



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**H.C.CR.A. 13. OF 2005**

**STEPHEN KAMANDA..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from original conviction and sentence of the Resident Magistrate's court***

***at Yatta in Criminal Case Number 1680 of 2003 dated 18/11/2004).***

**REASONS FOR JUDGMENT OF THE COURT**

1. The appellant herein, was charged with grievous harm contrary to Section 234 of the Penal Code. It was alleged that he committed the offence on the 1<sup>st</sup> day of November 2003 at Matuu High School against the person of MICHAEL MORESE. The appellant was found guilty, convicted and sentenced to four (4) years' imprisonment.
2. This appeal came up for hearing before me on the 21/06/2007. The state did not oppose the appeal for reasons that part of the proceedings in the lower court was conducted by an unqualified prosecutor contrary to section 85 (2) of the Criminal Procedure Code (C.P.C.). The learned Principal State Counsel also conceded that the case was not a fit one for retrial on the ground that the appellant had served a substantial part of his four-year sentence.
3. Mr Gitobu Imanyara who appeared for the appellant submitted that since the court was not properly constituted during the trial, the entire proceedings in the lower court were a nullity.
4. Secondly, Mr Imanyara submitted that while the complainant alleged that he was assaulted on 1/11/2003, the alleged offence was not reported to police until some 10 days later. Thirdly, Mr Imanyara contended that failure to call the investigating officer of the case was fatal to the prosecution's case. That if the said witness had been called, he would have shed some light on the circumstances surrounding the commission of the alleged offence which was said to have been committed during a fight in the school involving many students.
5. Finally, Mr Imanyara contended that the age of the appellant was an issue at time of trial and that the trial court failed to establish the age of the appellant despite the fact that there was on record evidence to show that the appellant was aged 17 years at the time of trial. Mr O'Mirera, Principal State Counsel conceded that indeed the age of the appellant was an issue and that failure by the court to delve into that fact was prejudicial to the appellant.

6. The main reason why I allowed the appeal is that the age of the appellant who was a high school student was not clarified and in my view failure by the trial court to enquire into the age of the appellant was prejudicial to the appellant in that it contravened failure to comply the provisions of the Children's Act, 2001.

7. Secondly, the evidence by the complainant was not consistent. In one and the same breath, the complainant said that he was standing at the doorstep when the appellant approached, and at the same time, he said that he was standing inside the classroom with the door closed.

8. PW2, JOSEPH MUSWII stated that he met the appellant, beating the complainant. The evidence of "meeting" is not in tandem with the beating that was alleged to have been going on inside the classroom. In essence, the complainant's testimony did not agree with that of PW2 and was therefore in doubt as to whether the beating took place inside or outside the classroom where the Christian Union meeting was taking place. PW3, EDWIN AMBUGA also stated that the appellant found the complainant standing at the doorstep, pulled him out and started beating him (complainant). In all, the prosecution evidence as to the actual place of assault was lacking in consistency and if the learned trial magistrate had carefully addressed his mind to it, he would have given the benefit of the doubt to the appellant.

9. I have considered the issue of the plea having been taken by a police sergeant and find that on the basis of the decision in PENGINEPO HASSAN KUVUA versus REPUBLIC – Criminal Appeal No. 131 of 2004 (Msa), the case in the lower court cannot be said to have been a nullity. The correct position is that if the appellant had pleaded guilty to the charge on 14/11/2003 when Sergeant G.K Kanyonda was the prosecutor, and the trial magistrate had then proceeded and purported to convict the appellant on such a plea, then there is no doubt that such proceedings would have been a nullity.

10. In the present case however, the proper proceedings were conducted by Inspector Mbonge right through the hearing up to the day of judgment. Accordingly, I would not have allowed the appeal on that ground.

11. Mr Imanyara had also argued that the complainant did not report the incident to the police until after 10 days from 1/11/03. The record does not bear Mr Imanyara out on this point. The complainant (PW1), PW2 and PW4 all stated that they went and reported the matter to Matuu Police Station on the same night the incident took place. That too is my finding and so I reject Mr Imanyara's arguments on this point.

12. These are the reasons for allowing the appeal. It is so ordered.

Dated and delivered at Machakos this 29<sup>th</sup> day of January, 2008.

**R.N SITATI**

**JUDGE**