



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 197 OF 2013**

**JOSEPH MAKAU MUSYOKO ..... APPELLANT**

**VERSUS**

**REPUBLIC**

*(Being an appeal from the conviction of Hon. M.A Opanga Ag. Senior Resident Magistrate delivered on 23/01/2013 in Kithimani Principal Magistrate Criminal Case No. 557of 2011)*

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*(Before Hon. B. Thurairaja J)*

**J U D G M E N T**

1. The Appellant, **Joseph Makau Musyoko** together with one **Robert Mutaka Malai** were charged with the offence of affray contrary to **section 92** of the **Penal Code**.

The particulars of the offence were that on the 14<sup>th</sup> day of February 2011 at **Kaluluini Sub-location** in **Yatta District** within **Machakos County**, unlawfully took part in a fight in a public place, along **Kaluluini/Katuki** feeder road.

2. The Appellant and his co-accused pleaded not guilty. The case proceeded to a full trial.
3. During the hearing of the appeal, both the Appellant and the learned counsel for the State made oral submissions which I have duly considered.
4. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.
5. The prosecution case was that on the material day at about 12.30 p.m. the Appellant and his co-accused were found at the road fighting. They were separated by PW1 **Nzomo Isika** and PW3 **James Mumo Mutiso**.
6. Both the Appellant and his co-accused made reports of assault at the **Matuu Police Station**. Both had minor injuries and were referred to the hospital for treatment. Both had P3 forms filled. After investigations were concluded they were charged with the offence of affray.
7. The Appellant in his defence gave sworn evidence. He called one witness. The Appellant in his evidence stated that it was the co-accused who attacked him by jumping at him and hitting him with his head. That the Appellant fell down and the co-accused continued assaulting him. One **James Mutiso** (PW3) then rescued him. The Appellant thereafter made a report to the police and he was issued with a P3 form. The Appellant blamed his being charged on the impartiality by the police officers.
8. DW2 C.I **Henry Zuma** the **OCS Matuu Police Station** gave evidence that the report was made at the police station by the Appellant and the same noted in the O.B. There was no report made by

- his co-accused.
9. The trial magistrate found the Appellant and his co-accused guilty, convicted them and discharged them under **section 35 (1) of the Penal Code.**
  10. The Appellant was aggrieved by the conviction and appealed to this court on grounds that can be summarized as follows:-
    - a. **That the conviction was against the weight of the evidence.**
    - b. **That the defence by the Appellant was not considered.**
    - c. **That the Appellant's written submissions were not considered.**
  11. PW1 and PW2 and the two eye witnesses gave a consistent and corroborative account of evidence that the Appellant and his co-accused fought. According to PW2 and PW3, the Appellant and his co-accused exchanged blows. The evidence of PW1 and PW3 is that they were the ones who separated the Appellant and his co-accused. It is also the evidence of PW1 and PW2 that the Appellant and his co-accused did not sustain any visible injuries.
  12. PW2 **Alfred Toronge** and PW5 **Benjamin Maingi** who are Clinical Officers from **Matuu District Hospital** produced P3 forms which reflected that both the Appellant and his co-accused sustained minor injuries. This further corroborates the evidence of the eye witnesses and that of the Investigating Officer, PC Kennedy Odhiambo that the Appellant and the co-accused fought. The fight took place at a public road according to the evidence of the eye witnesses.
  13. The defence case is not believable in view of the strong prosecution evidence. Even **James Mutiso** (PW3) who the Appellant testified went to his rescue also gave evidence of affray. With the evidence of the eye witnesses which is supported by the medical evidence, the trial magistrate arrived at the correct finding. I have no reasons to differ with the findings of the trial magistrate who saw the witnesses testify and observed their demeanour.
  14. With the foregoing, I find no merits in the appeal and dismiss the same.

**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Machakos this 30<sup>th</sup> day of July, 2015**

**B. THURANIRA JADEN**

**JUDGE**