



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Criminal Case 34 of 2005**

**REPUBLIC.....PROSECUTOR**

**VS**

**JOSEPH KIUMO RWANDA.....APPELLANT**

***(Appeal from the judgment of Hon. E. Oyugi; Resident Magistrate in Tigania RMC.***

***Criminal case No.1110 of 2004)***

**JUDGMENT**

The Appellant, Joseph Kiumo Rwanda was charged and convicted of assault contrary to Section 251 of the Penal Code; (Cap. 63, Laws of Kenya) and was sentenced two (2) years imprisonment without the option of a fine.

The Appellant, by a Petition of Appeal dated 30<sup>th</sup> March 2005, appealed to this Court on four (4) grounds : -

- (1)that the learned trial magistrate erred in law and fact by ignoring the evidence of the Appellant;
- (2)that the trial magistrate erred in law and fact by accepting contradictory evidence which cause doubt on the same, and that the benefit should have been given to the appellant;
- (3)that the magistrate erred in failing to consider the relationship of the accused and the complainant and the witnesses and which should have made him more cautious when arriving at the conclusion of the case;
- (4)that the learned magistrate erred in imposing excessive sentence in the circumstances by failing to take into account of the mitigation of the appellant;

Simultaneously with the filing of the Petition of Appeal the Appellant filed an application for grant of bail pending appeal and was released on cash bail of Kshs.10,000/= on 15<sup>th</sup> April 2005. Since then the matter has been fixed for hearing on no less than fifteen (15) times for one reason or another mostly absence of the appellant's counsel, and once the appellant. The Court marked the last adjournment on 24-07-2008 and fixed the matter for hearing on 30.10.2008.

On 30.10.2008, in the absence of Counsel for the Appellant, but Mokira holding brief for Mr. Kirima leaned Counsel for the Appellant, and in presence of the Appellant, and Mr. Muteti, Senior State Counsel, the Court directed that judgment be rendered on the basis of the record of the lower court.

I have consequently considered the four grounds of appeal in light of the said record, and the appellant's own evidence and the evidence of his two witnesses. The issue really is whether the accused committed the offence for which he was charged namely assault causing actual bodily harm contrary to Section 251 of the Penal Code (Caps 63, Laws of Kenya).

There is really no dispute that the appellant committed the offence as charged. The evidence of the prosecution witnesses, PW1, (his father, PW2, (a miraa dealer) PW3, also a miraa dealer, PW4, Stephen Guantai, a clinical officer who testified on the filling of P3 Form, (and injuries suffered by the complainant), PW1, and PWIV the investigating officer Nkubu Police Station, is clear, that the appellant assaulted his father, PW1 when he went to inquire from the appellant why he was felling trees in the home shamba without reference to him, the father. The Appellant responded by cutting his father on the hand drawing blood, or bleeding. The appellant also hit his father (PW1), on the shoulder causing him bruises on the right shoulder. These injuries were described by PWIV.

I think it is the height of utter dishonesty for the appellant to deny hitting his father on the head and shoulder and causing him actual bodily harm. It is equally the height of utter dishonesty for the Defence witnesses (John Mithika DW11) – who was asked by the appellant to split the timber, and Jacob Gitonga DWIII (the owner of the power saw) to see no evil and speak no evil of the appellant when they were present and saw the appellant beat PW1, his father.

The appellant cannot say that his evidence was not considered by the learned trial magistrate or that there was any contradiction or inconsistency in the prosecution evidence. Having considered the Defence evidence, the learned trial magistrate said –

**“In the circumstances I find, the accused person’s defence to the contrary not to hold any water. Of course the accused person had no justification to beat PW1 who is his actual father. If there was any dispute over the trees that were cut down there were other ways of resolving the matter**

**peacefully.”**

I am satisfied that the evidence by the defence was fully considered by the trial magistrate, there was no contradiction or inconsistency in that evidence. The relationship of father and son between the complainant (PW1) (father and the appellant/his son) was completely irrelevant to the offence committed by the appellant and his consequent arraignment, conviction and sentence. On the contrary, the appellant should have paused and explained to his father of that he had planted the tree or trees being cut, and that they did not belong to his brother, without beating his father on the head causing him actual bodily harm. It was for the appellant, and not the court to consider the relationship between the accused and the victim.

The Court was properly guided by the evidence to find the appellant guilty, and sentenced him to two (2) years imprisonment. The appellant argues in his petition of appeal that the trial court did not consider his plea for mitigation, and termed the sentence as harsh and excessive. I do not think so.

The offence committed by the appellant was not a common assault which carries a maximum sentence of one year, if found guilty under Section 250 of the Penal Code. An assault occasioning actual bodily harm (harm is any bodily hurt whether permanent or temporary), is a serious offence under Section 251 of the Penal Code, and carries a maximum sentence of five (5) years. The appellant who was sentenced to two (2) years out of the possible (5) years cannot be heard to say that such sentence is either harsh or excessive.

I consequently find no merit in the appellant’s Petition of Appeal dated 30<sup>th</sup> March 2005 and filed on 31<sup>st</sup> March 2005, and the same is dismissed. The appellant’s bail of Khs.10,000/- is cancelled and I direct that the appellant serve his sentence as ordered by the learned trial magistrate.

There shall be orders accordingly.

Dated, delivered and signed at Meru this 19<sup>th</sup> day of June 2009.

**M. J. ANYARA AMUKULE**

**(J U D G E)**