REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

Criminal Appeal 89 of 2007

JOASH MULONZA ========== APPELLANT

V E R S U S

REPUBLIC ========== RESPONDENT

J U D G E M E N T

The Appellant was charged with two counts of grievous harm contrary to ***section 234*** of the Penal Code.The plea was taken on 9th July 2002, before Hon. Mrs. Wekulo, RM. However, on 8th October 2002, the charge was substituted. The new charge was read and explained to the appellant, and he pleaded not guilty. That was before Hon. Mrs. Oganyo, RM.Thereafter, the trial commenced before Hon. Mrs. Oganyo, RM, on the same date (8th October 2002).

On 17th February 2003, the trial resumed before Hon. R. A. Oganyo, RM. On that occasion, the appellant's advocate successfully sought to re-examine PW2 and PW3. Thereafter PW4 and PW5 also testified.

At the time PW6 testified, it is not clear whether the trial court was presided over by the Hon. Mrs. R. A. Oganyo, RM or the Hon. Mutai, RM. I say so before the record simply indicates;

> "***Coram as before"***

Given that prior to 12th January 2004 (when PW6 testified), the case was mentioned before the Hon. Mutai, RM, it is possible that it is the same learned magistrate who presided over the court session on 12th January 2004.

Although nothing in the appeal before me turns on this issue, I nonetheless feel obliged to state that it is of vital importance for a court of record to clearly record the particulars of the judicial officer who presides over any court sessions. By so doing, the judicial officer will make it possible for any appellate court to know whenever there should have been compliance with the provisions of section 200 (3) of the Criminal Procedure Code.

The liberal use of the phrase "Coram as before" should be discouraged. Perhaps the only circumstances in which the said phrase should be used are when the court breaks off and later reconvenes on the same day, before the same presiding judicial officer. In those circumstances, if the court clerk remained the same person, and also the legal representation (if any) remained the same, the court may justifiably describe its Coram as being the same as it was before it reconvened.

After the appellant was put on his defence, he decided to give sworn evidence. He then gave his defence,

on 26th September 2007, before Hon. Ndegwa RM.

Finally, Hon. Ndegwa RM delivered the judgement on 26th October 2007. By his said judgement, the learned magistrate convicted the appellant on the two counts of grievous harm. And, after giving consideration to the mitigation, the trial magistrate sentenced the appellant to imprisonment for 2 years, on each count. He also ordered that the said sentences would run consecutively.

It is in respect to the conviction and sentences that the appellant lodged an appeal to this court. When the appeal came up for hearing, the learned Senior State Counsel, Mr. Daniel Karuri conceded the same. He did so because there had been no compliance with the mandatory provisions of section 200 (3) of the Criminal Procedure Code. However, he sought an order for the retrial of the appellant.

In the opinion of the respondent, there was sufficient evidence on record to sustain a conviction, if the appellant was retried.

On the other hand, the learned advocate for the appellant, Mr. Kaburi, submitted that the evidence adduced by the prosecution was not only insufficient but also contradictory.

I have given anxious thought to this matter. First, it does appear to me that the evidence on record could be sufficient to sustain a conviction. Secondly, the accused is a brother to the civilian witnesses, who were the complainants in the case. The said complainants suffered such severe injuries that the same were categorized as maim. One complainant was hospitalized for a week, whilst the other complainant was hospitalized for a month.

All the foregoing factors suggest that justice would be done, if the appellant was retried.

However, I also need to take into account the fact that the appellant was sentenced to a total of 4 years imprisonment, commencing from 26th October 2007. In effect, by the date of this judgement, the appellant would have served about 17 months in prison.

Having given due consideration to all the factors, I find and hold that justice will be done if the appellant is retried. In so finding, I have taken into account the fact that if the appellant should be convicted again, the trial court will be obliged to take into account such sentence as he had already served.

For now, the appeal is allowed. The conviction is quashed and the sentences are set aside. However, the appellant shall not be set at liberty. Instead, he shall be presented before the Chief Magistrate on 16th March 2009 for mention, to either take the plea or to set a date for plea. Thereafter, the trial of the appellant shall be accorded priority, and will be presided over by a court of competent jurisdiction, excluding both Hon. R. A. Oganyo and Hon. C. N. Ndegwa.

It is so ordered.

Dated, Signed and Delivered at Kakamega, this 12th day of March, 2009.

FRED A. OCHIENG

J U D G E