



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 17 of 2010

*(Appeal against conviction and sentence arising from the judgment of [MR. S. N. ABUYA, SRM]*

*dated 15<sup>th</sup> January 2010 in Butali Senior Resident Magistrate's Court in Criminal Case No.369 of 2006)*

CHRISTOPHER MUKHANJI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

### J U D G M E N T

The appellant was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of the offence were that *on the 16<sup>th</sup> day of May 2006 at Ikonyero village, Lubao sub-location in Kakamega District within the Western Province the appellant unlawfully assaulted **BWOSI SONGORE** thereby occasioning him actual bodily harm. The appellant was convicted and sentenced to a fine of KShs.5,000/= and in default five months imprisonment.*

In his petition of appeal the appellant contends that the conviction was against the weight of the evidence, that the prosecution did not prove its case to the required standard, that the prosecution evidence was uncorroborated and contradictory and that the trial court did not properly analyze the evidence on record. Miss Rauto counsel for the appellant submitted that PW2, PW3 and PW5 were alleged to be eye witnesses yet they gave contradictory evidence. PW4, the clinical officer who testified was not the one who treated PW1 or filled the P3 form and that was contrary to the provision of **Section 531** of the **Evidence Act**. Whereas the offence occurred on the 16<sup>th</sup> May 2006 yet PW6 stated that the appellant presented himself before the police on 2<sup>nd</sup> May 2006 and recorded his statement on 14<sup>th</sup> June 2006.

Mr. Orinda, State Counsel, opposed the appeal and submitted that the conviction was safe. The complainant knew the appellant and the witnesses who testified also knew the appellant. Medical evidence was produced and the offence occurred in broad daylight.

The evidence on record show that **PW1 SILVANOS BWOSI SONGORE**, was the complainant. His evidence was that on the 16<sup>th</sup> of May 2006 at about 11.00 a.m. he left Kakamega for his home using a bicycle. While on his way he met the appellant who is his neighbor and the appellant held him accusing PW1 of having uprooted his crops. PW1 was pushed to the ground and the appellant remove a knife. The appellant stepped on his left thigh and right heel and started strangling him. PW1 screamed and the appellant's son by the name **PHILOMEN MUHANJI** went to the scene and snatched the knife from the appellant. It is PW1's evidence that when he screamed **NOEL, ALICE** and **EVERLYNE** went to the scene. When the knife was snatched from the appellant PW1 managed to escape and went to report the

incident at the chief's office. PW1 sustained injuries and he was treated at Malava District hospital. It is PW1's evidence that the appellant is his neighbor and they share a common boundary.

**PW2, EVERLYNE KULUNDU**, testified that she is a business woman who sell vegetables and tomatoes. On the 16<sup>th</sup> of May 2006 at about 11.00 a.m. she was on the Lubao-Ikonyero road selling her vegetables when they saw the complainant coming from Lubao side heading to his home on a bicycle. She saw the appellant who held the complainant and dropped him down. The appellant started hitting PW1 with blows and kicks and PW1 started screaming. The appellant had a knife and wanted to stab PW1. The appellant stepped on the chest and legs of PW1. According to PW2, she was with Alice and Noel. The appellant's son went to the scene. **PW3 ALICE HASINDA**, was also along the same road with PW2 doing her business. She saw the appellant beating PW1 with blows and kicks and pushing him to the ground. The appellant removed a knife from his pocket and asked PW1 if he wanted to be killed. PW3 screamed and people went to the scene and pulled the appellant.

**PW4, KIZITO SIFUNA**, was a clinical officer based at Malava hospital. On the 17<sup>th</sup> of May 2006 the complainant PW1 went to the hospital and was treated. PW4, produced the P3 form which had been filled by his colleague. **PW5, NOEL OMUNGO**, was also along the same road selling vegetables on the 16<sup>th</sup> of May 2006. She saw PW1 with his bicycle heading home and when he reached where they were the appellant held PW1 by his shirt and the bicycle fell down together with PW1. She saw the appellant giving PW1 kicks and blows saying "you want me to kill you". PW5 screamed and people went to the scene. The appellant fled and PW1 went to report the matter at the sub-chief's office.

**PW6, PC ALI MASOUD**, investigated the case and recorded witness statements. He received the report from the complainant on the same day at about 2.50 p.m. He referred the complainant to seek medical treatment and issued him with a P3 form. On the 22<sup>nd</sup> of May 2006 the appellant took himself to the station and while there the complainant pointed to him the appellant and he was arrested and charged with the offence.

The appellant was put on his defence. He was affirmed and he testified that on the 15<sup>th</sup> May 2006 at about 8.00 a.m. he was at his home when BENSON MUHANJI and FRANCIS OVAMBO went to his home and informed him that his neighbor (the complainant) was uprooting his cane on his shamba. He reported the matter to the area village elder who referred him to the area chief. On the 16<sup>th</sup> of May 2006 he went to the area chief at 10.00 a.m. and reported the matter. The chief gave him a letter which he produced as his exhibit. The appellant further testified that he had a land dispute with the complainant and the matter was heard by the court in Kakamega and Bungoma as well as the Provincial administration. He took the chief's letter to the Agricultural officer who also gave him another letter dated 19<sup>th</sup> May 2006. It is his evidence that he never assaulted the complainant on the material day and that his son was not there as alleged.

DW2, BENSON MUHANJI, testified that on the 15<sup>th</sup> of May 2006 at about 8.00 a.m. he was with DW3 FRANCIS AVAMBE going to see their sick brother. On their way they saw the complainant uprooting cane from the appellant's farm. They went to inform the appellant and they decided to notify the assistant chief. On the 16<sup>th</sup> of May 2006 they went with the assistant chief and they were there up to midday. They then separated and went their different ways. They did not see the appellant assaulting the complainant. DW3 FRANCIS AVAMBE's testimony is similar to that of DW2. On the 15<sup>th</sup> of May 2006 he was with DW2 when they saw the complainant uprooting cane from the appellant's land. The following day they reported the matter together with the appellant to the area chief. He never saw any fight between the appellant and the complainant.

Counsel for the appellant submitted that the clinical officer who produced the P3 form was not the one who had filled the form. I do not find any problem with the production of the P3 form by PW4 as he was aware that the complainant had been treated at the hospital and the treatment documents were available. Section 35 of the evidence Act deals with civil proceedings and not criminal matters. The appellant did not object to the production of the P3 form. The clinical officer testified that the incident

occurred on 16<sup>th</sup> of May 2006 and the P3 form indicates that it was filled on 18<sup>th</sup> of May 2006 and therefore there is no difference in dates.

Counsel for the appellant further submitted that the prosecution evidence was uncorroborated and contradictory. The appellant's defence is that his cane was uprooted by the complainant and he went to report the matter to the area chief. He brought witnesses to show that he was with DW2 and DW3 on the 16<sup>th</sup> of May 2006. I have seen the letter dated 16<sup>th</sup> May 2006 from L. G SHIVOKA, Lubao sub-location assistant chief addressed to the Agricultural officer Malava division. I have also seen the letter dated 19<sup>th</sup> May 2006 from the Kabras Division Agricultural officer stating that the appellant had complained that his cane was uprooted and the damage was computed at KShs.3,681.30.

According to the complainant he left Kakamega Town at about 11.00 a.m. riding his bicycle heading home. The appellant assaulted him when he had reached near his home at Ikonyero in Lubao sub-location. The evidence of DW2 and DW3 is that on the 16<sup>th</sup> of May 2006 they were with the appellant at the assistant chief's office up to midday and then they went they separate ways. PW2, EVERLYNE KULUNDU, PW3 ALICE HASINDA and PW5 NOEL OMUNGO were all carrying out their businesses on the material day along the Lubao Ikonyero road. The incident according to the three witnesses occurred at about 11.00 a.m. They saw the appellant assaulting the complainant. I do find that there was no reason for the three witnesses to allege that they had seen the appellant assaulting the complainant yet they had no differences with the appellant. The land dispute is between the appellant and the complainant and the three independent witnesses had nothing to gain by accusing the appellant of having assaulted the complainant. The evidence of the three witnesses is corroborated by the evidence of PW4 KIZITO SIFUNA, the clinical officer who produced the P3 form.

The prosecution evidence did establish that indeed the complainant was assaulted on the 16<sup>th</sup> of May 2006 at about 11.00 a.m. The complainant was treated at Malava sub-district hospital and a P3 form was produced. The incident occurred during the day and other than the complainant himself three other witnesses testified that they saw the appellant assaulting the complainant. It is possible that after reporting the matter at the Lubao assistant chief's office the appellant parted ways with DW2 and DW3 and on his way home met the complainant and assaulted him. I do find that the prosecution proved its case beyond reasonable doubt. The defence evidence does not raise any doubt that it was the appellant who assaulted the complainant. The appeal lacks merit and the same is disallowed.

Delivered, dated and signed at Kakamega this 31<sup>st</sup> day of January, 2013

**SAID J. CHITEMBWE**  
**J U D G E**