



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 141 OF 2003**

**JACKSON MATHEKA NZUKI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

The appellant was charged in Machakos CR.C. 2564/02 with offence of causing grievous harm c/section 234 penal code. He was arraigned before court on 20.12.2002 when plea was taken. He denied the offence and the case proceeded to full hearing and the appellant was convicted of the said offence and sentenced to serve 2 years imprisonment. The appellant was dissatisfied with the conviction and sentence and he filed this appeal and pleads that conviction be quashed, sentence be set aside or alternatively, a non custodial sentence be considered.

The grounds of appeal are as follows:- The court should have accepted the accused's defence that complainant invaded appellants house, which is the reason why he was beaten on the back as he fled.

- That the complainant never raised alarm till he was on the ground and overpowered.
- That at time of the alleged beating or assault the appellant had blamed complainant for going to his house at night and that it is only the defence's evidence that show how the whole incident began.
- That there was no need to raise alarm by appellant or report to police as this was a family dispute that could have been resolved at home and further that since the appellant had resolved the problem, there was no need to sound the alarm.
- The other ground is that the appellant acted in self defence and used reasonable force and that if other people with appellant caused the grievous harm it is not him to blame.

The appeal was opposed and the state counsel contends that the evidence by prosecution witnesses was clear, cogent and consistent.

That running away and being beaten on the back is not evidence of the appellant being invaded. That PW1 raised alarm on being attacked and the other witnesses came to his assistance and the defence of justification was properly rejected by court as PW1 testified as to how he was attacked and the other witnesses corroborated his evidence. It is also argued by state that it does not matter who inflicted injuries on PW1 provided those with appellant had a common intention and hence the conviction was proper and

sentence lenient.

There is no doubt from the evidence on record that the plaintiff PW 1 was seriously injured. He suffered 4 broken ribs and other injuries to his back. There is also no doubt that there was a confrontation between the complainant PW 1 and the appellant.

It is apparent from the proceedings that the two brothers have long standing disagreement between them which the lower court considered in its judgement. In his evidence PW 1 said that once he was under attack, he started to run and he was beaten on his back in the process.

Running away is a normal reaction for anybody who would find themselves under such circumstances. PW1's being beaten on the back does not go to explain the appellants defence that the appellant had been invaded and PW1 was therefore fleeing.

The complainant first fled before he fell down. Appellant can not separate the transaction into two to say PW1 first ran and also later fell. Appellant claims to have been first fled in assaulting PW 1 for attacking him in his home. Indeed in her evidence PW 2 said that at the time PW 1 was being assaulted appellant said that PW1 had no right to go to his home at night. Even if PW1 had gone to appellants house on that night yet appellant was found still assaulting PW 1 150 metres away from his home. If he had ejected him for his compound, he was no longer justified in beating him while 150 metres away. The injuries speak for themselves. The force used was excessive as PW 1 was seriously injured. There is no evidence that PW 1 was armed.

PW1 did not see the weapons used by the assaultants to inflict injuries on him. PW2 said appellant used his bare hands though she had seen him with a panga when she first approached but appellant's son had a fork jembe handle. PW3 who arrived later saw appellant with the fork jembe handle but the appellants son had nothing. It is apparent that a fork jembe handle was used to assault PW 1 and it does not matter who had it, the appellant or his son. They had a common intention to harm PW 1. It does not matter who used what weapon to inflict what injury on PW 1.

Though appellant claimed he was attacked in his house while in bed, appellant never raised alarm. I believe an alarm would be sounded notwithstanding the fact that the attacker is subdued. Appellant and the wife said that PW 1 called on 2 people to prepare bows and arrows but none of these people were seen. If indeed they were under such attack one would have expected them to raise an alarm as they would not have known what was in store. It is unlikely that appellant was attacked by PW1 as the trial magistrate correctly found.

I came to the conclusion that the trial magistrate correctly found that it is appellant who caused grievous harm to PW 1 along with another not before court. There is no reason why the conviction should be interfered with. Appeal on conviction is dismissed. It seems the parties have several disputes between them. Since there are brothers and appellant was treated as 1st offender the court will consider substituting the sentence with a fine of Kshs.40,000/= in default 2 years imprisonment.

Appellant is also acquitted of sentence of suffering one stroke of the cane if he has not yet served it.

Dated, read and delivered at Machakos.....this .....day of.....,2003.

**R. WENDOH**

**JUDGE**