



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Criminal Appeal 77 of 2009

ERICK KIPKEMOI TARAGON.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

*(An Appeal from original conviction and sentence in Eldama Ravine R.M.CR.C.NO.472/200
by Hon D.M. Machage,
Resident Magistrate, dated 5th March, 2009)*

JUDGMENT

After his trial for the offence of **grievous harm** contrary to **section 234** of the **Penal Code**, the appellant was sentenced upon conviction to five years imprisonment. He has challenged that finding and sentence in this appeal on the grounds that:

- i) the charge was not proved to the required standard
- ii) the court erred in rejecting the prosecution's application to withdraw the charges
- iii) the trial of the appellant amounted to double jeopardy for the reason of his earlier trial
- iv) the appellant was drunk and therefore incapable of forming the intention to commit the offence
- v) the appellant's defence was not considered
- vi) the sentence was harsh.

Before I turn to consider these grounds, I remind myself of the duty of this court, being the first appellate court to re-evaluate the evidence and arrive at an independent decision.

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The evidence presented at the trial was that the complainant was drinking chang'aa at the appellant's home when a disagreement arose over some Kshs.40/= change. The complainant is alleged to have ejected the appellant and in doing so attacked him with a stick thereby injuring his left hand. The matter was reported to the police and the appellant arrested. The attack was witnessed by **P.W.2 Joseph Kipngetich**. The complainant was examined by **Dr. Kipsang Malache** who assessed the injuries as grievous harm.

The appellant in his sworn defence denied attacking the complainant and asserted that he only separated the complainant who was fighting with another man called Joseph. That in the process of separating them the complainant bit him (the appellant). His evidence was supported by that of his wife **D.W.2, Zeddy Chebet**.

I have considered the foregoing evidence and find as a fact that the complainant was injured in an attack. The only question which fell for determination at the trial was whether the injuries were inflicted by the appellant.

The learned trial magistrate found that indeed there were witnesses to the attack; that the appellant was known to the witnesses and further that there was sufficient light to enable the witnesses see the attack clearly. From the totality of the prosecution and the defence evidence, I find that when the attack occurred, the appellant was present. His position is that his role was only to separate the

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complainant and Joseph. That infact, he was injured by the complainant who bit him. There is evidence also that indeed the appellant was also injured and was issued with a P3 form.

I come to the conclusion that the two, namely, the appellant and the complainant fought and inflicted injuries on each other. There is on record evidence that both were charged in Criminal Case No.473/2008 with **affray** and accused (I believe the complainant too) was acquitted.

Before the commencement of the trial, the prosecution applied to withdraw the charges on the ground of double jeopardy the appellant having been charge in criminal case No.473/08 and acquitted. The application was rejected by the learned magistrate arguing that the injuries were grievous. **Section 77(5) of the Constitution** provide that:

“77(5) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.”
(Emphasis supplied).

See also **Section 279** of the **Criminal Procedure Code**.

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These provisions are intended to prevent the abuse of the court process and to secure the ends of justice where there is evidence that the process is being misused. The trial, the subject of this appeal was prejudicial to the appellant's rights and amounted to double jeopardy.

For that reason alone, this appeal is hereby allowed, the conviction is quashed and sentence

of five years imprisonment set aside. The appellant will be set at liberty forthwith unless detained for any other lawful reason.

Dated, Signed and Delivered at Nakuru this 19th day of May, 2010.

**W. OUKO
JUDGE**