REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL 38 OF 2007

JAMES KAINGA …… APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

JUDGMENT

(An appeal from the judgment of Mr. Oyugi Ag SRM Tigania Magistrate's Court case No. 760 of 2006)

The appellant, James Kainga was charged in the lower court with the offence of causing grievous harm contrary to section 234 of the Penal Code. The particulars of the offence show that on 20th October 2005 at Kimachia Location in Meru North District in the Eastern Province, he unlawfully did grievous harm to Moses Kairithia. The appellant was convicted as charged and was sentenced to 5 years imprisonment by Tigania Senior Resident Magistrate. He has appealed against both conviction and sentence. At this initial stage I will begin by considering the first ground of appeal. That ground is as follows:-

*"**The learned trial magistrate erred in law and in fact in that he convicted the appellant on a charge which had been unlawfully brought by an institution which had no locus standi."***

In support of that ground of appeal, learned counsel for the appellant argued that the charge against the appellant was bad in law for having been brought by "*Kenya Police Tigania"*. Learned counsel likened a charge sheet to a pleading in civil action. He submitted that if such a pleading is brought by someone without capacity it cannot hold in law. Appellant relied on the book "*Criminal Procedure in Uganda and Kenya by Douglas Brown"* at page 33 where he stated:-

"***Criminal prosecution in Uganda are brought in the name of the state, i.e. "Uganda." In Kenya the term "Republic" is used."***

He further relied on the book, "*Procedure in Criminal Law in Kenya"* by Momanyi Bwonwonga, in the following passage:-

"***The only person who in law is permitted to prefer charges against an accused person is the Republic. The reason for this is that crimes are regarded as wrongs against the state and, it is its responsibility to charge and prosecute those who commit wrongs against society."***

The learned state counsel in response to this line of argument submitted that the police had powers to lay complainant. Section 19 of The Police Act in that part:-

"***A police officer may lay any lawful complaint before a magistrate……"***

The substances of the appellant's complaint as contained in the first ground appeal is that the typed lower court's proceedings have the heading:-

"***REPUBLIC OF KENYA***

IN THE RESIDENT MAGISTRATE'S COURT AT TIGANIA

CRIMINAL CASE NO. 760 OF 2006

K.P. TIGANIA …….. PROSECUTOR

VERSUS

JAMES KAINGA …… ACCUSED"

The charge sheet also had the heading:-

"***The Kenya Police charge sheet."***

To submit as the appellant did in support of the ground that the lower court case was brought by police rather than the Republic, was a miss-apprehension of the procedure of initiating and conducting criminal trials. The functions of the Kenya Police is set out in section 14(1) of the Police Act. That section provides:-

"***The force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged."***

Section 15(2) in part proves that police:-

"……***take all steps necessary to prevent the commission of offences and public nuisance, to detect offenders and bring them to justice and to apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exist."***

Bearing in mind those provisions of The Police Act cited here then one needs to consider section 89(1) of the Criminal Procedure Code which provides how criminal proceedings may be instituted. That section is in the following terms:-

"***Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant."***

The moment the complaint is laid before the magistrate either by person who believes an offence has been committed or by bringing a person arrested without a warrant, the magistrate then begins those proceedings. At that moment that the magistrate begins those proceedings, those proceedings are brought by the Republic but prosecution by a person appointed by the Attorney General or by a person in public service. See Section 85(1) (2) and (3) of the Criminal Procedure Code. The mere fact that a typist, as in this case, types the heading of the proceedings indicating that the prosecution is the police does not detract the factual position that the proceedings indeed were brought by the Republic. I am not persuaded by the decision in Criminal Appeal No. 8 of 2006 High Court Meru **DAVID KILEMI VRS. REPUBLICE** where it was stated:-

"……***..I am persuaded that the appellant's appeal has high chances of success. I am persuaded by the argument that it is the Republic who is permitted to prefer charges against accused persons, working as it were through its agents such as the police, the office of the Attorney General and even private individuals."***

From the reading of that case, it is not clear whether the learned judge was faced with similar circumstance as myself in this case, where the typist, for best reasons known only to herself or himself; indicated that the proceedings in criminal case were by Kenya Police. The original hand written proceedings do not support the typist heading. The first ground of appeal is rejected and fails. This is the first appellant court. I am duty bound to re-evaluate the evidence tendered at the lower court submit it to fresh exhaustive examination and draw my own conclusion. In doing so, I must make allowances for the fact that the trial court had the advantage of hearing and seeing the witnesses. See **Okeno V. R. (1972) EA 32**. PW1 treated the complainant, PW2, who had been assaulted on 20th October 2005. He found that PW2 had two deep cuts over the scalp and a compound fracture of the left ulna bone. In his opinion, the injuries had been inflicted by a sharp object. He classified the injury as grievous and filled the P3 which he produced to court. He stated that PW2 was called John Kairithia, instead of the name Moses Kairithia, borne out in the P3. The appellant argued that the contradiction in the name should have led the trial court to find that a case had not been proved against the appellant. I have considered that argument but I am of the view that the misstatement of PW2 name is curable by section 382 of the Criminal Procedure Code. I am of the view that the said misstatement of the name John instead of Moses did not cause any prejudice to the appellant. It is noteworthy that the appellant did not cross examine PW1 at all. Section 382 the Criminal Procedure Code provides that in determining if an error has occasioned a failure of justice the court shall consider whether an objection should or could have raised at an earlier stage. In this case, the appellant should have raised the objection by cross-examining PW1, which he did not do. PW2 stated that he saw the appellant in his '*shamba*'. Appellant was planting beans when PW2 said he was going to report the matter to the chief. Appellant cut PW2 on the left hand, forehead and backside of the head. PW2 was hospitalized for one month following that attack. That attack was witnessed by PW3 and PW4 who wholly corroborated PW2 evidence. The lower court found appellant had a case to answer. Appellant in defence gave unsworn statement. He stated that it was the appellant who on 22nd October 2005 attacked him by cutting him twice on the head. That he was treated at local dispensary and later admitted at Meru General Hospital. That he was issued with a P3 which he said he had with him but did not produce it in evidence. Appellant called two witnesses. The first stated that he gave appellant permission to cultivate the "*shamba*" in question. He further stated that appellant and the complainant

were both his relatives. The second witness stated that he was in the company of appellant on 22nd October 2005 when complainant attacked appellant. The first part of ground No. 2 of appeal shall be considered together with ground No. 3 and 5 because they relate to the appellant's argument that the trial court shifted the burden of proof to the appellant. The trial magistrate in his considered judgment found prosecution's case to be water tight. He in other words believed the evidence of prosecution. In my view, the burden of proof was not shifted to the appellant. It ought to be noted that the complainant and the witnesses who witnessed the incident said it occurred on 20th October 2005. Appellant did not cross-examine on that date nor did he suggest during the tendering of the evidence of the prosecution that the incident occurred on 22nd October 2005. For the appellant, therefore, and his witness to later in defence state that the incident occurred on 22nd October 2005 was afterthought and is rejected. The court, contrary to the arguments by the appellant, had no obligation in law or otherwise to assist appellant in presenting his case. The fact remains that although the appellant alleged that he was the one attacked by PW2, he did not prove that attack. But much more, appellant did not categorically deny attacking PWII. Infact he stated on being asked by PW2:-

"***I then tried to block using the panga I used."***

In making that statement, he did not deny cutting PW2. I find I am in agreement with the finding of the learned trial magistrate when he stated in the judgment:-

"……***.I don't believe the accused person defence that it is him who was assaulted by PWII."***

In my view there was credible evidence establishing that the appellant mounted a vicious attack upon PW2. I find that the charge of causing grievous harm was proved as required. The appeal therefore on conviction is not merited. Similarly, there is no reason to interfere with the lower court's sentence. The appellant's appeal is dismissed.

Dated and delivered at Meru this 30th day of July 2009.

MARY KASANGO

JUDGE