



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Criminal Appeal 233 of 2011**

**JOHN AMBUNDO ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**(Appeal arising from the decision of [MISS J. WESONGA, DMII) dated 17.10.2011 in Kakamega Chief Magistrate's Court in Criminal Case no.429 of 2011)**

**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 the appellant *on the 21<sup>st</sup> of February 2011 at 4.30 p.m. in Mwitumba village, Matiha sub-location, North Butso location, Kakamega Central district within Western Province while armed with stones unlawfully assaulted **DIVINA OMWANDA** thereby occasioning her bodily harm.* He was convicted and sentenced to serve one year in probation. The grounds of appeal are that the prosecution did not prove its case to the required standards, the burden of proof was shifted, the appellant's defence was rejected and that the conviction is based on circumstantial evidence.

The complainant **DIVINA OMWANDA** testified as PW1. On the 21<sup>st</sup> of February 2011 at about 4.00 p.m. she was collecting firewood at the boundary of her land when the appellant started abusing her. He picked stones and started throwing at her. She was hit on the knees and her back. She reported the matter at Emukaba AP Camp. She had reported the appellant to the chief before that incident on the 19<sup>th</sup> of February 2011 for tilling her land. During the incident **JULIUS (PW2)** went to the scene and rescued her. She hit by four times with stones. **JULIUS WANJALA WABUBA** testified as PW2. On the 21<sup>st</sup> of February 2011 at about 4.00 p.m. he heard screams from a woman and went to the scene. He saw the accused throwing a stone at the complainant and it hit her on her left knee. The appellant stopped on seeing him. He told the complainant to leave but she was adamant. After she left **PATRICK LUMUMBA, JONATHAN** and **BEN ASITSA** went to the scene. **JONATHAN** is PW1's child.

**PW3**, is **PC BERNARD NDEGE**. He received the complaint from the complainant on 22<sup>nd</sup> February 2011 at the Eshihongo police patrol base. He issued the complainant with a P3 form and on 24<sup>th</sup> of February 2011 he arrested the appellant who had gone to the police station. The complainant stayed with the stones and later took them to the police station. **PW4, SETH OLE KUO** is a clinical officer who was based at Esishiasian Health Center. He attended the complainant on 22<sup>nd</sup> February 2011. The complainant had swelling on both knees and injuries on the back.

The appellant was put on his defence and he gave sworn testimony. His evidence is that the complainant is her neighbor. On the 21<sup>st</sup> of February 2011 at about 4.30 p.m. he saw the complainant's son **ZAKARIA ALUTSEHE** armed with a panga, a spade and stones and he ordered him leave his land. The appellant defied that order and Zakaria hit him with a stone. He wanted to cut the appellant with his panga but the appellant shielded using a jembe. Patrick Lumumba was passing by and he went to separate the two. The appellant was bleeding and he went with Patrick to Emukaba AP Camp. At the AP Camp he met the complainant coming out. The AP referred him to the area chief who gave him a letter to

go for treatment. He was treated at Bushiri Health Center and he produced his P3 for and treatment notes. He took his P3 to Eshihongo police post and Zakaria Alutsehse was charged in Criminal Case No. 428 of 2011. The appellant denied assaulting the complainant. He further testified that there is a boundary dispute with the complainant and the complainant's son was trying to stop him from working on his land.

**PATRICK LUMUMBA ZADOCK** testified as **DW2**. On the 21<sup>st</sup> February 2011 at about 4.30 p.m. he saw the appellant being beaten by Alutseshe Omwanda, the complainant's son. The two were fighting and the appellant was bleeding. He took him to the AP Camp where they saw the complainant coming out. The AP informed them that the complainant had reported that the appellant had beaten her. He took the appellant to the area chief. According to DW2 when he saw the complainant at the AP Camp she did not have any injuries and was walking normally.

The trial court evaluated the evidence and found that it was the appellant who had assaulted the complainant. According to the evidence of **PW2 JULIUS WANJALA**, he saw Patrick Lumumba (**DW2**) who went to the scene. Indeed PW2 referred to DW2 as a pastor. DW2 did not see the complainant at the scene. According to PW2 the complainant had already left the scene. It is clear from the evidence on record that there is a boundary dispute between the complainant and the appellant. It is not clear from the prosecution evidence at one time did the fight between the appellant and the complainant's son took place. DW2 saw the appellant being assaulted by the complainant's son. The timing given for the two alleged incident is more or less the same. I have seen the charge sheet in Criminal Case No.428 of 2011 where Zakaria Olutseshe is the accused. The particulars of the offence in the charge sheet are that the accused in that suit on the 21<sup>st</sup> day of February 2011 at Mwitumbo village, Ematiha sub-location in Kakamega Central district within Western Province unlawfully assaulted **JOHN AMBUNDO** thereby occasioning him actual bodily harm.

From the prosecution evidence it is established that there was a dispute between the appellant and the complainant's son. The only eye witness who saw the complainant being assaulted is PW2. It is not clear why PW2 did not see the appellant being assaulted by the complainant's son. There is a rivalry between the two families and the appellant's defence did raise some doubt as to whether it was the appellant who was assaulted or the complainant. The injuries sustained by the complainant are described as swelling on the lower limbs and backache. There were no cut wounds on the other hand the appellant sustained cut wounds and he was stitched. I do not understand why PW2 did not see the appellant bleeding. I do find that the defence evidence did raise some doubt as to whether the complainant was indeed assaulted. It is possible that the complainant went to report after having seen his son assaulting the appellant.

In the end I do find that the appeal is merited and the same is allowed. The conviction and sentence of the trial court is set aside. The appellant is set at liberty unless otherwise lawfully held.

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

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