REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Appeal 207 of 2009

(Appeal against conviction and sentence of
[MR. P. O. OOKO, RM] in the Chief Magistrate's Court
at Kakamega in Criminal Case No.1465 of 2006)

SOLOMON MUSHIRA SHABOLA …………………. APPELLANT

V E R S U S

REPUBLIC …………………………………………… RESPONDENT

J U D G M E N T

1. The issue arising in this Appeal is whether the Appellant, Solomon Mushira Shabola should have been convicted of the offence of causing grevious harm contrary to Section 234 of the Penal Code or that the evidence disclosed the offence of affray contrary to Section 92 of the Penal Code.

2. In conceding to the Appeal, Mr. Karuri, learned Senior State Counsel submits that the evidence on record pointed to affray and failure to call the Investigating Officer was fatal to the case as no connection was made between the evidence and the charge. For avoidance of doubt, the particulars of the charge were as follows;

> ***"On the 13th day of May, 2000 at Matioli village, Itenyi Sub-location in Kakamega District within Western Province, [the Appellant] jointly with others not before court, unlawfully did grevious harm to FREDRICK SITATI LIYERA.***
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> ***On the 13th day of May, 2000 at Matioli village, Itenyi Sub-location in Kakamega District within Western Province, jointly with others not before court, unlawfully did grevious harm to REUBEN MUSONYE RIYERA"***

3. In evidence tendered to prove the charge, PW1, Fredrick Sitati stated that on 13.5.2006 at 7. a.m. the Appellant and his children, Eric, Nyayo and Ben came to his land and told him to stop picking tea, as he wanted the land to be left as it was. An altercation ensued and he was hit on the head with an iron bar by the Appellant and he lost consciousness. The two were brothers and had a dispute about use of their father's land.

4. PW1 allegedly suffered a broken upper arm and right leg as a result of the attack by the Appellant and his sons.

5. PW2, Reuben Musonye was also involved in the episode between PW1 and the Appellant and he stated that he allegedly saw the Appellant hit PW1 with a metal rod. Further, that he too was hit and his left ankle was fractured. The attackers then left and PW1

and PW2 were taken to hospital by good samaritans.

6. PW3, George Waitindi Imbugua, the Assistant Chief, Itenyi Sub-location received the report of the incident in question on 13.5.2006 at 8.30 a.m. from one Elvas Makaloo and when he went to the scene, he found the injured and assisted in taking them to Kakamega Provincial General Hospital. As the local administrator, he was aware of the land dispute between the parties.

7. PW4, Phoebe Wamalwa and PW5, Francis Wasike confirmed the injuries sustained by PW1.

8. In his defence, the Appellant stated that on the material date, PW1 and PW2 attacked him and he defended himself by hitting PW1 with a stick before one Laban hit PW1 with a metal rod and so he fled the scene, leaving Laban with PW1.

9. DW2, Erick Liyai denied being in the incident but said that when he returned home, he found PW1 and PW2 lying down, injured.

10. DW3, Alphonce Musonye allegedly witnessed PW1 confronting the Appellant who then picked "a club" and hit PW1 on the left hand. That the two ten held each other and struggled as PW2 attempted to cut the Appellant with a "panga". One Laban then hit PW1 on the head and DW2 saw him bleeding and so he fled the scene.

11. According to DW3, there were fifteen people who were fencing the disputed land and he was present when the fight started. That it was Laban who injured PW1 and PW2 with the metal rod and not the Appellant.

12. The learned magistrate found that the appellant's guilt had been proved beyond reasonable doubt and sentenced him on each count of the offence of causing grevious harm to serve seven (7) years in prison, both sentences to run concurrently.

13. To my mind, I should begin by addressing what amount to an affray.

In Black's Law Dictionary, 5th Edition, the term is defined as;

> "*The fighting of two or more persons in some public place to the disturbance of the people e.g. where two or more persons voluntarily or by agreement engage in any fight, or use any blows or violence towards each other in any angry or quarrelsome manner, in any public place to the disturbance of others."*

14. In ***Section 92*** of the Penal Code, the offence of affray is proved when a person *"takes part in a fight in a public place."*

15. From the definitions above, what happened at Matioli village on 13.5.2006 cannot be an affray. I say so, with respect, because the evidence on record would show that PW1 and PW2 together with their witnesses pointed to a planned and deliberate attack by the Appellant and his sons and the result of their handiwork were the serious injuries suffered by PW1 and PW2. ***Section 231 (b)*** of the Penal Code as read with ***Section 234*** thereof define what acts would amount to grevious harm. I have no doubt that the Appellant, motivated by differences over land with his brothers, set out on that fateful morning to strike them and to injure them and he did so with the help of his sons. It is instructive that the appellant did not get injured at all during the alleged fight and his defence that it was Laban who caused injuries to PW1 and PW2 was an afterthought. Laban's name was only introduced into the case as an afterthought and not once in cross-examination of PW1 and PW2 was that issue raised.

16. In the end, I find that the Appellant deliberately attacked his brothers and caused them serious injuries. It matters not that the Investigating officer was not called to testify as there was sufficient evidence on record to convict him.

17. The Appeal herein has no merit, the sentence is lenient and the whole Appeal on all its limbs is dismissed.

18. Orders accordingly.

Delivered, dated and signed at Kakamega this 21st day of April, 2010

ISAAC LENAOLA

J U D G E