



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 74 OF 2010

DAVID KILUNJA

KILONZO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Kangundo PM Criminal Case No. 697 of 2007 — C. Obulutsa, PM)

RULING

The Appellant was convicted after trial of **assault causing actual bodily harm** contrary to **section 251** of the **Penal Code, Cap 63**. The particulars of offence stated in the charge were that on 18th October 2007 at Kambai village, Kangundo Location in Kangundo District of the Eastern Province, he unlawfully assaulted one **Muli Kilonzo**, thereby occasioning him actual bodily harm. He was sentenced to serve **4 years imprisonment**.

The Appellant was also convicted in count 2 of **creating a disturbance in a manner likely to cause a breach of the peace** contrary to **section 95(1) (b)** of the Penal Code. It was alleged that at the same time and place he created a disturbance in a manner likely to cause a breach of the peace by chasing one **Julius Ngove Musembi**, with a panga and threatening to cut him with it. For this count he was sentenced to 6 months imprisonment. The two terms of imprisonment were to run concurrently.

He has appealed against both convictions and sentences.

The matter before the court now is an application for bail pending hearing and determination of the appeal. It is by **notice of motion dated 2nd November 2010**.

I have considered the submissions by the learned counsels appearing. I have also read the proceedings and judgment on the lower court.

The main point canvassed in this application by learned counsel for the Appellant is that the medical evidence tendered before the lower court was unsatisfactory and contradictory, and that therefore the appeal has overwhelming chances of success.

The medical report (P3) was produced by PW5, **Dominic Mbindyo**, a clinical officer. However, this medical report was prepared and signed by another clinical officer, **Fridah Musyoki**. It was not prepared by a medical officer.

It is doubtful if a clinical officer is a medical officer within the legal meaning of that term. This medical report might well turn out to be useless.

Apparently realising this shortfall, the prosecution called a medical officer, **Doctor Mwangi**, who testified as PW6. Dr. Mwangi produced in evidence the complainant's treatment notes which were prepared by another doctor, Dr. Kiragu, who was no longer available to testify. Dr. Mwangi was familiar with Dr. Kiragu's writing and signature.

The treatment notes showed that the complainant had been admitted in hospital on 18th November 2007 and discharged on 26th November 2007. He had a fracture in the leg, been referred for plaster and put on periodic review. X-rays taken in the year 2010 showed healing fractures.

Apart from this medical evidence there was eye-witness testimony by PW2 (**Julius Ngove Musembi**) and PW3 (Pius Mutinda Kisini). They both testified that they were present during the physical altercation between the Appellant and his elder brother, the complainant (who testified as PW1), and that they witnessed the Appellant assault the complainant with a jembe on the leg, so seriously fracturing the leg that the bone protruded. They fully corroborated the complainant's testimony. The quarrel between the brothers stemmed from a land dispute.

There were a few discrepancies in the testimony of the complainant as to how long he may have been admitted in hospital following the assault. But I cannot find any material discrepancies in his testimony regarding the assault itself.

Having considered the submissions of the learned counsels, and having carefully read through the testimonies of the witnesses before the lower court and the judgment of that court, I am not satisfied that the Appellant's appeal has overwhelming chances of success.

No other material has been placed before the court as would entitle the Appellant to the court's discretion to release him on bail pending disposal of his appeal.

The application by notice of motion dated 2nd November 2010 is therefore dismissed. It is so ordered.

DATED AT MACHAKOS THIS 8TH DAY OF FEBRUARY 2011

H.P.G. WAWERU

JUDGE

DELIVERED THIS 11TH DAY OF FEBRUARY 2011