appellant was charged with. There was no ambiguity.

17. Having evaluated the evidence on record, I find no merits in the appeal and dismiss the same.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Kitui this 29th day of January 2015.

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B. THURANIRA JADEN

JUDGE