



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 58 OF 2003**

**(From Original Conviction and sentence in Criminal Case No. 831  
of 2002 of the Principal Magistrate's Court at Kitui: J. K. Nga'r  
Nga'r, Esq. on 21.2.2003)**

**PHILIPH KIMANZI SYENGO ::::::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**REPUBLIC ::::::::::::::::::::::::::::::::::::::: RESPONDENT**

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

The appellant was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code before the District Magistrate Court at Kitui. He was alleged to have assaulted Onesmus Musyoki Mutinda on 8.5.2002 at Masa Market Kitui. The case proceeded to full hearing and he was convicted of the offence and sentenced to a fine of Kshs. 7,000/- in default 6 months imprisonment. He is dissatisfied with the conviction and sentence and has appealed. He has raised 3 grounds of appeal; namely that the Magistrate erred in law and fact in failing to find that the evidence adduced did not support the charge as all that transpired was a scuffle between complainant and appellant; that the evidence adduced was contradictory and lastly that the sentence imposed was excessive since the appellant was a first offender.

A brief background of the case is that the appellant and respondent were at a meeting. The appellant who was the secretary of the committee came in late. He started to record minutes in an exercise book but the Assistant Chief asked why he was not recording in the hard covered book that he was supposed to use. The complainant took up the issue to ask why the appellant was not using the hard covered book. As per prosecution evidence the respondent stood up and kicked respondent and others intervened and separated them. The Respondent left and later reported to police. On the other hand the defence claimed that the appellant never kicked anybody but that instead it is respondent who hit them.

All the witnesses who testified for the defence and the prosecution were present in the same room. They basically agree on how it all started, when the appellant was asked about the hard covered book. Infact it is the assistant chief P.W.2 who first asked about the said hard covered book. It is then that respondent took it up alleging embezzlement of funds on the part of the committee. This may go to explain why there is such a divided line between the evidence of the people who were in the room at the time. Those who testified for the defence are some of those who were accused of embezzlement of funds as committee members.

P.W.1, 2 and 3 were very consistent in their evidence as to what occurred. Actually to all of them the appellant kicked respondent once near the shoulder and the respondent then got hold of appellants leg and they were separated. The witnesses did not see any visible injury on the respondent. P.W.4 the Clinical Officer claimed to have seen respondent on 9.5.2002 and in cross examination said he saw him on 4.6.2002 the date he filled the P.3 form. P.W.4 said he was the first to see or examine the respondent. This was a month after the alleged assault that is on 4.6.2002. If that is the case I wonder whether there would still be any visible injury to be seen by the clinical officer. Whatever the case, I do believe the prosecution witnesses who were very consistent in their testimony that appellant did kick the respondent on being asked about the hard cover book and probably about alleged embezzlement. I do find that the Magistrate

did not error in law or fact in finding that the appellant assaulted the respondent. The evidence was cogent and consistent. The conviction was proper.

The injuries inflicted were very minor. This should have been considered at the time of sentence. The kick was one. The appellant was treated as a first offender. The sentence of 7,000/- was excessive in the circumstances. I will set aside the sentence and instead order that he be discharged under S. 35 (1) Penal Code unconditionally and warned not to repeat same behaviour.

The fine paid of 7,000/- is refunded to the appellant.

**Dated, read and delivered at Machakos this ..... day of ..... 2004.**

**R. V. WENDOH**

**JUDGE**