



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**

**Criminal Appeal 74 & 75 of 2008**

1. MUSYIMI YULU

2. RAPHAEL YULU KYALO .....APPELLANTS

VERSUS

REPUBLIC

JUDGMENT

1. Raphael Yulu Kyalo and Musyimi Yulu were charged in Kilungu SRM's Court Criminal Case No. 49/2004 with the offences of grievous harm contrary to section 234 of the Penal Code and on the alternative charge accused were charged with assault contrary to section 251 of the Penal Code. They were convicted of the offences and sentenced to serve 18 months in prison on each of the two counts and the sentences were to run concurrently. They appealed against both conviction and sentence and the Appeal as is consolidated conceded for the following reasons;
2. That the prosecution was conducted by an unqualified person and that the trial was thus invalidated and a retrial should be undertaken as the charges were proved beyond reasonable doubt.
3. I will quickly dispose of that issue by stating that one PC Maina only participated in proceedings during the taking of plea and I.P Mwangi conducted the prosecution thereafter. It is not my understanding that the proceedings were thus vitiated as is the law in Elirema vs Republic [2003] e KLR. I therefore agree with the advocate for the Appellants that this court should look at the evidence afresh, evaluate it and reach its own decision on the facts and the law.
4. The evidence tendered before the subordinate court was that on 28.12.2003, PW1, Alois Sila Nzavu was allegedly attacked by the Appellants who cut him up with machetes and before he lost consciousness, he heard his father telling them not to kill his son. He was taken to hospital and treated and he said that the Appellants were his relatives and he recognized them at the 7.30 p.m incident using moonlight. PW2, Raphael Nzavu Kyalo, father of PW1 stated that on the material night he heard someone screaming and he approached the direction of the screams and found PW1 being attacked by the Appellants and so he shouted for them to leave him alone and when he tried to intervene to save his son, they turned to him and injured him in the hand. He however managed to drag his unconscious son away and later took him to hospital. It was his evidence that there were differences with the Appellants and they had previously threatened to kill him over a dispute relating to a tree.
5. PW3, James Nthusi Nzavu allegedly arrived at the scene after PW1 had already been felled and when he tried to assist, one Teresia Yulu hit him on the mouth with a '**rungu**'. He assisted in taking PW1 to hospital. PW2, Irene Mwendu saw PW1 after

he had been injured and also helped in taking him to hospital.

6. PW5, PC James Mutisya received the initial report at Kitui Police Station and he was unable to talk to the complainants as one was seriously injured. Later he visited the scene with one PC Outa and the Appellant were arrested.
7. PW6, Dr. James Kaburu examined the complainants and issued them with P3 forms (exhibit 1 and 2). He assessed the injuries to PW1 as grievous harm and PW3 as assault.
8. I should note at this stage that when PW5 was recalled, he stated that the initial report was one of affray and that even the Appellants had made a report of injuries caused by the complainants and that one Richard Kyalo Nzavu had been arrested and was to be charged with affray and causing a disturbance. He had no injuries at the time of arrest. Later in any event the intended charges were dropped. It was also his evidence that one PC Wycliffe Wanjala recorded the reports of both groups and opined that the offence was one of affray but when PW5 investigated the matter he opined that the offenders were the Appellants and he preferred the more serious charges.
9. The Appellants in their defence denied the charges and the 2<sup>nd</sup> Appellant said that on the material night, while his mother was milking cows, he heard one Mwanja Nzavu, a cousin, insulting his mother and calling her a dog and prostitute. The said Mwanja Nzavu then started cutting banana trees, jumped the fence and broke a hurricane lamp lit at the milk shade. He was joined by Silas Nzavu and Kilonzo Nzavu who all attacked him and his mother. He denied injuring any of the attackers and that in fact Nzavu Kyalo, Benard Mwanthi and Nthusi Nzavu were the ones who attacked and injured his father. That after the attack he reported the incident at Kilome Police Station and he also found the complainants there making a report and while at the Station, Mwanja attempted to attack him again and police officers restrained him. All parties wrote statements and later they were charged although they had also been issued with P3 form for their injuries.
10. Raphael Yulu Kyalo and Teresa Yulu as well as Maria Mutwiwa gave evidence similar to that of the 1st Appellant but I should add that Maria Mutwiwa, a neighbour of both complainants and Appellants stated that on the material night, the two groups were ***“fighting in the cowshed.”*** She said that she did not participate in the fight but saw what happened –that ***“it is Yulu son house (sic) which were (sic) being hit with stones i.e. bricks. It is Nzavu people throwing stones and also Nzavu himself and I saw him (sic)”***. That the two families had a grudge and that is what sparked the fight.
11. I have read the judgment of the learned trial magistrate and it is unclear on what basis he found the Appellants guilty of the offence. He seemed to have accepted the evidence by the Appellants that they were the aggrieved party but stated that ***“they were at liberty to move their case at any time (sic).”***
12. In any event, on my own evaluation of this case, I must begin by restating the principle that in any criminal case, the charge (s) must be proved beyond reasonable doubt and the burden never shifts to the accused person. Further, in the totality of this case, there is no doubt that on the material night, there was physical engagement between the complainants and the Appellants. All of them got injured and all trooped to make a report at Kilome Police Station. It is also true that the Occurrence Book report produced by PW5 indicated that the offence committed was affray. Later, PW5 who purportedly investigated the cause decided that the Appellants were to be charged with grievous harm and assault respectively. The question is what offence, if at all, did they commit? ***“Affray”*** is defined in section 92 of the Penal Code as taking ***“part in a fight in a public place.”*** Acts intended to cause grievous harm are defined in section 231 of the Penal Code as read with section 234 thereof. Assault is a less serious offence than grievous harm. There is no doubt that the injuries sustained by Sila Nzavu from the P3 form amounted in definition to grievous harm because the multiple wounds on his head exposed the skull and seriously endangered his life and injuries to Raphael Nzavu were less serious. There is also no doubt that the injuries were caused by the Appellants acting in

self defence. I have reached that conclusion because in their lengthy evidence they proved beyond reasonable doubt that they were attacked at their home by the Nzavu family because of an existing grudge between them. The evidence of Maria Mutwiwa was unchallenged and it was independent of the “*warring*” parties. It is instructive that the initial report was that of a common fight and not the Appellants setting out with criminal intention to go and cause harm to the complainants. I accept the defence’s evidence that it was the Nzavu family that set out to attack the Yulu family and not the other way round.

13. Having so held, I am convinced that had PW5 investigated the case properly, and he admitted that he did not, the Appellants would not have been in the dock. The Occurrence Book report that the Appellants were also injured should have led to more serious investigations which sadly were not undertaken.
14. I conclude by stating that the case against the Appellants was not proved beyond reasonable doubt and their consolidated Appeal is allowed. They are set at liberty unless they are otherwise lawfully held.
15. Orders accordingly.

Dated and delivered at Machakos this 11<sup>th</sup> day of February, 2010.

**Isaac Lenaola**

**Judge**