

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 443 of 1999

EDWARD MWAURA MUNIU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Judgment and Conviction in District Magistrate's Court at

**Kigumo in Criminal Case No. 787 of 1998 dated 4th
May 1999 by Mr. P.J.D.
Mwangulu –D.M.I –Kigumo)**

J U D G M E N T

Edward Mwaura Muniu (hereinafter referred to as the appellant) was tried and convicted by the District magistrate's court Kigumo for the offence of Assault causing actual bodily harm contrary to section 251 of the Penal Code. He was sentenced to serve 2 years imprisonment and to suffer 3 strokes of the cane.

The complainant was one Ernest Mwaura a paternal uncle to the appellant. He testified that he was attacked by the appellant when he protested because the appellant was cutting grass and throwing it to his potato vines. The assault was allegedly witnessed by the complainant's child Monica Waruchu (P.W.3). A P3 form which was produced by Julius Njuguna (P.W.4) showed that the complainant suffered a bite on the right index finger and cut wound on the right parietal region. In his defence the appellant simply denied having assaulted the complainant. In his judgment the trial magistrate stated as follows:

“In this case I find P.W.1 & 3 truthful. I accept their evidence. I do not see any reason why they should frame the Accused. I reject the defence which I find to be only denial. On considering the evidence I am satisfied that the prosecution have proved the case against the Accused person beyond doubt.”

It is evident from the above that the trial magistrate did not consider the fact that the appellant and complainant were close relatives and appeared to be having a disagreement over the use of land. The trial magistrate also erred in treating the evidence of P.W.3 as lending support to the evidence of the complainant. This is because, although P.W.3 is indicated as a Juvenile, no inquiry appears to have been made to ascertain her age nor was any voir dire examination carried out. The evidence of P.W.3 was therefore irregularly obtained and ought not to have been relied upon.

I accept that the trial magistrate had the advantage of seeing the demeanor of the witnesses. Nevertheless, he did not make any special observation to justify his preferring the evidence of the complainant to that of the appellant. Moreover the appellant could not just be condemned merely because his defence was “only a denial.” The appellant was not under any obligation to adduce any evidence as the burden remained upon the prosecution to prove its case. In this case although there was evidence from the P3 form that the complainant had suffered harm the evidence was not sufficient to prove beyond reasonable doubt, that the injuries to the complainant were caused by the appellant.

I find that there was a doubt the benefit of which ought to have gone to the appellant. The appellant's conviction was therefore not safe. Accordingly I allow his appeal, quash the conviction and set aside the sentence which was imposed upon him.

Dated signed and delivered this 28th day of November 2005.

H. M. OKWENGU

JUDGE