



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 22 OF 2010

(Appeal from the Senior Resident Magistrate's Court Nyando in CR. CASE NO. 522 OF 2008)

REPUBLIC.....RESPONDENT

-VERSUS-

CHARLES ODEP ATHIAMBO.....APPELLANT

JUDGMENT

This is an appeal from the ruling of **C. Kutwa**, Resident Magistrate Nyando that was delivered on 4th June, 2009 in Criminal Case No. 522 of 2008. The respondent was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The learned trial magistrate found that he had no case to answer upon the close of the prosecution case and acquitted him under Section 210 of Criminal Procedure Code. Being aggrieved by the ruling the State preferred an appeal against the ruling as follows:-

- 1. That the learned trial magistrate erred in law in acquitting the respondent.**
- 2. That the trial magistrate erred in law in acquitting the respondent on the wrong decision in law.**

In her submission learned State Counsel **Miss Mary Oundo** submitted that there was enough evidence at the stage upon which the court acquitted the respondent to have placed the respondent (accused) on his defence.

The respondent objected to the appeal through his counsel **Mr. Anyul** who submitted that there was no mistake on the part of the learned trial magistrate, in that the evidence of the witnesses were contradictory as they did not appear to know the respondent's home. Further that the Investigating Officer was not in court to confirm the names of the respondent. He also contended that no prima facie case was established against the accused.

From the evidence on record 3 prosecution witnesses testified. The complainant, a village elder present at the time of the alleged assault and a medical officer who confirmed injuries. **PW1 & PW3** stated that the names referred to of **Kuona Odeko** are an alias used to refer to the accused. It therefore appears that there was no confusion in the names. The respondent was referred to by his names and nick name. In the premises the issue of confusion in the names does not arise. Secondly, the argument by the respondent's Counsel that the Investigating Officer was to confirm names does not hold water. An investigating officer relies on witnesses to establish whether a crime was committed or not. There is evidence of assault and at the stage the case reached fingers were being pointed at the respondent. This court is of the view that a prima facie case had been established to have had the respondent placed on his defence. In the circumstances therefore the appeal succeeds. The case is remitted back to Nyando for hearing to begin a fresh before a different magistrate.

DATED AND DELIVERED THIS 26TH NOVEMBER, 2010.

ALI-ARONI

JUDGE

In the presence of:

..... for State

..... Appellant present in person.