



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

Criminal Appeal 184 of 2003

PATRICK KOOME MUTUOTA 1ST APPELLANT

CYPRIANO IKOBO M'IMPWI 2ND APPELLANT

- VERSUS -

REPUBLIC RESPONDENT

(Being an appeal against the Ruling of Mr. J. Njiru, DM1 in Maua Criminal Case No.1586 of 2001 delivered on the 11th August, 2003)

JUDGMENT

This is an appeal by the State against an order of acquittal of the respondents by Maua P.M. Court (J. Njiru, D.M.I)

The respondent was charged with grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence, according to the charge sheet, are that on 19th July, 2001 at Antuanduru sub-location in Meru-North District within Eastern Province, the respondents jointly with another not before the court, did grievous harm to Joseph Kiriantu.

The prosecution called six witnesses to prove the charges. After the sixth witness testified, the hearing was adjourned to enable the prosecution call 2 witnesses, a doctor and police officer. The court ordered that that would be the final adjournment granted to the prosecution. The hearing was fixed for 11th August, 2003. On that day the attendance of the two witnesses had not been procured forcing the prosecution to close its case after the court declined to grant another chance.

In a ruling delivered the same day the court found that, an account of the failure of the prosecution to call the two witnesses and particularly the doctor's evidence, the offence of assault had not been shown at least on a prima facie basis. The court proceeded to acquit the respondents under Section 210 of the Criminal Procedure Code. This prompted the appellant to prefer this appeal raising four grounds, challenging the acquittal under Section 210 of the Criminal Procedure Code and maintaining that a prima facie case had been established against the respondents. It was also argued that failure to call medical evidence was not fatal as the offence could still be proved with the evidence adduced by the prosecution witnesses who testified. The 1st respondent through counsel opposed the appeal and submitted that failure to adduce medical evidence was fatal as there was no proof of injury. The 2nd appellant submitted that the evidence was insufficient. Before considering these vital arguments, it is necessary to re-evaluate

the evidence adduced at the trial in order to arrive at an independent conclusion bearing in mind the fact that this court lacks the advantage of the trial court where the evidence was adduced. I have already stated that the prosecution called six witnesses. According to PW1 – Joseph Kiriantu Taricha, the complainant, on the fateful night at about 9.30 p.m. when he got to his home from the home of PW2 Jeremiah Bundi Kiremba, (Jeremiah) he was suddenly attacked by two people who he later identified as the respondents. His arm was fractured in the process and eye gorged out. He was issued with a P3 and went to the hospital, where he was hospitalized for five days. Jeremiah testified of how on the night in question the complainant, who is his brother left his (Jeremiah's) home to return to his home. Shortly afterwards Jeremiah heard noises from the complainant's home. He rushed there and upon reaching he found the first respondent beating the complainant with a walking stick while the 2nd respondent had a torch. One Geoffrey Ntongai M'Mburuka (PW1) (Ntongai) came to the scene and at this stage the respondents left the complainant alone.

Ntongai himself told the court that when he got to the scene of the attack he found the 1st respondent hitting the complainant with a walking stick, while the 2nd respondent was holding a torch.

A community nurse at Kangeta Health Centre, PW4, Stephen Muriithi Thirinja, (Stephen) examined the complainant on 11th July, 2001 and prescribed some medicine for him. On 23rd July, 2001 the respondents were also examined by Stephen as they too complained of having been assaulted.

There was evidence also that prior to the alleged assault, the complainant had been beaten by another person of the name, Kamuchuru. The complainant reported this to PW5, PC Katelo Ali on 10th July, 2001.

The respondents were subsequently arrested and charged before the lower court. That constitutes the evidence against the respondents. I have already stated that it is the contention of the appellant that that evidence was sufficient *prima facie* evidence and the respondents ought to have been put on their defence. It is now settled that a *prima facie* evidence is one that the court evidence is one that the court can base a conviction if the defence offers no evidence in rebuttal.

From the record, there is evidence that the complainant was attacked on two different occasions. On the first occasion he was attacked by one Kamuchuru although the complainant reported this to the police the assailant was not charged. Then on the second occasion he was attacked by two people who he claims are the respondents. These were people known to him. He identified the first respondent as the Assistant Chief and the second respondent too. Those who rushed to the scene, including Jeremiah, and Ntongai actually saw the complainant being beaten by the 1st respondent while the 2nd respondent held a torch. The trial magistrate failed to comply with Section 169 of the Criminal Procedure Code in concentrating on matter peripheral to the trial and giving little attention to the evidence that was adduced before him. That ruling was based on the fact that failure to call medical evidence was fatal to the prosecution case. That is what is for determination in this appeal.

The charge the respondents faced was causing grievous harm contrary to Section 234 of the Penal Code which provides;

“234. Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life”

The ingredient of this offence is unlawful inflicting of grievous harm. But what amounts to grievous harm? Section 4 of the Penal Code defines the word "harm" as;

“..... any bodily hurt, disease or disorder whether permanent or temporary”

Grievous harm means;

“..... any harm which amounts to a main or dangerous harm, or seriously or permanently injures

health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense”

In view of the foregoing definitions, it is my considered view that grievous harm charge must be supported by medical evidence. This is particularly so, like in the present appeal, where there was evidence that the complainant had been assaulted by some other person prior to the incident in question.

Although the nurse (Stephen) who treated the complainant was called, his testimony is not of any assistance in this regard. It does not show the degree of injury.

Without medical evidence as to the extent of the injuries suffered by the complainant, it would have been futile for the learned trial magistrate to require the respondents to defend themselves.

In the result this appeal is dismissed.

DATED AND DELIVERED AT MERU THIS 7TH DAY OF May, 2007

W. OUKO

JUDGE