



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

CRIMINAL APPEAL NO. 255 OF 2000

SAMUEL KALERIA MUTUMA 1ST APPELLANT

JOSEPH MUTUMA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original judgment of the Learned District Magistrate at Tigania

Law Courts dated 14.12.2000 in Tigania DM Criminal Case No. 400 of 2000)

JUDGMENT OF THE COURT

The two appellants, who are son and father respectively were the first and second accused in Tigania District Magistrate's Criminal Case no. 400 of 2000 in which they were jointly charged with two counts of assault causing actual bodily harm contrary to section 251 of The Penal Code. In the first count they were jointly charged with assaulting Aloise Mburugu on the 12.4.2000 at Makandi Village in Meru North District. In the second count, they were jointly charged with assaulting Peter Kinyua on the 12.4.2000 at Makandi Village, Mbeu Location of Meru North District.

Each of the appellants denied the charges against them. After the hearing of the case, whose prosecution was conducted by Sergeant Gituma, each of the two appellants was found guilty as charged on both counts. On the first count the appellants were each fined Kshs. 3,000/= in default three (3) months' imprisonment. On the second count, each of the appellants was fined Kshs. 2,000/= in default two (2) months' imprisonment. The appellants paid the fine.

Briefly the facts of this case are that on 12.4.2000 at about 9.00am the first complainant Alois Mburugu was alone in his shamba number 4909 at Mbeu Location. The two appellants together with their other brothers entered the shamba and informed the complainant that since he had failed to heed the warning never to step on the shamba, then he had to die. The second appellant picked up a stone with which he hit the complainant on the chest. The second complainant who witnessed the attack while he was in the home ran to the shamba only to be hit with a stone on the mouth. The stone was thrown at the second complainant, PW2 by the first appellant. The first complainant, PW1 fell down unconscious. Before PW1 fell down, he was again hit on the right side of the face by a stone that was thrown at him by the first appellant.

When PW1 came to at Kiburine Dispensary, he found that his left wrist was badly injured. Thereafter, he obtained a P3 form. He also later recorded a statement with the police.

The second complainant, PW2, one Peter Kinyua stated that on 12.4.2000 at about 9.00am, he was at his home when he heard noise at the shamba of Mburugu, PWI. On going to the shamba, he found the two appellants and other family members beating up PWI. He screamed. Then the second appellant picked up a stone and threw it at PW2, hitting him on the mouth and nose. He also saw the first appellant hit PWI on the face with a stone. PWI fell down.

Later on, both PWI and PW2 obtained P3 forms and also made reports to the police. PW2 stated that PWI was carried from the shamba. The appellants ran away after the attack on both PWI and PW2.

Other evidence was given by PW3, one Gideon Muchui and PW4, Joseph Miriti who both said they witnessed the attack upon the complainants by the two appellants and other family members.

The two appellants were later arrested by PW6, PC Moses Matevu and charged with the two offences.

The appellants gave sworn evidence. The first appellant stated that on 12.4.2000, at about 11.00am, he was at his home when he heard screams from his mother. The mother was calling for help. While he was attending to his mother who had a fractured leg, PWI, PW2, PW3 and PW4 came to their compound and started throwing stones at them.

Neighbours came to the scene. In the process he was hit on the leg and shoulder. The second appellant was also hit on the shoulder. The two were later issued with PW3 forms. Consequently, PWI and PW2 were arrested and charged with assault. He denied assaulting the complainants.

The second appellant, Joseph Mutuma also stated that on the day in question he was at his home when he heard screams from the shamba. On going to the shamba, he found his wife lying on the ground with a broken leg. At that time too, the first appellant appeared on the scene. PWI and other people also appeared on the scene and started hitting the second appellant with stones. The appellant screamed. Those screams attracted neighbours to the scene, among them Symon Mwenda, DW4. The second appellant denied hitting anyone in the process. Later, the two appellants took P3 forms and reported the incident to the police. The second appellant also testified that there was a boundary dispute between him and the first complainant and that the complainants were also charged with assault.

The appellants called three witnesses, namely Zipporah Kainda, as DW3, Symon Mwenda as DW4 and Jeremiah M'Kurachia as DW5. The gist of the evidence of these three witnesses is that they saw the complainants attacking the appellant with stones.

In his judgment, the learned trial magistrate concluded that the appellants did indeed assault the complainants.

This appeal is not contested, mainly on the ground that the prosecution in the trial court was conducted by a Sergeant who is not qualified to act as court prosecutor in accordance with the provisions of section 85 of the Criminal procedure Code. Mr. Oluoch who appeared for the state has not asked the court for an order of retrial.

As a first appellate court, my duty is to reconsider and re-evaluate the evidence in the lower court so as to establish whether indeed as conceded by Mr. Oluoch, this is not a fit case for retrial, and whether or not to allow the appeal. I have carefully carried out a re-evaluation and reconsideration of the evidence as set out above. In the first place, the learned district magistrate did not give any reasons for the conclusions that he made that the appellants were guilty as charged. He simply made a statement and ended there. Since even the appellants gave sworn evidence and called witnesses, it was only fair and as provided by section 169(1) of the Criminal Procedure Code for the learned trial magistrate to show that he believed the prosecution case for reasons that should have been stated therein. Nor did the learned trial magistrate set out the point or points for determination. For these reasons, I do find that the learned trial magistrate's judgment was wanting and not in conformity with the provisions of section 169(1) of the C.P.C.

Secondly, and as conceded by Mr. Oluoch, the prosecution in the lower court was, throughout the trial

conducted by police Sergeant Gituma. This, as submitted by Mr. Olouch, is contrary to the express provisions of section 85 of the C.P.C. as to who a competent prosecutor is. The section does not mention a police officer of the rank of sergeant to be one such competent prosecutors.

Having thus been conducted by an incompetent prosecutor, the trial in the lower court was a nullity and of no consequence. The court need not belabour the point that it is now trite law that unless the provisions of section 85 of the C.P.C. are complied with as regards the prosecutor, the proceedings from a prosecution conducted by an officer below the rank of Assistant Inspector of Police are a nullity. As the learned state counsel has not asked for a retrial, the court will not grant an order that is not sought.

Additionally, because of the nature of the evidence on record, the court would not be inclined to order a retrial even if the same had been asked for. From the evidence, there was a fight between the appellants and the complainants. It is not clear who the author of the fight was. Each side is pointing an accusing finger at the other. In my view, the appellants should have been given the benefit of that doubt and acquitted.

In the result, I do allow the appellants' appeal. The convictions on both counts of the charge are quashed. The sentence of a fine of Kshs. 3,000/= or three (3) months imprisonment and a fine of Kshs. 2,000/= or two (2) months imprisonment imposed upon each of the appellants on the two counts respectively are set aside. Unless otherwise lawfully held, each of the two appellants is set at liberty forthwith.

Orders accordingly.

Dated and delivered at Meru this 6th day of December 2005.

RUTH N. SITATI

JUDGE

6.12.2005