REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO.40 OF 2013

ISAAC WAITA MUTHUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kangundo Principal Magistrate's

Court Criminal Case No. 400 of 2011 by Hon. M.K.N. Nyakundi , PM on 10/12/12)

JUDGMENT

1. Isaac Waita Muthui; the appellant was charged with the offence of causing grievous harm contrary to **Section 234** of the **Penal Code.** Particulars thereof being that on the 31st day of July, 2011 at **Kaukiswa A.I.C Church, Matungulu Location** in **Matungulu District** within **Machakos County** did grievous harm to one **Simon Musyoki Mulwa.**

2. Facts of the case were that on 31st day of July 2011, PW1, **Simon Musyoki Mulwa,** the complainant was in church. Congregants were praying raising their hands and in loud tones. The father of the accused instructed them to lock the door. Some members of the church objected to the door being closed. In the process the appellant held one of the ladies blouse at the chest (breast). The complainant moved to separate them only to be pushed by the accused. He fell and injured his left hand. The appellant was arrested and taken to the Police Station. The complainant was examined by **PW6, Dominic Mbindyo** a Clinical Officer. Per his findings, he had sustained a compound fracture of the left radius hence this case.

3. In his defence the appellant stated that he was instructed by the Pastor to close the door. There was a conflict between two (2) groups at the church. Some women attacked him as he closed the door. He was slapped by **Catherine** and they struggled. PW1 had snatched him keys to the door. In the course of the scuffle he saw PW1 on the floor. They were about twenty people hence he could not tell how he fell down. He denied having assaulted him.

4. The learned trial magistrate evaluated evidence adduced and found the appellant guilty of a lesser cognate offence of assault contrary to **Section 251** of the **Penal Code.** She convicted and fined him Kshs. 10,000/= or 3 months imprisonment in default.

5. Being aggrieved by the conviction and sentence he appealed on grounds that the learned trial magistrate erred in law and fact;-

i. By convicting the appellant without evidence of the investigating officer;

ii. No medical notes or X-rays were produced in evidence to confirm injuries sustained;

iii. The medical practitioner was unqualified;

iv. Convicting on substituted charges was erroneous; and

v. The fact that the appellant was a minor was disregarded when the sentence was meted out.

6. The appeal was canvassed by way of written submission.

7. This being the 1st appellate court my duty is to re-evaluate the evidence, draw my own inferences and come to a logical conclusion knowing that I did not have an opportunity of seeing or hearing witnesses who testified at the trial cou*rt.* ***(See Okeno versus Republic (1972) E.A. 32).***

8. I have re-considered evidence adduced at the trial as well as rival submissions of both parties.

9. The appellant was accused of having contravened **Section 234** of the **Penal Code** which provides:-

> "***Any person who <u>unlawfully does grievous</u> harm to another is guilty of a felony and is liable to imprisonment for life."*** **<u>Emphasis mine.</u>**

For a person to be culpable for the offence, he must have acted unlawfully.

10. The charge as framed had an omission which was however not brought to light.

11. To prove the case the prosecution adduced medical evidence in an endeavor to establish the facts that the complainant was injured. It is argued on appeal that the P3 form in that regard was filled by a Clinical Officer who was not qualified as he was not a Medical Officer. It has been held severally that a Clinical Officer is qualified to fill a P3 form because that is his area of competence. (***see Raphael Kavoi Kiilu – Criminal Appeal No. 198'/2008; Fappyton Mutuku Ngui –versus- Republic[2014] eKLR,*** **Section 2** of the **Clinical Officers Act (*Training, Registration and Licensing) Act, Cap 260(LOK).*** The trial magistrate did not misdirect herself in accepting evidence of the Clinical Officer.

12. However, she is also faulted in accepting evidence adduced by the Clinical Officer because, he did not have proof of injuries sustained. It is stated that soon after the complainant sustained an injury he was taken to Mater Hospital then treated at Equator Hospital where an X-ray was done. No such evidence was adduced yet the Clinical Officer filled the P3 form. The basis upon which he filled the P3 form was questioned. The question could have been answered by the officer who investigated the case and formed an opinion to charge the appellant. The Investigating Officer, if any, did not tender evidence which leaves the question unanswered.

13. According to the P3 form the complainant's left hand was tender to touch. It had a compound fracture and a displacement. The Injury sustained was assessed as grievous harm. In reducing the charge from grievous harm to assault the learned trial magistrate stated that there were no initial treatment notes to inform her of the actual injury the complainant sustained. Taking into consideration the complainant's advanced age she stated that:-

> "***A slight fall would injure his body due to the weakening of bones".***

14. This would therefore call upon this court to re-evaluate evidence adduced and come to the conclusion as to whether or not the offence as envisaged in law was committed.

15. Evidence adduced was that there were two (2) factions at the **African Inland Church** that the complainant and appellant had attended on the material date. **Pastor Ngewa** headed one faction while the

other was under the leadership of **Pastor Mutungi.** The complainant belonged to **Pastor Ngewa's** faction while the appellant's family belonged to **Pastor Mutungi's** faction. Both factions were using the same room for purposes of worship. The two (2) factions already had a dispute in court **Civil Suit No. 56** of **2011.** The complainant was one of the plaintiffs while the appellant's father was one of the defendants. The relief sought was the defendants to be injuncted from using the church. Apparently they had loudspeakers that they were using such that the plaintiff's prayers could not be heard.

16. According to PW1, on the material date some members of the church attempted to close the door while others blocked them. He noticed the appellant was holding a certain lady's blouse by the breast. He moved to separate them. His action prompted the appellant to push him. He fell and injured his left land.

17. PW2, **Serah Minoo Mbuvi** stated that as the two (2) factions worshipped simultaneously the appellant's father gave him keys to close the door. When he went to close the door she (PW2) sought to know why the door was being closed. The appellant then held her blouse at the breast region and twisted it declaring that the door had to be closed. The complainant intervened to help only to be pushed. **PW3, Samuel Mutiso** confirmed what PW2 stated in material particular.

18. In his defence the appellant stated that he had gone to close the door when some women attacked him, namely **Catherine Mutuku Mutua, Serah Minoo Mbuvi** (PW2) and **Grace Mbuvi. Serah** held him pulling him with an intention of taking the keys. She slapped him. **Simon (PW3)** intervened and there was a struggle, people had crowded at the door. While searching the keys he noted that the complainant had taken them and he was on the floor. He could not tell how he had fallen down. He denied having pushed him. He stated that he was not holding **Serah's** breast. **Serah** acted first by snatching him the keys hence the struggle that ensued.

19. Isaiah Mutiso Mutungi, the **Pastor** testified in support of the appellant and stated that there was a fracas. The group that the complainant was part of was in favour of **Pastor Ngewa** having declined to accept the pastor who had been sent to the church. It was his first time at the service. He was shocked by the group of about 30 people who set upon the Machines and were disconnecting the public address system. The ladies mobbed the appellant who had been given the responsibility of closing the doors. The struggle was over the key that the appellant had. He then heard one of the complainant's sons saying that he would break the appellant's neck.

20. It should therefore be believed when the appellant states that he was mobbed by women who belonged to the rival faction. Denying having pushed the complainant the appellant stated that the end result of the event happened in the course of the struggle between him and many other people. Consequently, there was no slightest evidence that either the appellant had the intention of occasioning an injury on the person of the complainant or that he acted recklessly by pushing the complainant.

21. In order for the appellant to be guilty of the offence as charged, the prosecution had a duty of proving that he acted by doing the act that caused the complainant to suffer grievous harm and that he did it intentionally hence making the act unlawful.

22. Evidence adduced fell short of proving *mens rea* on the part of the appellant that was required for the offence.

23. In the premises the case against the appellant was not proved to the required standard of proof beyond any reasonable doubt.

24. The appeal therefore succeeds. I quash the conviction and set aside the sentence imposed. If the fine was paid, the same shall be released to the appellant forthwith.

25. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **21ST** day of **JANUARY, 2015.**

L.N. MUTENDE

JUDGE