



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

CRIMINAL APPEAL NO.118 OF 2003

**(From original conviction and sentence in Criminal
Case No.2437/2001 of the Chief Magistrate's Court
at NAKURU – H. WASILWA(S.R.M.)**

SAMUEL MUGO KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant SAMUEL MUGO KAMAU has filed this appeal against the conviction only. The Appellant was first charged with two counts of ASSAULT CAUSING ACTUAL BODILY HARM contrary to Section 251 of the Penal Code.

After the court heard the evidence of the first Complainant, PW.1, it directed that the P3 form in his respect be completed again and that the injury be assessed as grievous harm and not just harm as indicated. The P3 form in respect of PW1, was returned and a fresh form filled reflecting the charge as ordered by the court. The Doctor who produced it in court, PW2, in Cross-examination by the defence stated that the injury was not grievous as the P3 form indicated, but harm. He was not the Doctor who had completed the P3 form after examining the Complainant, PW1. That was the first ground of appeal that the two Doctors were at cross-purposes and contradicted each other. The State in opposing the appeal submitted that PW2's comments on the injury suffered by the Complainant and the P3 form were unethical as his only role was to produce the P3 form. I agree with the State Counsel, PW2 had no capacity to comment on the injury suffered by PW1. He did not examine or treat him for the said injury. He also did not complete the P3 form. His comments were uncalled for more important the comments were unqualified. He did not qualify to the court why he thought the injury suffered by PW1 was merely 'harm'. He only said the injury was not deep, He did not say when, if at all, he saw the injury. It should not be forgotten he testified on 20.9.2002, while the injury in question was inflicted on November 12, 2001. His comments were unreliable.

The issue to determine is whether the prosecution proved beyond any reasonable doubt that the injury suffered by PW1 was grievous harm. The evidence of PW1 was that he had suffered a cut on his hand. PW5, a neighbour tied up the wound, which was by then bleeding according to her evidence and that of PW3 and PW4. PW1 was taken to hospital. When the court stepped him down on first day he testified, he said he had been admitted for a month. He later said it was for 4 days which PW3, his mother confirmed.

The Court, it must be remembered, stepped him down on grounds he was still looking quite unwell. He had testified that his small finger where he had been injured by the Appellant, was “dead”. That was the ground on which the court said that the P3 form was filled prematurely. It is untrue to say that court ordered for the P3 form to be re-filled and that it even suggested which injury was to be classified. The court did not substitute the charges against the Appellant to reflect the change in count 1 for ASSAULT TO GRIEVOUS HARM. That is within court’s power under Section 214 of the Criminal Procedure Code. That ground had therefore no merit.

The second ground raised in this appeal was inconsistency as to scene where this incident occurred. Whether outside PW3’s home or near the Shamba. Even though the State admits that inconsistency and explains that it was caused by Appellant’s admission that he was present at the scene of incident wherever it was.

I do not see any serious inconsistency considering the evidence of PW5, the neighbour to both Appellant and his witnesses and the Complainants and their witnesses. Her evidence was that she was in her shamba harvesting maize when she heard screams. She went to the scene a few seconds later and managed to witness both assaults.” It is clear from this evidence that the homes of the Complainants were near her shamba for her to reach within a few seconds to the scene.

The distance between the homes and shambas do appear to have been quite short and in my view insignificant. The Appellant has also urged the court to find his evidence and that of the witnesses he called was consistent and therefore truthful. Apart from exact position of the assault, I did find that the Complainant and his witnesses were consistent. The Trial Court after hearing them and examining their demeanour found them truthful. The trial court did not believe the defence.

What was the defence story?

It was that the Appellant was surrounded by both Complainants and their relative PW4 and PW1’s brother. That as PW1’s mother lifted his panga to cut the Appellant, he cut PW1 instead and that as PW3 intervened she too was cut. He says they then went to the Police to report the incident.

If Appellant’s story was to be believed, question is what was there for the Complainants to report.

According to the Appellant, they had assaulted each other. They could not have reported anything. PW6 was the Police Officer who received their report and he says that the two Complainants reported that the Appellant had assaulted them. The Appellant also went to the Station and according to PW6, he admitted assaulting the two and so he arrested him same day of incident. PW6 also said that the Appellant reported that the Complainant had tried to break into his house. That was not what he said in his defence.

On considering the evidence adduced before the trial court and the trial court’s Judgment. I see no ground upon which to fault the Court’s finding. This appeal lacks in merit and I accordingly dismiss it.

JESSIE LESIIT

JUDGE

Read, signed and delivered this 2nd day of July, 2003.

In presence of

JESSIE LESIIT

JUDGE