



**WATENE WAHOGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant herein **Watene Wahogo** was charged with the offence of **assault, and causing actual bodily harm contrary to section 251 of the penal code**. The particulars of the offence state that on the 2<sup>nd</sup> day of July 2008 at Industrial Area Estate Nakuru in Nakuru District of the Rift Valley Province, unlawfully assaulted Charles Otieno Odipo thereby occasioning him actual bodily harm.

The appellant pleaded not guilty. He was tried by the Resident Magistrate Nakuru, found guilty, upon conviction he was sentenced to one (1) year imprisonment without an option of a fine. Being aggrieved by the conviction and sentence, the appellant appealed, he contended that the judgement was against the weight of the evidence. Further, the learned trial magistrate misdirected herself on the legal requirements that the prosecution discharged the burden of prove of the charge beyond reasonable doubt. The learned trial magistrate was also faulted for not considering the appellant's defence and mitigation and for failing to indicate the language used by the court to conduct the proceedings.

By way of further arguments, counsel for the appellant submitted that the appellant was kept in Police custody for three days which is in contravention of the provisions of the Constitution. The appellant was supposed to be charged within a reasonable time and in any event within 24 hours. Delay for three days infringed upon the appellant's Constitutional right to a fair trial. As regards the evidence adduced by the prosecution's witnesses, counsel for the appellant was of the view that, there is glaring contradictions found in the evidence of **Charles Otieno Odipo (PW1)** who was the complainant and **Jennifer Mbuli (PW2)** the eye witness. Those contradictions were not resolved in the judgment by the learned trial magistrate.

Going by the evidence before the trial court, it is apparent that there was a grudge between the appellant and complainant. From the evidence of PW1, PW2 and PW3 the whole prosecution of the appellant was dictated by malice and they wanted to settle a score. Further the defence and the mitigation offered by the appellant was not taken into account.

The State conceded to this appeal. The learned State Counsel **Mr. Mugambi** submitted that there were inconsistencies in the evidence of PW2 and PW3. Going by the evidence, it is apparent there was a grudge between the appellant and the complainant. That explains why the complainant went to demand for change of Kshs 80/= in the company of PW3. From the evidence, PW1, PW2 and PW3 were all demanding for change and it is not clear who had the change, this lends credence to the allegation that there was something else going on between the parties apart from the change of ksh 80/=

This being a first appeal, I hereby set out the summary of the evidence before the trial court for my own independent evaluation and independent decision on whether or not to allow the appeal. PW1 testified that on 2<sup>nd</sup> July 2008, at around 3.00 p.m. he was having tea at PW2's kiosk when the appellant came by, the kiosk selling tomatoes on a bicycle. PW1 gave PW2 Kshs 100/= and asked her to buy for him tomatoes of Kshs 20/=. PW2 bought the tomatoes but did not bring the change of Kshs 80/=. She told PW1 that she would collect the change later.

At 5.00 p.m. On the same day, PW1 and PW3 went for the change. When they reached PW1's kiosk, they were told that she had gone to look for the old man who went away with the change. They went to the appellant's kiosk and found PW2 talking to the Appellant about the change. PW2 pointed at PW1 as the person who is demanding for change. That is when PW1 told PW2 just to leave the change if the appellant was refusing with it. When the appellant heard this, he got out with a walking stick and hit

PW1 on the right hand. He also scoped soil and threw it on his face. PW2 and PW3 advised PW1 to walk away and leave the accused person alone. The next day PW1 reported the matter to the Police and went to the Provincial General Hospital where he was treated.

**Dr. Daniel Wainaina** produced the P3 form which showed that PW1 was treated at the Provincial General Hospital on 3<sup>rd</sup> July 2008 and PW4 filled the P3 form. He found that PW1 had a swollen tender right elbow joint. The injuries were two days old and were caused by a blunt object.

PW2 also testified that on 2<sup>nd</sup> July 2008 the appellant went to her kiosk selling tomatoes. PW1 was also in her kiosk drinking tea. According to PW2, PW1 gave her employee Kshs 100/= to buy for him tomatoes worth Kshs 20/=. PW2's employee gave the appellant one hundred shillings and asked PW2 to pick the change later. PW2 said she knew where the appellant operated from, and she would get the change later. At 5 pm, PW1 went for the change, PW2 told him to wait so that she could go for the change but when she reached the appellant's kiosk he denied having been given the hundred shillings and started asking PW2 why she took so long to ask for the change. Meanwhile PW1 came to check, and was told that the appellant was refusing with the change. That is when the appellant started abusing PW1 and hit him on the face. The accused person took a walking stick and hit PW1 on the hand, PW2 asked PW1 to leave else he would be killed.

**Daniel Mengich Muindi (PW3)** testified that he was with PW1 on 2<sup>nd</sup> July 2008 at about 5.00 p.m. PW1 told him he had left his change at the tea kiosk and he should accompany him to collect the same. While at PW2's kiosk they found her employee who told them that PW2 had gone to get the change. Both PW1 and PW3 went to the appellant's kiosk. PW1 asked her for the change that is when the appellant came out and started abusing PW1. According to PW3 the appellant slapped PW1, and then came with a walking stick and a knife. He hit PW1 with a walking stick on the right hand.

After evaluating the above evidence the accused person was placed on his defence. He denied having committed the offence. The accused person tore onto the credibility of the prosecution's witness's evidence and concluded that the whole charge was framed up against him. In her judgment the trial court was satisfied that the prosecution proved the charge beyond reasonable doubt. There was evidence by eye-witnesses who gave an account of what they saw. The injuries sustained by the appellant were also confirmed by the medical report. The appellant was accordingly convicted and sentenced to one year imprisonment.

The first submission by counsel for the appellant was that his client's Constitutional right to a fair trial was infringed upon because he was not taken to court within 24 hours as stipulated in the Constitution. This contention has no basis; the charge sheet shows that the appellant was arrested on 2<sup>nd</sup> August 2008, which was a Saturday. He was arraigned in court on 4<sup>th</sup> August 2008, when plea was taken. The accused person could not have possibly been taken to court on a Sunday.

The other ground of appeal is that the charge against the accused person was not proved beyond reasonable doubt. I have evaluated the evidence before the learned trial magistrate, I find there are material inconsistencies found in the evidence of PW1, PW2 and PW3. Those inconsistencies affect the overall credibility of the evidence. Firstly, PW1 testified that he asked PW2 to buy for him tomatoes for Kshs 20/= from the appellant. On the part of PW2, she testified that PW1 asked her employee to buy for him tomatoes of twenty shillings. Further, PW2 testified that PW1 came for his change. She asked him to wait while she goes for it. PW1 on the same note testified that he went to PW2's kiosk at 5.00p.m. Found that she had gone for the change from the appellant's kiosk. PW3's testimony is also inconsistent in that he testified that the appellant slapped PW1 on the face.

These inconsistencies are material especially when they involve three witnesses who were present at the same time. When considered in its entirety, the evidence before the trial court shows there was a grudge between the complainant and the appellant which went beyond the change of 80 shillings. For those reasons the trial magistrate should have resolved the inconsistencies in favour of the appellant and acquitted him of the charge. The appeal is allowed. The conviction is quashed and sentence imposed by

the trial magistrate is set aside respectively. Unless otherwise lawfully held the appellant is to be set at liberty forthwith.

**Judgment read and signed on 27<sup>th</sup> day of March 2009**

**M. KOOME**

**JUDGE**