

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 2 OF 2008

RAMADHAN WESONGA APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal against conviction and sentence from the original Criminal Case No.909 of 2005 in Mumias Senior Resident Magistrate's Court – judgment of [MR. S. N. ABUYA, R.M.] delivered on 28.1.2008)

J U D G M E N T

The appellant and three others were charged with the offence of assault causing actual bodily harm contrary to **section 251** of the **Penal Code**. They were convicted and he was sentenced to serve 8 months community service at Eluche Secondary School. The grounds of appeal are that the case was not proved beyond reasonable doubt, the court relied on hearsay evidence, the evidence was contradictory, the defence was ignored and the sentence is excessive.

Mr. Mwebi, counsel for the appellant filed written submissions and contended that the offence took place at night. The complainant only identified the 1st accused who died before the case was finalized, he was not able to identify the appellant, the judgment did not indicate which counts the appellant was found guilty of as there were three counts, the defence displaced the prosecution case. The State relied on the evidence on record.

Before the trial court **PW1 YUSUF BARASA** who was the complainant testified that on the 25.7.2005 they were doing community policing when they went to the house of one **ASMAN OSUNDWA** and found people taking chang'aa. He was in the company of four other people. When he tried to enquire why people were taking chang'aa Asman's mother screamed that they were thieves and asked for a panga. PW1 was assaulted while his colleagues ran away. Three other people who were taking chang'aa joined and also assaulted him. He was treated at Makunga for two days and was issued with a P3 form. It was his evidence that the appellant was in the house of Asman Osundwa and he was taking chang'aa.

PW2 JOSEPH NDIRI was with **PW1** on the material date but when PW1 was being attacked he ran away and did not see the appellant. **PW3 AKWABI JEFRED MALOBA** was based at the Kakamega General Hospital and he treated the complainant. He produced the P3 form. **PW4 PC. RICHARD SHIKAMI** was based at Mumias police station. The report was made that the complainant had been attacked by over 4 people and he gave the names of Asman Osundwa, that of the appellant who was the 3rd accused before the trial court and the 4th accused. He investigated the case and charged the appellant with the others.

The appellant was put on his defence. In his sworn evidence he testified that on the 25.8.2010 he was arrested by the police in his house at about 10.00 p.m. He denied that he assaulted the complainant. He denied that he was in Asman's house during the incident.

The main issue in this appeal is whether the prosecution proved its case as required. Counsel for the appellant contends that the complainant only identified only one person. The appellant's name was not

given to the police. The complainant admitted that he did not know the other people who assaulted him. I have gone through the record of appeal it is clear that when the complainant testified he indicated that the appellant was one of the attackers. He only could not remember where the other attackers assaulted him. During cross-examination by the appellant the complainant indicated that the appellant was drinking chang'aa in glasses during the incident. He told the appellant that he was in the house of Asman Osundwa. It is the evidence of PW4 that when the complainant went to report he mentioned the names of the appellant. The evidence of PW2 who said that he did not see the appellant at Asman Osundwa's house does not disprove the prosecution case as the evidence shows that the appellant was inside the house while the witness was outside. The witness ran away before those who were inside started attacking the complainant. It is therefore clear that PW2 could not have seen the appellant.

Given the evidence on record I do find that PW1 saw the appellant at the scene. He gave his name to the police and that is why the appellant was charged. The prosecution proved its case as required. The appeal lacks merit and is hereby disallowed.

Delivered, dated and signed at Kakamega this 17th day of October 2014

SAID J. CHITEMBWE

J U D G E