



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL NO. 142 OF 1997

(From Original Conviction and Sentence in Criminal Case No. 4127 of
1993 of the Senior Principal Magistrate’s Court at Machakos: E. N.
Maina Miss, on 7.7.97)

STEPHEN MUINDE KALULU ::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

REPUBLIC ::::::::::::::::::::::::::::::::::: RESPONDENT

Coram: J. W. Mwera J.
Mrs. Nzei Advocate for Appellant
Orinda State Counsel for Respondent
C.C. Muli

J U D G E M E N T

20 In the lower court the appellant was charged under S.251 Penal Code in that on 8th December 1993 at Eastleigh Estate Machakos he unlawfully assaulted NZIOKI NDANGILI occasioning him actual bodily harm.

After trial he was found guilty convicted and sentenced to pay Sh.5000/- fine in default 6 months imprisonment with effect from 7.7.97. He paid the fine.

A seven-point appeal was filed and Mrs. Nzei argued principally that the lower court relied on hearsay evidence to convict eg. that the medical evidence by Dr. Kibore was not original because the complainant had been initially treated by some medical personal other than Dr. Kibore, who never testified. That there were contradictions in the prosecution case especially as regards who took the complainant to hospital, this was done the following day, and what his actual injuries were. That the defence evidence did not receive due analysis and appreciation in the Learned Trial Magistrate’s judgement yet the appellant had raised pertinent points like grudges and the lot. That the minor complainant’s evidence was not corroborated. The 10 Learned State Counsel who seemed to have also seen the lower court decision in the light Mrs. Nzei did, conceded the appeal.

On this court’s own review of the lower court proceedings and judgement, the complainant threw a stone to bring down mango fruits in the compound where his family and that of the appellant lived. The stone bounced off and struck the appellant’s car’s windscreen breaking it.

Both the minor complainant (P.W.1) and the appellant plus his witness Justus Mutisya (D.W.1) say so. But then this court does not believe that when the complainant ran to a point alittle further off, the appellant did nothing save to tell him to inform his parents. He beat the complainant and Peter 20 Masika (P.W.2) who was coming into the compound that time saw it. It may not be of use to say that P.W.2 was a

friend of P.W.1's father and leave it there. It can equally be said that D.W.2 was the appellant's friend and he testified on his behalf. The Learned Trial Magistrate rejected D.W.2's evidence on account of their friendship but this court thinks otherwise of it. It is only added that the appellant was upset with the damage of his windscreen and he punished the complainant for it.

It may have been an error saying as the Learned Trial Magistrate recorded that P.W.1 gave unsworn evidence. She had been satisfied with his intelligence and duty to tell the truth. So he gave evidence on oath and the appellant's lawyer then, cross examined him – properly. But it is not correct to say that his father and not Paul Kivuva (P.W.3) took him to hospital while P.W.1 said:

“We went to Machakos Police Station. Then I was taken to Machakos General Hospital.”

10 This is after the complainant's father, who had been at a seminar returned home and got acquainted with the news. This no doubt was on 9.12.93. P.W.1's mother had not taken the boy to hospital so Paul Kivuva came to that home (of his brother) on 9.12.93, he said:

“I took the boy to Machakos General Hospital.”

P.W.3 was firm that he did it At no point was it suggested that the 20 complainant's father did that. After going to the police station, P.W.1 was taken to the hospital – and this could be anybody including P.W.3 who told the Learned Trial Magistrate that he did so. This court was unable to see the alleged contradiction. Indeed there was corroboration from P.W.2 of the minor's evidence. He saw the appellant beating P.W.1. And Dr. Kibore's (P.W.5) evidence was not hearsay. Granted, a clinical officer first saw and treated P.W.1 on 9.12.93. Dr. Kibore said:

“On 14.12.93, I examined Nzioki Ndangili He had a blunt injury on the head. His jaws were painful..... He also had blunt injuries on the chest and back.”

The P.3 form P.W.5 produced was a result of his own examining P.W.1. This could not be hearsay evidence. Some concern was raised about the points where injuries were inflicted. While P.W.1 himself spoke of being beaten on the cheeks and the back, the doctor spoke of these adding the chest. This court is unable to agree, with the assault being witnessed by (P.W.2) that this could go as far as to vitiate the charge 10 against the appellant.

Again granted all evidence put together, from the prosecution and the defence, and placed before the Learned Trial Magistrate points to a family grudge between the P.W.1's father and the appellant. They once fought and seemingly the two families living in one compound were not on good terms at all. But that, as the Learned Trial Magistrate found did, not demonstrate that there was therefore no assault and no evidence to prove it. There was an assault by the appellant on the complainant and evidence, eye and medical, supported it.

20 Accordingly he was properly convicted. The sentence was also lawful. P.W.5 said:

“The injuries were not very serious so the patient must have recovered by now.”

The appellant was a first offender and one cannot fail to see that even if he committed the offence, the complainant's family may as well have found a way to get even with him. But all that aside, having considered all the foregoing the appeal against conviction is dismissed. But the fine is reduced from Sh. 5000/= to Sh.3000/= in default 2 months imprisonment. But that the whole sum was paid the balance of Sh.2000/= to be refunded.

Judgement accordingly.

Delivered on 28th May 2001.

J. W. MWERA

10 JUDGE