REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 78 OF 2004

(From original conviction and sentence of the CM's court at Kisii in criminal case No.1705 of 2001)

THOMAS MACHUKI OGETII ……..……...…… APPELLANT
VERSUS
REPUBLIC ……. RESPONDENT

JUDGMENT:

The appellant was convicted for the offence of assault c/s 251 Penal Code by Senior Resident Magistrate Kisii and sentenced to four years imprisonment. He appeals against both conviction and sentence.

Mr. Ondika for the appellant submitted that P3 form was not produced. There was therefore no medical evidence.

Further he said witnesses gave contradicting evidence. One said appellant reversed the vehicle suddenly while another said he accerated forward. It was also at night.

Mr. Kemo supported the conviction and said there were no contradictions in the evidence. He said the evidence adduced was sufficient to support offence of assault.

The evidence of PW1 the complainant, PW3 & 4 was consistent on the issue of assault. They had boarded the vehicle in Kisii town going to Ikoba market. Appellant was the driver. Apparently on reaching Tabaka the appellant and his conductor decided not to continue to Ikoba and it is clear the passenger started to complain. It seems appellant was incensed by these complaints. When the complainant alight appellant got out and assaulted her. She was the first to alight and perhaps complained the most.

He hit her with a beer bottle. PW3 & 4 confirmed they witnessed the assault.

They were passengers in the vehicle and had seen the appellant well. Thus I find there was no material contradiction on part of the witnesses.

P3 form was not produced though it was identified and marked. Medical evidence is very important to prove the offence of assault. Mere marking of P3 form for identification was not enough. In absence of medical evidence it is difficult to conclude if there was actual bodily harm or not. Actual bodily harm is an important ingredient for the offence of assault under s.251 Penal Code. The learned magistrate after finding the appellant assaulted the complainant, as he properly did, should have invoked provisions of s.179(2) C.P.C. and reduce the charge to that of common assault under s.250 Penal Code which is a lesser offence. I therefore quash the conviction of appellant for offence of assault contrary to s.251 Penal Code and substitute it with a finding of conviction for offence of assault contrary to s.250 Penal Code.

As for the sentence appellant was jailed for four years. Record of proceedings do not show if his previous record was called for and one would only assume that he was a first offender. Sentence of 4 years was excessive. In any case the offence of assault c/s250 Penal Code carries a maximum of one year imprisonment. Appellant should have been given a no-custodial option. I set aside the sentence of four years and substitute it with one of a fine of shs.10,000/= in default one year imprisonment. It is so ordered.

Dated and delivered at Kisii on 24th September 2004.

KABURU BAUNI

JUDGE