



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 129, 130 & 131 of 2004

1. CHARLES MBATHA MUINDE

2. MORRIS NGIMA NZIOKA,

3. FREDRICK MUTUNE MUSEMBIAPPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Conviction and Sentence in Chief Magistrate's Court
Criminal Case No. 1019/2003 by Hon S.M. Kibunja on 15.7.2004)

JUDGMENT

1. Morris Ngima Nzioka, Fredrick Mutune Musembi and Charles Mbatha Muinde were jointly charged with the offence of causing grievous harm to Philip Musyimi Nzioka on 18.5.2002 at Wambali Village, Kiteta Sub-location contrary to section 234 of the Penal Code. At the end of the trial they were all found guilty of the offence and sentenced to serve three (3) years in prison. Their appeal is both against the conviction and sentence and the appeal is conceded for reasons that the medical evidence was produced by a person other than the doctor who prepared the report and since the issue was objected to during trial, then it should have been rejected and without it, the offence could not have been proved beyond reasonable doubt. No retrial is sought and having read the record the evidence tendered was as follows:-
2. According to the complainant, on 18.5.2002, he was at his home when the Appellants and others abducted him and after the 2nd appellant hit him with a walking stick and breaking his left hand, they carried him to his home and there they undressed him and forcefully applied sisal juice on him and he was also forced to sign the contents of a document he had no knowledge of and the next day his wife took him to hospital. The only witnesses to the alleged incident were PW2, Mwendu Muthengi who allegedly saw PW1 being carried away and being beaten by the 1st and 2nd Appellant and PW4, Esther Munyiva Musyimi; wife of PW1 who said that it was the 2nd Appellant who hit the complainant with a walking stick and then the others frog-marched him to a meeting at the 2nd Appellant's home and when she went there, she was forced to give milk, tea leaves and sugar as a "*fine*" and then she went home.
3. PW3, Cpl David Kambi received the report of alleged assault at Tawa Police Station and having received the names of the suspects arrested them and charged them with the offence of causing grievous harm.
4. The P3 form was produced by Dr. Kaburu on behalf of Dr. Okemwa who was said to be on study leave. The said action

was objected to but the learned trial magistrate found that it was expedient that Dr. Kaburu should produce the P3 form to avoid undue delay and expense. The P3 form was in fact filled 3 months after the incident and in cross-examination, Dr. Kaburu found that the injuries would normally heal six weeks after the incident and he did not have the initial treatment notes and that Dr. Okemwa also “*saw the patient ... 3 months after injuries.*”

5. In their defence, the Appellants said that they were the Location officials of the Atui clan and that on the material day, they were attending a meeting at the 2nd Appellant’s home to resolve a land dispute between the complainant and the 2nd Appellant and after hearing the matter and upon all parties and attendees being fed, all the parties, including the complainant, slept in the home as is the traditional and dispensed the next day. There was no violence and according to the 2nd Appellant, sisal was only used to plant the boundary upon the disputed being resolved and a record was made by the Clan Secretary to be transmitted to the area District Officer who had authorized the meeting by a letter produced as exhibit “D1”.
6. From my reading of the record, my opinion is that on 18.5.2002, an attempt was made by the Atui clan to resolve a land dispute between the 2nd Appellant and the complainant. I believe that evidence because both the complainant and his wife alluded to it and in fact confirmed that the families had prior differences because of that dispute.
7. Further, the meeting was authorized by the area District Officer as per his letter produced as D. exhibit 1. The question is, was there an attack on the complainant leading to his alleged injuries? PW4, wife of the complainant and PW2 were the only witnesses who purportedly saw him being hit. She said that it was the 2nd Appellant who hit the complainant with a walking stick but she could not tell which hand was broken after the beating. PW2 on the other hand said that the complainant was indeed beaten and his hand broken at the home of the 2nd Appellant while the complainant said that his hand was broken at his home. How can such contradictory evidence be believed? The contradictions are material because the grudge between the parties may easily have influenced the evidence given in court.
8. But suppose indeed there was an attack on the complainant; is the medical evidence such as to dispel any doubts I may have? Sadly not; the defence objected to Dr. Kaburu producing the P3 form and I agree with learned State Counsel that the maker who was in Nairobi for studies should have been called to produce it. I say so because in the end, Dr. Kaburu could only confirm that the other doctor had seen the patient 3 months after the alleged incident and in a case where the injuries are suspect, his evidence only supported the case for the defence.
9. In the end, I am not convinced that the Appellants conviction was without blemish and it is quashed. Their sentences are also set aside and the Appeals as consolidated are all allowed. They may be released unless they are otherwise lawfully held.
10. Orders accordingly.

Dated thisday of2010.

ISAAC LENAOLA

JUDGE

Countersigned and delivered at **Machakos** this 5th day of March **2010**.

H.P.G. WAWERU

JUDGE