REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

Criminal Appeal 142 of 2007

REPUBLIC ..... APPELLANT

VERSUS

JASON MURIUNGI ..... 1ST RESPONDENT
STANLEY KATHURIMA ..... 2ND RESPONDENT
JOSHUA MANGANA JASON ..... 3RD RESPONDENT

(Being an appeal against the judgment of Mr. .S.O. Mogute R.M. in Meru CMCC Criminal Case No. 846 of 2006 delivered on 31st July 2010)

JUDGMENT

The appeal before court is by the state. The respondents were charged with two counts in the lower court. On the first count, they were charged with the offence of causing grievous harm contrary to section 234 of the Penal Code.

The 2nd count, they were charged with assault causing actual bodily harm contrary to section 251 of the Penal Code.

The lower court found the respondents not guilty on both counts and acquitted them. The state has filed this appeal against that decision. The appellant has filed the following grounds:-

1. That the learned magistrate erred in law in holding that the respondents were never identified as the ones who committed the offence.
2. That the learned magistrate erred in law in acquitting the respondents against the weight of evidence.
3. That the learned magistrate erred in law in not considering the circumstances under which the offence was committed.
4. That the acquittal was against the law.

I shall deal with all the grounds at the same time. The Attorney General's rights of appeal are set out in section 348 A of the Criminal Procedure Code. The provisions of that section were considered in the case **Paul Kobia M'Ibaya Vs. Republic** Criminal Appeal Case No. 267 of 2003 where it stated:-

"We recognize that what constitutes a question of law or point of law for purposes of an appeal to the superior court would ultimately depend on the nature of the determination by the subordinate court and will vary infinitely from case to case. In some cases, the point of law can be gleaned from the decision without much ado. For instance, the subordinate court could make findings which are ex facie erroneous in law or embark on an rroneous statutory interpretation. Those cases where the error of law is patent or is apparent on the face of the record present no difficulty. There are other less obvious cases where the error of law may arise from the manner the subordinate court has treated the evidence adduced at the trial. The cases of Republic Vs. Kidaga [1973] EA 368; Republic Vs. Wachira [1975] EA 262 from the High Court and Patel Vs. Republic [1968] EA 97 from the predecessor of this court are good illustrations of this category of cases. In all the three cases, the respective subordinate court acquitted the accused without putting him on his fence on the ground that there was no case to answer. In all the three cases, the Attorney General appealed to the High Court under section 348 A of the CPC against the acquittal. The appeals were invariably allowed on the ground that the respective magistrates reached a conclusion on the evidence which no court properly directing itself could have reached. That ground was recognized to be an error of law."

Having considered the evidence adduced in the lower court, I cannot find that this case falls within the ambits of section 348 A. There was no error in the manner in which the learned magistrate analyzed the evidence at all. The respondents were charged with grievous harm of PW1. PW1 stated on being asked who injured him:-

"I don't know who exactly injured me on that day."

That evidence should be borne in mind with the understanding that there were about 7 people who were said to have participated in the fight with PW1 and 2. Yet, there were only 3 people, the respondents herein who were arrested and charged. It is also noteworthy that the clinical officer noted that PW1 suffered injuries which he stated were "*maim*". The clinical officer stated:-

"Maim is not grievous harm."

It therefore follows on the evidence tendered by the prosecution the charge of grievous harm was not proved. I therefore find that there is no error that is apparent from the decision of the learned magistrate in respect of count 1.

Even in respect of the 2nd count, the judgment of the learned magistrate makes it clear that the present appeal has no merit. I quote part of the learned magistrate's judgment to support that contention as follows:-

"The evidence of the prosecution witnesses is contradictory and the same cannot sustain a conviction in a court law: PW1 while adducing his evidence in examination in chief told the court that the 1st accused and second accused persons injured him on the material day. But while being cross examined by the defence counsel he stated categorically that he never knew exactly who injured him on the day in question. PW1 went further to state before me that the accused person should tell the court who was involved with the incident which took place on criminal case does not shift ....."

In the end, I find that the present appeal has no merit and the same is hereby dismissed.

Dated and delivered at Meru this day of 8th October 2010.

MARY KASANGO
JUDGE