220/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 87 OF 2008

ALPHONCE MATHUKU KILONZO .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 26 of 2007 by Hon. D.G. Karani , RM on 4/4/2008)

JUDGMENT

1. The appellant was charged with the offence of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code.** Particulars of the offence being that on the **6th** day of **July, 2005,** at **Syokisinga village**, **Kyua Hlocation** in **Machakos District** within the **Eastern Province** assaulted **Nzivulu Munyole** occasioning her actual bodily harm.
2. He was tried, convicted and sentenced to pay a fine of **Ksh. 15,000/=** in default to serve **six (6)** months imprisonment. Being aggrieved by the conviction and sentence he appeals on ground that:-

> "i. The learned trial magistrate erred in law in that having indulged the prosecution severally by granting adjournment on their requests, proceeded to take the evidence of two crucial witnesses in the absence of the defence counsel and without granting the appellant an opportunity to get his or other counsel to proceed with the defence to the prejudice of the Appellant**.**
>
> ii. The learned trial magistrate erred in law in that even after denying the appellant time to be represented by an advocate during the prosecution case, similarly denied the appellant's advocate an adjournment during submissions inspite of being informed of the reasons why he (counsel) had not attended court and thus the appellant was prejudiced.
>
> iii. The learned trial magistrate erred in failing to appreciate that it was common ground that there was bad blood between the appellant and PW1 and thus failing in deciding whether or not there was any likelihood of a frame-up .
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> iv. The learned trial magistrate erred in failing to note and appreciate the material inconsistencies in the prosecution case first, as relates to where PW2 and PW3 were at the time of the alleged assault and also as to the exact nature of the injuries sustained.
>
> v. The learned trial magistrate erred in law and in fact in failing to pose and have resolved

the questions as to the delay in commencing the proceedings against the appellant.

3. The file was placed before **Lenaola, J** pursuant to **Section 352,** of the **Criminal Procedure Code.** He perused the petition of appeal and found that no sufficient grounds had been lodged to make the court interfere with the decision of the Lower Court. Consequently, he rejected the appeal summarily.
4. The order prompted the appellant to appeal to the Court of Appeal. The appeal was allowed and the High court was ordered to admit the appeal.
5. The facts of the case were that PW1, **Nzuvule Munyole** was grazing her goats and cows where she had leased pasture on **Mutinda's** Parcel of Land. The Appellant an Assistant Chief of Syokisinya sub-location went and accused her of brewing Karubu, a local brew. PW1 challenged him to visit her home and carry out a search to establish the allegation. Her assertion provoked the appellant who held her and slapped her severally. She sustained an injury on the left eye. He also whipped her on the back. She sustained injuries. She reported the matter to the police. She was referred to the hospital. She was examined by PW4, **Peter Wambua Muthengi** a clinical officer at **Kitui District Hospital**. She had pain on the right cheek bone and tenderness on the posterior back and chest. It was concluded that she had suffered harm. The appellant was arrested and charged.
6. In his defence the appellant denied having assaulted the complainant. He stated that he had a staff meeting at **D.O.s Office Katangi** from **10.00am** to **3.00pm**. After the meeting he went to **Katangi Market** where he stayed until 8.00pm. It was further his testimony that on the **4th July, 2005,** he had gone to the complaint's home to warn her to stop brewing "karubu". She told him that she would not stop. That was not the first time he had warned her to desist from brewing karubu. He had also stopped the wedding of the complainant's son from taking place at a primary school as the headmaster cited disturbance of students taking tuition classes. Both counsels submitted. I have duly taken into consideration their submissions. .
7. This being the first appellate court, I am duty bound to analyse and re-evaluate the evidence which was adduced before the trial court and come up with my own conclusions bearing in mind the fact that I did not have an opportunity of hearing and seeing witnesses. (see ***Okeno versus Republic (1972) E.A. 32).***
8. It is an accused person's fundamental right to be represented by counsel of his choice. (see ***Section 77(5)(d) of the repealed Constitution).*** This right was accorded to the appellant. The only issue to be addressed is whether the magistrate in the trial court facilitated the effective and full participation of counsel who was on record. The question arises because it has been stated that the trial magistrate indulged the prosecution severally by granting adjournments but proceeded with the hearing where two (2) crucial witnesses testified in the absence of the defence counsel whereby the appellant was prejudiced.
9. The court emphasized the need for representation by counsel in the case of ***Peter Pett versus Grey hound Racing Association [1968] 2 ALL E.R. 545)***. It was stated thus:-

> ***"It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: "you can ask any questions you like." Where upon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?"***

10. This court having appreciated the position must interrogate what the law provides in respect of adjournments. **Section 205** of the **Criminal Procedure Code** provides for adjournments in the course of hearing of the case. This discretion to adjourn the case must however be exercised reasonably. The rights of the accused and that of the complainant must be balanced when granting adjournments. All the court has to ensure is that the accused has been given reasonable time to participate in the proceedings either personally or by way of representation by counsel.
11. Looking at the proceedings of the Lower Court at the stage of plea taking the appellant was

represented by counsel. The case was scheduled for hearing on the **22nd February, 2007**. On the stated date the case was adjourned at the instance of the appellant. His advocate needed time to prepare for the defence and he also had a matter before the High Court, Machakos. The case was adjourned to **7/4/2007.** It turned out to be a Saturday; therefore it was rescheduled to **7/6/2007.** On the said date counsel for the appellant was not available; the matter came up next on the **6/7/2007.** Counsel for the appellant was not present. He had taken his wife to hospital per the reason given. The court having taken into consideration all circumstances granted the appellant a last adjournment. In my opinion the trial magistrate was justified in making such an order. On the **13/8/2007** the case was heard, the complainant and one of the witnesses testified. The third witness testified on the **11/9/2007** and was duly cross-examined by the appellant's counsel. The remaining witnesses, the formal one, the Doctor and police officer were not present. The case was adjourned to **30/10/2007.** On the said date counsel for the appellant was not present. No reason was given to the court but on its own notion the court granted an adjournment to **10.15am**. At the said time, no reason was given of the appellant's counsel's absence. Procedurally the case proceeded. It is important to note that on the **23.5.2007** it was the appellant who made the application for adjournment and notified the court that his advocate was not available. Similarly, on the **30/6/2007** he personally prayed for change of date. Therefore it cannot be taken that he was a timid person who lacked understanding as to what to tell the court.

12. The two (2) witnesses testified and the case for the prosecution was closed. The ruling was delivered in the presence of the advocate for the appellant on the **17/1/2008.** Thereafter he conducted the appellant's defence.
13. A court may in all cases permit a witness to be recalled for further cross-examination (see ***Section 146 of the*** **Evidence Act, Cap 80 Laws of Kenya**). This can only be done following good cause being shown. If compelling circumstances are brought to the attention of the court, the court would have all reasons to grant such an application. On the **21/2/2008,** counsel for the appellant **Mr. Mbindyo** stated thus.

> ***"I need to submit as some prosecution witnesses testified in my absence. I need to be supplied with the proceedings regarding the evidence tendered in my absence"***

The case was adjourned following that application. An order for the advocate to be furnished with proceedings was made. When the matter came up on 10/3/2008 counsel for the appellant did not appear. The court proceeded to give a date for judgment.

14. The appellant was infact indulged by the trial magistrate on so many occasions. The right to recall witnesses was waived by the appellant. In granting an adjournment, the right to the case being heard within reasonable time and the concerns of judicial economy time must be considered. In the circumstances the **1st** and **2nd** grounds cannot stand.
15. The charge is said to be a frame-up following bad blood that existed between the complainant and the appellant. Medical evidence adduced proves that the complainant was examined two (2) days after the alleged incident. She was found to have sustained injuries that were classified as harm. The complainant's evidence that she was slapped and whipped on the back on the fateful date by the appellant is corroborated by that of PW2 and PW3 who per their evidence were present. PW3 was a 13 years old minor whose evidence was not discredited. PW2's evidence was similarly not discredited save that it has been stated that she said the complainant bled from the mouth, evidence that was not adduced by the complainant. This came up in cross-examination. The issue would be whether such an allegation would amount to a frame up.
16. It is admitted the appellant had previously stopped the complainant's son's wedding. It is also admitted he had warned her to stop brewing the traditional liquor save that the appellant argues it was on the **4/7/2005** while the complainant states it was on the date she was assaulted.
17. Even if there was disagreement between the two (2), it is not explained how a 3 years old boy who was not allied to either of the parties could come up with such an allegation. Believing the boy, I do uphold what the complainant stated as to who caused the injuries she sustained was to true. In the premises I find that the appellant was not framed up.
18. What is also intriguing as correctly interrogated by the trial magistrate is why the appellant an

administrator did not arrest the complainant if she was engaging in brewing traditional liquor instead of simply warning her. Despite the *alibi* defence put up the prosecution's case was still overwhelming.

19. In the premises, I have no reason to interfere with the decision reached by the trial magistrate in convicting the appellant. The sentence meted out is within the law.
20. The appeal is therefore dismissed in its entirety

DATED, DELIVERED and **SIGNED** this **8TH** day of **APRIL,** 2014**.**

L.N. MUTENDE

JUDGE