



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO Criminal Appeal 31 of 2001

**(From original conviction and sentence of Senior Principal Magistrate's Court
at Kericho-Criminal Case No.519 of 2001 – K. O. Ogolla [SRM])**

LEONARD KIMUTAI TOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

I. Background

1. A charge of assault causing actual bodily harm contrary to section 251 of the Penal Code was preferred against Leonard Kimutai Too.
2. The particulars of offence being;
“On the 7th day of February 2001 at Tugunon Farm Kapseger in Kericho District within Rift Valley Province unlawfully assaulted Isaac Rono, thereby occasioning him actual bodily harm.”
3. A plea of not guilty was entered. A trial was held and Leonard Kimutai Too was found guilty convicted and sentenced to 2 years imprisonment on 17th August 2001.
4. Being dissatisfied with the conviction and sentence he appealed to this High Court on 30th August 2001.
5. The grounds of appeal being that the evidence before court was inconsistent and material in contradictions. That he should have been given the benefit of a doubt and that the conviction and sentence was manifestly harsh.

II. Evidence at Trial.

6. The prosecution called the complainant and two other witnesses. The complainant, an assistant chief stated that the accused was driving a tractor. The said tractor then was used to run him down. The accused got off the tractor gave him chase with stones. He sustained injuries PW6 corroborated this evidence.
7. PW4 stated he saw the accused chasing the complainant with stones and hitting him whilst PW5 said he saw the accused throw the stone. It hit a post, bounced back and hit the complainant.
8. The other witnesses were arresting officers. PW2 an administration police was instructed to arrest the accused at about 2.00 a.m. of the following day. PW7 re-arrested the accused at the police station from three administration police who brought him to the police

station.

9. In his defence the accused state, yes, he drove a tractor. The complainant who was in his civilian clothes stopped him. He, the accused, thought he wanted to be hired by the complainant. Instead the complainant said that he required the accused to be disciplined.

10. A boundary dispute existed between his widowed mother and the complainant.

11. The accused left the scene but only to be arrested the following day. He saw no witnesses.

III. Appeal.

12. The advocate for accused argued that there was too much contradiction in the case to permit this conviction to stand. The appellant had not been given the opportunity to mitigate.

13. The State did not support the conviction. The appeal was conceded.

IV. Opinion

14. The ingredient of the offence is one of assault causing actual bodily harm. The appellant stated he never assaulted the complainant. The prosecution was unable to clearly state where exactly the complainant was hit. The complainant went to the clinical officer PW3 with a torn shirt. He said he had a back pain. The clinical officer said it was the left palm and elbow that was soft and tender and described the injuries as harm. The clinical officer saw no bruises.

15. The witnesses though did not say where the complainant was hit. PW6 said he saw the complainant being chased by the accused with stones. PW4 said the accused hit the complainant with a stone but where exactly was not stated. PW5 said the stone was thrown, hit a pole bounced back and hit the complainant. No description of where exactly he was hit was given.

16. I accordingly am of the opinion that the assault was not established. It was not consistent with the alleged injury. None of the witnesses noticed a torn shirt that the clinical officer saw; almost 24 hours after the event.

17. I would agree that the conviction was unsafe to rely on. The appellant's conviction is quashed and the sentence is hereby set aside.

18. He is at liberty unless otherwise unlawfully held.

Dated this 3rd day of December 2009 at Kericho

M. A. ANG'AWA

JUDGE

Advocate:-

- G. B. A. Moturi Advocate instructed by the firm of G. B. A. Moturi & Co. Advocates
- B. L. Kivihia State counsel instructed by the Attorney General for the State.