



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 236 OF 2010

JOSEPH KANG'ARA KIOKO APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. C. Obulutsa Principal Magistrate delivered on 2/8/2010 in Kangundo Principal Magistrate Criminal Case No. 448 of 2009)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **Joseph Kang'ara Kioko** was charged with the offence of grievous harm contrary to **section 234** of the **Penal Code**.

The particulars of the offence were that on the 15th day of June 2009 at **Kwaani Location** of **Kangundo District** in the **Eastern Province**, unlawfully did grievous harm to **David Nzesya Kavanga** by hitting him on the mouth with his fist loosening his lower teeth.

2. When arraigned before the lower court, the Appellant pleaded not guilty. After a full trial, the Appellant was convicted and sentenced to serve five (5) years imprisonment on 2/8/2010. The Appellant was aggrieved by both the conviction and sentence and appealed to this court.

3. The prosecution case was that at the material time, the complainant, PW1 **David Nzesya** was at his farm when he noticed some soil had been scooped and carried away. There was a jerrican nearby which had been used to ferry the same. While the complainant was talking to a boy who had come to take away the jerrican, the boy called the Appellant who is a neighbour. The Appellant proceeded there and punched the complainant several times on the mouth. The complainant screamed for help and PW2 **Benjamin Kimwele** and PW3 **John Kawinzi** went to his rescue. The matter was reported at **Kangundo Police Station**. Investigations commenced. The complainant's teeth had become loose. He was issued with a P3 form and referred to hospital for treatment. The Appellant was arrested and subsequently charged with the offence herein.

4. In his defence, the Appellant gave sworn evidence. No witnesses were called. The Appellant testified that he was called by the complainant who was near the river. That when the Appellant proceeded to where the complainant was, the Appellant found the complainant holding a container and a *jembe* which belonged to the Appellant. According to the Appellant, he had left the container and the *jembe* at the sand mine. That the Appellant wanted to take his container and *jembe* but the complainant resisted and a

struggle ensued. That the complainant then bit the Appellant on the right thumb. The Appellant screamed for help and used force to free himself. Neighbours rushed to the scene and separated them. That the Appellant reported the matter to the police and was issued with a P3 form and proceeded to hospital for treatment. The Appellant produced his treatment card as an exhibit. He denied the charge.

5. The trial magistrate was satisfied that the prosecution case was proved beyond reasonable doubt, hence the conviction. The Appellant raised the following grounds of appeal:-

1. **“The learned magistrate erred in law and infact when he convicted the Appellant on a charge that was defective and incompetent.**
2. **The learned magistrate erred in law and infact when he misdirected himself on the applicable law and procedure.**
3. **The learned magistrate erred in law and infact when he failed to hold that the prosecution case had not been proved beyond reasonable doubt.**
4. **The learned magistrate erred in law and infact when he failed to consider the Appellant’s defence as against the prosecution case.**
5. **The learned magistrate erred in law and infact when he convicted the Appellant on a incredible, unreliable and contradictory evidence.**
6. **The sentence was manifestly excessive.”**

6. The appeal was canvassed by way of written submissions which I have duly considered. Although the first ground of appeal is that the charge is defective, no submissions have been made in that regard. I have considered the charge sheet and I have not seen any defects on the same. I will consider that ground of appeal as having been abandoned. The same applies to the second ground of appeal, that is on whether the trial magistrate applied the applicable law and procedure.

7. The complainant’s evidence was that he was punched by the Appellant several times on the mouth, causing three of his teeth to become loose. PW2 and PW3 testified that they rushed to scene and found the Appellant holding the complainant with the complainant bleeding from the mouth. None of the two witnesses witnessed the actual assault. According to the evidence of PW2 and PW3, they did not notice any injuries on the Appellant. A P3 form was produced by PW5, **Dominic Mbindyo**. PW5 did not however state his qualifications and merely stated that he treats patients and fills in P3 forms.

8. On the other hand, the Appellant in his evidence stated that the complainant threatened him, then they struggled and the complainant bit him on the thumb. The Appellant produced his treatment card as an exhibit. DW2 **Peter Chele Muindi** and DW3 **Alexander Mutuku** also testified that they rushed to the scene after hearing the screams and found the Appellant alone with a bleeding left thumb.

9. The Investigating Officer PW4 **IP. Kariuki** testified that he received the complainant’s report at about 4.45 p.m. on the material day. The Investigating Officer’s evidence that the complainant may have been attacked and was defending himself is mere speculation that is not supported by any evidence. Going to the farm on its own cannot be termed as a wrong. The Investigating Officer’s evidence that the Appellant was at fault for going to the complainant’s farm is also not supported by evidence. Both the prosecution and the defence adduced evidence that shows that both the complainant and the Appellant sustained injuries. It does not come out clearly from the evidence on record whether this was a case of affray. No time indications have been given by the witnesses for the court to see whether the witnesses were testifying on one single incident or two incidents. Only DW2 gave the time indication of the incident he witnessed at 9.30 a.m. None of the witnesses saw the actual assault. The evidence on record therefore boils down to the word of the complainant and that of the Appellant against each other. I would in the circumstances give the Appellant the benefit of doubt.

10. With the foregoing, I find the appeal meritorious. Consequently, I quash the conviction and set aside the sentence. The Appellant is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 25th day of November 2014.

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B. THURANIRA JADEN

JUDGE