



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 244 OF 2010**

*(From Original Conviction and Sentence in Criminal Case No. 1841 of 2008 of the Principal Magistrate’s Court*

*at Kwale: A.M. Obura – S.R.M.)*

**MWINYI RAMA ..... APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

**MWINYI RAMA** the Appellant herein has filed this appeal against his conviction and sentence by the learned Resident Magistrate sitting at Kwale Law Courts. The Appellant was arraigned before the trial court on 16<sup>th</sup> December 2008 charged with the offence of **ASSAULT CAUSING GREVIOUS BODILY HARM CONTRARY TO SECTION 234 of the PENAL CODE**. The particulars of the charge were as follows:

***“On the 4<sup>th</sup> day of September 2008 at Mukokwani Village in Msambweni District within Coast Province unlawfully did greVIOUS harm to Omar Rana Gwaya”***

The Appellant entered a plea of ‘not guilty’ to the charge and his trial commenced before **HON. A.M. OBURA**, Senior Resident Magistrate on 28<sup>th</sup> May 2009. The prosecution led by **INSPECTOR SIBUDA** called a total of four (4) witnesses in support of their case. The complainant in his evidence told the court that on the material day he and two of his brothers went to the home of the Appellant, who was their eldest brother at 7.00 A.M. They demanded that the Appellant’s wife wake him up as they were demanding a share of the rental income from their late father’s property. A commotion ensued in which as the complainant alleged, the Appellant hit him with a jembe thus removing two of his front teeth. The matter was reported to police. The Appellant was then arrested and charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He opted to make a sworn defence in which he denied the charges. The learned trial magistrate delivered her judgement on 23<sup>rd</sup> April 2010 in which she convicted the Appellant of the offence of assault causing grievous bodily harm and thereafter sentenced him to serve four (4) years imprisonment. It is against this conviction and sentence that the Appellant now appeals. **MR. OKANGA**, Advocate appeared and argued the appeal on behalf of the Appellant whilst **MR. ONSERIO**, State Counsel made oral submissions in opposition to the appeal.

I have carefully perused the record of the trial in the lower court. As a court of first appeal I am mandated to re-examine and re-evaluate this evidence [see **AJODE –VS- REPUBLIC 2004 KLR 81**]. My own assessment is that the evidence adduced by the prosecution was wanting in several respects. **PW1** told the court that the Appellant asked his wife to pass to him a jembe. **PW1** proceeds to state in his evidence in chief at page 10 line 12:

***“He [the Appellant] called his wife to bring a panga. The wife threw a jembe to him. I was near him. It was a small one. It cut my chin and also removed my two teeth ...”***

From the evidence it is not clear exactly who was holding that jembe when it hit the complainant. More importantly the evidence appears to suggest that the jembe caught the complainant on the chin when the Appellant’s wife threw it to the Appellant. At no time did **PW1** specifically testify that the Appellant held the jembe, aimed it at him, and hit him on the mouth. The evidence here is obscure and unclear. It is imperative to note that the weapon allegedly used to hit and injure the complainant i.e. the jembe was not produced as an exhibit in court. No reason is given why police failed to collect this jembe as an exhibit.

It is clear from the evidence that this was not an unprovoked attack on the complainant by his brother the Appellant. This was clearly a fight between the brothers over the rental proceeds of their late father’s property. Both **PW1** and his brother **ABDUL AZIZ RAMADHANI PW2**, testify that they went early in the morning to the Appellant’s home to confront him over the issue of this rental income. They were demanding their share of the same. It could be argued that **PW1** and **PW2** provoked the Appellant by rousing him from his sleep to argue about money. This fact is evidenced by the testimony of **PW1** at page 10 line 11:

***“He [Appellant] turned to enter his house and go back to sleep. Hamisi [another brother] held him. Mwinyi picked up a stick and started hitting Hamisi severally”***

From this it is clear that a commotion erupted between the brothers as a result of their argument over money. This was not an unprovoked attack by the Appellant on the complainant.

The fact that this incident was actually an affray between the brothers is further evidenced by the fact that the Appellant was also injured during the fight and was issued with a P3 form which he produced as an exhibit in his defence **Dexb1**. It is curious why police decided to act and charge the Appellant yet totally ignored the fact that the Appellant himself was also injured in the incident as proved by his P3 form. The proper course of action would have been to charge both the Appellant and the complainant with the offence of Affray.

**PW3 SAMUEL GITHUI**, produced the complainant’s P3 form as an exhibit before the trial court **Pexb1**. He admitted that he did not personally examine the complainant but stated that he was producing the exhibit on behalf of his colleague ‘**Dr. Binga**’ who was not available to testify. At no time did the trial magistrate enquire from the Appellant whether he had any objection to the production of the P3 form by a witness who was clearly not the maker. This was a serious omission on the part of the trial court, an omission which was prejudicial to the Appellant, as he was denied the opportunity to cross-examine the maker of this document. In those circumstances the trial magistrate erred in accepting this P3 form as a

valid exhibit in this case.

I have also perused the judgement of the learned trial magistrate where she found at page 23 line 31:

***“There was also proof beyond doubt that there was commotion on the material date when the complainant and his brothers went to see the accused who is also their brother”***

She goes on to state at page 24 line 17:

***“It is most likely that all the brothers joined in the fight or tried to intervene in some way ...”***

In light of the above findings it is curious that the trial magistrate still proceeded to convict the Appellant, despite concluding that the brothers were involved in a commotion over rent proceeds.

The trial magistrate did not in my view give due weight to the defence raised by the Appellant; which defence was corroborated in all material respects by **DW1 BINTI OMARI HAMISI** who was an eye witness to the incident. At the very least the defence raised cast grave doubts on the prosecution case. It is my considered opinion that the learned trial magistrate erred in rendering a conviction on the basis of the evidence tendered before her. The evidence adduced did not meet the standard of proof in criminal cases. It is clear that the police favoured one side over the other. I do find merit in this appeal which I hereby allow. The Appellant’s conviction is quashed and the 4 year sentence is set aside. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and Delivered in Mombasa this 20<sup>th</sup> day of May 2011.**

**M. ODERO**

**JUDGE**

In the presence of:

Mr. Onserio for State

Mr. Okanga for Appellant