



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO.83 OF 2004

(From original conviction and sentence of the Chief Magistrate's court at
Kisii in criminal case No.2972 of 2003).

KEPHA EVANS OGENCHE APPELLANT

VERSUS

STATE RESPONDENT

JUDGMENT:

The appellant was charged with the offence of assault contrary to s.251 Penal Code. The learned Senior

Resident Magistrate found him “guilty of assault causing grievous harm contrary to s.234 of the Penal Code as read with

s.231 of the same code”. He was sentenced to 10 years imprisonment. He has now appealed against both conviction and

sentence.

The appellant has listed seven grounds of appeal but on the hearing day only ground one was highlighted.

The said ground states:

- “1. The learned Trial Magistrate erred in law and in fact in convicting the appellant of the offence of assault causing grievous harm c/s 234 as read with s.231 P.C. contrary to the indictment/charge before him.”

The appellant was charged with the offence of assault c/s 251 Penal Code. This charge was never altered or

substituted to introduce another offence of grievous harm.

All along the appellant was tried and he was called to defend himself for the offence of assault and never that of

grievous harm. The doctor who examined the complainant assessed the degree of injury as harm and not grievous harm.

There was therefore no evidence of grievous harm. The learned trial magistrate was therefore wrong to substitute the

charge in his judgment and convict the appellant on an offence he was not charged of. I concur with the learned state counsel

that if for any reason the magistrate during trial thought there was need to alter or substitute the charge he should have

invoked section 214 of the C.P.C. This he did not do.

In the circumstances I find the appeal has merit and the same is allowed. Both the conviction and the sentence are set aside.

The state counsel asked court to order for a retrial but counsel for appellant objected. Appellant was only convicted

on 26th April 2004. It will not be difficult to get witnesses to testify. I therefore direct that the appellant be retried before

another magistrate of competent jurisdiction. He should be remanded in custody until he appears before the court.

It is so ordered.

KABURU BAUNI

JUDGE

28/7/2004

Dated and delivered on 28th July 2004.

KABURU BAUNI

JUDGE