REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 38 OF 2018

THE REPUBLIC.....APPELLANT

VERSUS

JOHN OTIENO MOSETI.....RESPONDENT

[Being an Appeal from the Conviction and Sentence of Hon. A. C. Towett (RM) Nyamira Law Courts dated 16th day of March 2012 in Nyamira Principal Magistrate's Court Criminal Case No. 220 of 2012]

JUDGEMENT

This is an appeal by the State against the acquittal of the respondent who was charged with the offence of grievous harm contrary to Section 234 of the Penal Code.

The particulars of the charge were that on 28th February 2012 at Bosiango Trading Center in Nyamira District within Nyamira County he unlawfully did grievous harm to Samson Nyangori Areba. After hearing, considering and evaluating evidence from both sides, the trial Magistrate came to the conclusion that the prosecution had not proved its case beyond reasonable doubt and acquitted the respondent. The grounds for this appeal are: -

> **"(a) THAT the Hon. Trial Magistrate erred in law in acquitting the respondents whereas the prosecution had discharged its burden of proof as required by law.**
>
> **(b) THAT the Hon. Trial Magistrate erred in fact when she misinterpreted the evidence adduced by the Prosecution to arrive at an erroneous conclusion.**
>
> **(c) THAT the Hon. Trial Magistrate erred in fact and law when she did not consider the evidence adduced by the Prosecution during the pendency of the trial."**

The appeal was heard by way of written submissions. In addition to considering the submissions, I have as I am entitled to, evaluated the evidence in the court below so as to arrive at my own conclusion. Having done so I find that this appeal has no merit. The case in the court below and this appeal are a classic example of why the office of the Director of Public Prosecutions should never act at the direction of any person. The complainant gave evidence on 26th September 2012 and was cross examined by Counsel for the defence. After that the trial magistrate was transferred and at the next hearing it was before another magistrate. The complainant raised concern with that court. It is instructive that at that juncture pursuant to his rights under Section 200 (3) of the Criminal Procedure Code the respondent elected to have the case start afresh. The complainant however raised issue with the trial court and refused to have the matter heard in Nyamira. This compelled the court to transfer the case to Kisii Chief Magistrate's court for hearing. The record reveals that the file reached Kisii on 2nd December 2014 and again in exercise of his rights the respondent elected to have the trial start denovo. The case was then fixed for hearing on 17th March 2015. It did not proceed because the trial magistrate was away on other official duties. It did not for one reason or another proceed in Kisii on the subsequent dates and on 20th July 2015 it was retransferred back to Nyamira. On 19th October 2015 the magistrate who was allocated the case noted that the complainant was available and so the case would start denovo. He also issued summons for the other witnesses and scheduled the case to start on 10th October 2016. Come that day the prosecution intimated they only intended to call a doctor and a police officer and both were not in court. The trial magistrate granted an adjournment but also reminded the prosecution that the case was to start afresh meaning that the complainant had to be recalled. Subsequent to that, the prosecution called a doctor and a police officer but did not recall the complainant. This despite the defence Counsel's application to proceed from where Hon. Kitagwa had left the matter. Hon. Kitagwa's order was for the case to start denovo. Essentially therefore the complainant did not give evidence in the case as he was never recalled despite his being available to testify. Moreover, even were we to find that his earlier testimony could still be considered, the defence casts doubt on whether it was him or the respondent who was the aggressor. The clinical officer (Pw2) and the police officer (Pw3) did not witness the incident. The medical evidence adduced merely confirms that the complainant sustained injuries. The police officer who testified did so on behalf of another officer who was transferred to Nairobi. He did not investigate the case and he merely repeated what he read in the file. His evidence was mostly hearsay and he neglected to call witnesses who were competent and compellable despite being issued with witness summons to do so. The respondent testified on oath and called two witnesses who unlike in the case of the complainant corroborated his evidence. The defence painted the complainant as the aggressor and I am satisfied that it cast doubt on the prosecution's case. True the incident occurred in broad daylight and each party positively identified the other. However, one cannot attack another person and when the other person defends himself turn around to say he was the victim. The complainant was the aggressor. It is my finding that the respondent's defence rebutted the prosecution's case sufficiently to create doubt in the mind of the court. The respondent was entitled to the benefit of that doubt. Accordingly, I find no merit in this appeal and it is dismissed.

Signed, dated and delivered in Nyamira this 4th day of July 2019.

E. N. MAINA

JUDGE