



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**Criminal Appeal 150 of 2008**

***(Appeal from original conviction and sentence of SRM's Court Winam***

***in CR. Case No. 1706 of 2008.***

**JACOB OTIENO NYAMURU.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**Coram:**

**Mwera Judge**

**Ms. Oundo for State**

**Appellant in person present**

**CC. Diang'a.**

**JUDGMENT**

In the lower court at Maseno the appellant faced a charge under S. 234 PC in that on 21.3.2008 at Upper Kombewa, West Kisumu with others not before court they unlawfully did grievous harm to Julius Ouma Jaberu. After trial and conviction, the learned trial magistrate ordered that he serve 5 years in prison. From the lower court record it appears that at one point this charge was brought along with an allegation of robbery with violence contrary to Section 296 (2) but the same was dropped and so the grievous harm charge was proceeded with. The appellant put forth initially 5 grounds of appeal. But without leave of the court a supplementary petition was filed with 6 grounds.

In the initial petition it was contended that the appellant's fundamental rights were breached when he was arrested on 25.3.2008 and taken to court on 28.3.2008. That there were contradictions in the evidence regarding the teeth knocked out and that the appellant was charged with 3 offences in one case. Without obtaining leave first the supplementary grounds need not be addressed.

Letting the learned Senior State Counsel Ms. Oundo reply to the appeal first, the court heard that the complainant attacked the complainant and knocked out his 2 teeth. The complainant knew the appellant. The matter was reported to the police. He was arrested and charged. The complainant was treated; his injuries were classified as harm. Although the learned trial magistrate may not have fully conformed to

the provisions of S. 169 CPC as to drafting of a judgment, this court should now do so as the first appellate forum. Regarding the contention about breach of fundamental rights, Counsel told the court that that was not raised as early as was possible for an explanation to be sought, and possibly tendered. Coming to the sentence the court heard that 5 years was lenient compared to the maximum of life in prison provided for under S. 234 PC. And that the appellant's defence was merely limited to a denial.

In response the appellant denied that he assaulted the complainant. Police arrested him while in his shamba for no reason. He could not commit the assault on 21.3.2008; he was in custody. That a robbery case had been laid against him but it was withdrawn, when it transpired that he was the complainant. A confusion arose about these charges and when the appellant at last went to court he faced the present assault charge. He denied being aware of the supplementary grounds which apparently the learned State Counsel said were not served on her.

Turning to the evidence before the learned trial magistrate, Jared Obiero Opondo (PW1) a clinical officer at Kombewa District Hospital said that on 22.3.2008 he examined the complainant, Julius Auma Jabel who claimed that he was assaulted on 21.3.2008 by a known person. Julius had lost 2 lower incisor teeth. He carried one in his pocket. PW1 classified the injury as grievous harm (Exh P1), caused probably by a blunt object.

Julius Auma Jabel (PW2) a farmer at Kombewa said that on 21.3.2003 (08?) at about 8 pm the appellant went to his house and attacked him. He had asked for Ksh 200/= which the witness gave him. Then 3 days later the appellant with other people came to PW2's house again took his Ksh 10,000/= and beat him up.

At that point the prosecutor told the learned trial magistrate that PW2's evidence was at variance with his statement to the police. He was stood down until later when he resumed his testimony. PW2 told the court that the date the 3 assailants raided his house they beat him with fists knocking out 2 teeth, and took his Ksh 10,000/=. He saw the appellant, whom he knew. He also recognized one other when he spoke. The next day he recovered Jacob's Identity Card, which the witness took to the police. Jacob was the appellant (accused in the lower court). The complainant reported about the incident on 20.3.2008 – about the robbery.

P.C. Daniel Cheche (PW3) of Kombewa Patrol Base recalled on 25.3.2008 while at the office at 07:20 hrs the complainant reported about an assault incident. He said that the assailant was in his shamba. The police went there with the complainant and arrested the appellant. He was later charged. The complainant had told PW3 that he was assaulted by one Jacob Otieno – no complaint of robbery. That the complainant had identified the appellant at the scene. Injuries were on his mouth.

The appellant in his unsworn statement denied the charges. He said that on 20.3.2008 he was in his shamba when the complainant's house burnt down. He was suspected. He was arrested from his shamba. He was later charged.

In this court's view the evidence before the learned trial magistrate was as confused as the charges brought against the appellant. First, the charges were two – of robbery with violence allegedly committed on 20/3/2008. It read that Julius Ouma Jaber was robbed by Julius Otieno Nyamuru, (the appellant) presumably on whom actual violence was used! The alleged robber was the subject of actual violence during the incident? It cannot be. Then in the same charge sheet was count 2 grievous harm contrary to Section 234 PC committed by the appellant against the complainant on 21.3.2008. It remained to be entertained by the learned trial magistrate. The evidence of the complainant is that he was assaulted as he was robbed of Ksh 10,000/= at 8 pm while alone in his house. This was at night. It was not said by what light if any, the complainant saw and identified the appellant. Or if he recognized him. Then next day he recovered the appellant's identity card which he took to the police. The appellant must have been his neighbour. He did not tell the police about the recovery of the appellant's identity card. They simply went to the shamba where the appellant was working. The complainant identified him and he was arrested. What became of the identity card of Jacob, PW2 took to the police station? Was it recovered in the complainant's house where the assault took place to link the appellant to the incident? No explanation

or link was offered. The appellant denied the offence.

All in all the prosecution evidence was too scanty to base a conviction on. The conviction is quashed and the sentence set aside. The appellant to be set free forthwith unless otherwise lawfully held.

Appellant allowed.

Judgment delivered on 15.6.2009

**J. W. MWERA**

**JUDGE**

*JWM/hao*