



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

**AT MALINDI**

**Criminal Appeal 61 of 2005**

**SEIF JUMA MOHAMMED ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(From the original conviction and sentence in criminal case No. 43 of 2005 at the Senior Resident Magistrate's court at Kilifi Mr C.O. Obulutsa SRM)***

**J U D G M E N T**

The appellant, Seif Juma Mohamed, was charged in the Senior Resident Magistrate's Court at Kilifi with the offence of assault causing actual bodily harm, contrary to the provisions of Section 251 of the Penal Code.

The particulars are that on the 4<sup>th</sup> day of April 2004 at Sun N Sand village, in Kilifi District within Coast Province unlawfully assaulted Margaret Paulgat thereby occasioning her actual bodily harm.

He was convicted after trial and sentenced to a fine of sh. 12,000/- and in default to serve 5 months imprisonment. He appealed against conviction and sentence and at the hearing was represented by Mr Okongo.

Mr Okongo drew 12 grounds of appeal which is convenient to use as an index. At the hearing, Mr Okongo applied for leave to be allowed to argue grounds 1,2 and 3 together. Then grounds 4,5,6,7 & 8 together. Lastly grounds 9,10,11 & 12 together. There being no objection from, Miss Amenge, the state counsel, I allowed Mr Okongo's application.

In ground 1,2 & 3 the appellant attacks the admissibility of the P3 form, reliance on the said P3 form and reliance of the trial magistrate's personal experience and familiarity with the signature of the doctor who was alleged to have signed the P3 form and the fact that the said doctor failed to attend the hearing.

The basis of this submission is that the admission of the P3 form in evidence was an error in law, in that the same was filed by Dr Mwita who was the maker of the document. However, the same was produced by Dr Ondieki Otworu (PW4). Dr Ondieki Otworu did not know Dr Mwita and hence was not acquainted with Dr Mwita's signature. On the premises, the document was not admissible under Sections 33 as read with 77 of the Evidence Act. Moreover, the P3 form did not bear the stamp of Kilifi District Hospital where it is alleged to have originated. It was not an authentic document and the court ought to have rejected it.

Furthermore, the charge sheet shows that the complainant was Margaret Paulgart while the P3 form bears the name Margaret Asiko. Last but not least, that the medical report by Dr Pally Yusuff on the basis of which the P3 form was filled bears the name Margaret Asiko. That medical evidence had the names of three different persons – Julia Asiko, Margaret Asiko and Margaret Paulgart.

In the face of these material contradictions, counsel submitted, it was prejudicial to put reliance on the said P3 form and to found a conviction on the same.

The P3 form issued by the police in Section 2 seems to require that it be filled in by a medical officer (defined in Cap 2 as a medical practitioner employed in Government service) and the other would be a medical practitioner ( defined in Cap 253)

Dr Mwita was a medical officer and was competent to fill and sign the P3 form. The problem is that he had retired at the time of the hearing. Dr Ondieki Otworu had taken over his place. But Dr Ondieki Otworu did not know Dr Mwita and had not worked with him and hence was not conversant with his handwriting or signature. Yet the court allowed him to produce the said P3 form. In allowing him to do so, the court also took judicial notice of the fact that it was conversant with the signature of Dr Ondieki Otworu who had testified before the court in numerous occasions.

The P3 form, as I understand it, is a medical examination report to be filled in by the witness in order to enable the police to decide whether to prosecute and upon what basis.

It also serves as a reminder or note for the witness in giving evidence from which he can refresh his memory as to the particular case in which he is giving evidence. Whilst it is true that as a matter of practice the police would not normally prosecute without support of a P3, that does not give the document itself the force of evidence. In other words, it is not the P3 which is being put in evidence but the evidence of the witness concerned. In this case that witness would have been Dr Mwita but for the fact that he had retired. Dr Ondieki Otworu (PW4) came in his place. Unfortunately Dr Ondieki Otworu did not know Dr Mwita. He was not conversant with his signature nor his handwriting. To my knowledge there had been many cases in the past where the doctors and clinical officers who had filled P3 forms had retired or their attendance could not be procured without undue delay or incurring unnecessary expenses. The legislature in its wisdom then amended the law and came up with Section 33 and 77 of the Evidence Act to cater for such situations.

Section 33 of the Evidence Act provides:

“statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable are themselves admissible .....

(b) when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty .....

Section 77 of the Evidence Act provides:

“(1) In criminal proceedings any document purporting to be a report under the hand of a government analyst or of any geologist employed in the public service upon any matter or thing submitted to him for examination or analysis may be used in evidence.”

To my mind, in the context of this case, the two sections contemplate a situation where the doctor or clinical officer giving evidence knows the doctor who had filled the P3 form. In effect he should be conversant with his handwriting and signature. It does not contemplate a situation where the doctor or clinical officer giving evidence is a total stranger to the doctor or clinical officer who filled the P3 form. In my humble view, to allow any doctor or clinical officer who is a stranger to the doctor or clinical

officer who filled the P3 form to give evidence on behalf of another doctor or clinical officer would amount to hearsay. For that reason, I find and hold that the admission of that evidence and putting reliance on it and coming to conclusion that harm was proved was thus an error in law.

Having said so, it is worthwhile to pause and ask myself why the evidence of Dr Mwita was necessary. In my view, a doctor or clinical officer evidence performs two functions. *One*, as an independent witness not involved in the assault who is able to look at soon after the assault and to confirm whether or not there is an injury.

*Two*, as an expert witness to assess the injury as to the degree of harm. Dr Mwita's evidence would have been evidence of the existence or otherwise of the injury and its classification as harm or otherwise. In his absence another doctor or at the very least a clinical officer who had worked with him and was conversant with his handwriting should have been called to testify and produce the P3 form. It was an error in law for the learned trial Magistrate to enter into the arena of conflict by taking judicial notice of the handwriting and signature of Dr Mwita and relying on the same to found a conviction. In doing so, he denied the accused the opportunity of cross examining the witness on that aspect of medical science.

Last but not least, the said medical report does not bear a stamp of Kilifi District Hospital which is suspect. The absence of Dr Mwita in court compounded by absence of the stamp of Kilifi District Hospital put the authenticity of the P3 in doubt. That being my position, the question I pose is this? Without the P3 form being admitted could the court have come to the conclusion that the prosecution's case was proved beyond reasonable doubt?

As I said earlier, it is not the P3 which is being put in evidence but the evidence of the witness concerned, which in this case was Dr Mwita. In the absence of Dr Mwita Dr. Ondieki Otworu could have performed that function but for the fact that he was not conversant with the handwriting and signature of Dr. Mwita whom he had not the privilege of working with.

In passing, I am also of the view that the same P3 form, so far as the patient is concerned, is at variance with the rest of the evidence touching on the patient. The P3 form is in the name Margaret Asiko. The medical report of Dr Yusuf attached to is in the name of Julia Asiko. The charge sheet bears the name of Margaret Paulgart. In the face of conflicting evidence regarding the identity of the complainant, it was necessary for the prosecutor or the trial Magistrate (under Section 150 of the Criminal Procedure Code) to bring evidence clarifying whether Margaret Paulgart, Julia Asiko and Margaret Asiko referred to one and the same person – the complainant. Recalling of the witness Margaret Paulgart (PW1) would have been enough. The conflicting names as aforesaid was a fundamental contradiction. The court ought to have found that the prosecution's case was not proved beyond reasonable doubt.

In respect of grounds 4,5 & 6, learned counsel submitted that the learned trial magistrate failed to consider the sum total of the evidence of the appellant and his witnesses and thereby arrived at a wrong decision. That several patrons were in the bar including William Juma (DW2), the bar man. DW2 testified that it was the complainant who attacked the accused by pouring beer on him. That Cosmas Nyerere (DW3) supported the testimony of William Juma (DW2). The defence counsel submitted that there was no fighting between accused and the complainant. That the learned trial magistrate should have believed the defence evidence in totality and came to a finding that it was the accused who was assaulted by the complainant.

I have carefully evaluated the defence evidence. Seif Juma DW1's evidence in cross examination is that,

*"There was a struggle as I held her hands."*

William Juma (DW2) in his evidence in chief testified that:

*"As he was going to the counter, the lady poured her drink on him and he held her hands."*

Cosmas Nyerere (DW5) testified in his evidence in chief that:

*“I rushed to see Margaret with a bottle and a glass on her hands .....*”

The sum total of the defence evidence, as I understand it, is that there was a fight involving the complainant and the accused. Seif Juma (PW1), William Juma (DW2) and Cosmas Nyerere (DW5) intervened and separated them. The police decided to charge the accused, after investigation was carried out, on the basis of the complaint of the complainant. The appellant chose not to complain. There is clear evidence of a fight which forms one of the ingredients of the offence.

In respect of grounds 8,9,10,11 & 12 of the appeal, the learned counsel complained that notwithstanding the fact that the evidence in its totality favoured the accused, yet the learned trial magistrate found against the accused and thus occasioned injustice.

The evidence, as I perceive it, is that it is common ground that there was a struggle. The struggle culminated into some injury which was classified as harm courtesy of the P3 form. The issue is whether the medical evidence was improperly admitted or not. If improperly admitted then its exclusion steals the thunder from the prosecution. It leaves the prosecution case hollow. That is why harm was not proved. As I said earlier, the moment Dr Mwita said he had not worked with Dr Ondieki Otworu and was not conversant with the said doctor's handwriting or signature, it was that moment the medical evidence snapped. In effect there was no harm proved by medical evidence through Dr Ondieki Otworu. The learned trial magistrate should have given the appellant benefit of doubt.

For those reasons, the appeal against conviction and sentence is allowed. Conviction is quashed, sentence set aside and the appellant is set free unless lawfully held for some other lawful reasons. If any monies were paid by the appellant by way of a fine the same to be refunded forthwith. It is so ordered.

Dated and delivered at Malindi this 23rd Day of July 2007

**N.R.O. OMBIJA**

**JUDGE**