

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL NO. 47 OF 2000

(From Original Conviction and Sentence in Criminal Case No. 204 of 1999 of the Senior Resident Magistrate's Court at Kangundo: C.D. Nyamweya Esq. on 21.3.2000)

BERNARD MBITHI KISIVE :::::::::::::::::::: *APPELLANT*

VERSUS

REPUBLIC :::::::::::::::::::: *RESPONDENT*

Coram: J. W. Mwera J.

Isika Advocate for Appellant

Orinda State Counsel for Respondent

C.C. Muli

J U D G E M E N T

The appellant was charged under S. 251 Penal Code in that on 2.1.99 at Motel. But Kangundo, formally with another not before the court they assaulted Julius Kitavi Muli occasioning him actual bodily harm. He was tried convicted and fined Sh.15000/= in default 6 months imprisonment corporal punishment is optional and the Learned Trial Magistrate did not order it.

A seven – point appeal filed by M/s Isika and Company Advocates in a supplementary petition was argued by Mr. Isika in that there was no proof of the charge or particularly that it was not the appellant who injured the complainant. That one Musyoki a friend of the appellant did but not in concert with the appellant. That Musyoki was not charged at all. That the sentence was excessive in the circumstances. That had the local station occurrence book (OB) been produced the appellant would have been exonerated of the charge.

The Learned State Counsel supported the conviction and considered the sentence lenient. Having gone over all the evidence and Learned Trial Magistrate's judgement this court is of the view that it was the appellant and his friend Musyoki who assaulted P.W.1. While the appellant boxed him about the face Musyoki who was still at large at the time of the trial threw a bottle at P.W.1. It cut him and injured him. The evidence flows in that way from P.W.1 himself, Joseph Matheka (P.W.2) a bar maid at the same place where the assault took place. The appellant with the other not before court (Musyoki) were friends who were jointly assaulting P.W.1. It was nothing near Musyoki simply throwing bottles at strangers – P.W.1 and appellant quarrelling and fighting at a public place. So conviction remains.

As for the sentence, the Learned Trial Magistrate noted that the appellant was a first offender. That the appellant was the aggressor. However this court will set aside the lower court sentence and substitute it with one of a fine of Sh.10,000/= in default six months in jail. Ends of justice will still be served even with the reduced

fine. The fines were paid and so only the balance will be refunded.

Save for reduced fine, this appeal is dismissed.

Judgement accordingly.

Delivered on 4th June 2001.

J. W. MWERA
JUDGE