



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 151 OF 2013**

**PATRICK SUKWA NGILA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original Conviction and Sentence of the Principal Magistrate's Court at Kangundo by Hon. I.M. Kahuya (Ag. SRM)) in Criminal Case No. 590 of 2012 dated 5<sup>th</sup> July, 2013)*

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**JUDGMENT OF THE COURT**

1. The Appellant herein was tried and convicted by the Principal Magistrate's Court in Kangundo for the offence of Assault causing actual bodily harm contrary to **Section 251** of the **Penal Code**. Based on the said conviction, the accused person was sentenced to two (2) years imprisonment after which, being dissatisfied with the judgment of the Court, he preferred an Appeal whereby he challenged both the conviction and the sentence meted out on him. Therefore, the Appellant approached this Court vide a Petition of Appeal dated and filed on 18<sup>th</sup> July, 2013.

2. The appellant has set out fourteen(14) grounds of appeal which appear on the face of the Petition of appeal filed in Court on 18<sup>th</sup> July, 2013, the combined gist of which in the submissions of the appellant with acceptance of this court comes down to two important legal issue:

*(i) Whether the Appellant's constitutional rights were violated.*

*(ii) Whether the prosecution proved the case beyond reasonable doubt.*

3. This being the first appeal, this court will examine and re-evaluate the evidence on record and reach its own finding on the matter. It is noted that the appeal is opposed by the prosecution who filed submissions to the effect. The appellant also filed submissions in support of the appeal.

4. The prosecution called five witnesses; Benedict Ndambuki (PW1) who testified that on the material day he was at his home around 6pm when the accused person came over demanding for their father's shares. In the cause of talking the accused attacked the complainant with a cane. He added that he shielded himself with his hand and as a result it got fractured. He further stated that he reported the incident the next day and stated that they had quarreled before after the said accused illegally sold off PW1's land in 2011. During cross-examination the witness stated that their father's share had never been sold to the accused person. He confirmed to have injured his third left finger before at his work place. Josphat Ndumbuki (PW2) and Esther Mbithi (PW3) confirmed to have been home with PW1 when they

saw the accused person visited the complainant. They talked briefly about their father's shares before the accused hit PW1 thrice on his right hand. Lilian Kioko (PW4) and the clinical officer attached at Kangundo District Hospital testified to have treated the complainant a day after the injury. The complainant had a fracture on the left forearm. The same was plastered followed by physiotherapy. She classified the degree of injury as maim and produced the P3 form as PExh.1. No. 88194 PC Rugut (PW5) and the investigating officer from Tala police post testified that on 3<sup>rd</sup> June, 2012 at around 9.30a.m he was in the office when PW1 officially reported the incident. He advised him to seek treatment after which he issued him with a P3 form. When the same was returned, he recorded witness statements before charging the accused person with the present offence. During cross-examination, the witness stated that he worked hand in hand with PC Kipsang who was the lead investigator.

5. In his defence, the appellant gave unsworn statement and was his sole witness. He testified that on the material day he was at home when PW1 visited him while drunk and started abusing the accused's wife for no reason. On inquiring why he was doing so, the complainant punched the accused on the face causing him to fall. At this time his wife and son interjected and the next day he reported the incident at Kithimani police post. He added that he was issued with a P3 form but the same was snatched at Tala police post. He concluded that his father's shares had been sold to him and that he had documentary evidence to prove the same.

6. The above is the summary of evidence. The appellant submitted that he was not accorded sufficient rights to a fair trial under **Article 50(2) (b)&(c)** of the **Constitution**, and that the Appellant herein was convicted and sentenced on an alleged substituted offence assault causing actual bodily harm whose ingredients were neither read nor explained to him thus occasioning not only prejudice to him but also a miscarriage of justice. Further, it is worth noting that the said substituted offence is not a cognate offence to the offence of grievous harm contrary to **Section 234** of the **Penal Code**.

7. The prosecution dismissed this allegation and submitted that the appeal does not raise any substantive grounds in law or in fact. On this issue, I have looked at the record.

8. On the first ground of appeal, it's noteworthy that the accused had initially been charged with the offence of assault causing grievous bodily harm. This offence was later substituted to the lesser offence of assault causing actual bodily harm. The offence was substituted before the close of the prosecution's case thus very well within the confines of the law. Further the charge substituted is the very same charge to which all the evidence tendered by the witnesses established and proved. There is evidence the accused was at all times granted sufficient time to challenge it in cross-examination. It is misleading for the appellant to submit that the ingredients of the substituted offence were not read out and explained to the accused person. It's very clear from the typed proceedings that the charge and the particulars thereof were read out and interpreted to the accused person who maintained his plea of not guilty. Further the court gave the accused person an opportunity to further challenge the evidence of the prosecution witnesses relating the lesser charge as substituted to which the accused said he did not wish to. As such, it's the finding of this court that all the rules were observed and adhered to in substituting the said charge and the accused was not occasioned any prejudice whatsoever.

9. On the second issue, the appellant had alleged that the prosecution did not prove its case beyond reasonable doubt. The appellant submitted that in the *locus classicus* case of **Woolmington v. DPP (1935) A.C 462, Lord Sankey** opined that, *throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt.* Additionally, by dint of **Section 107(1) & (2) of the Evidence Act (Cap 80) Laws of Kenya**, he who alleges must prove. The appellant submitted that the prosecution did not prove its case beyond reasonable doubt and that the facts narrated to the court did not in any way point to the accused person's guilt owing to the glaring inconsistencies, and that the trial magistrate failed to acknowledge the fact that the evidence given by PW1, PW2 and PW3 contradicted each other with regard to time. According to PW1 the alleged offence occurred at 6pm while according to PW2 and PW3 it occurred at 8pm and 8.30pm respectively. This was evidence in chief in which there was stark contrast yet neither the court nor the prosecution established the exact time. It was also submitted that the trial magistrate also failed to note the fact that there were no medical/treatment notes provided or adduced in Court by the Prosecution to show that the

accused person was indeed harmed as alleged. The Appellant submitted that the P3 form produced in court by PW4 and relied upon by the trial court in finding the accused person guilty is not primary evidence and cannot therefore be relied upon to convict any accused person. This is especially so because PW4 who filled the P3 form testified to the effect that the Complainant sustained a fracture on his Left Hand yet the PW1 the complainant herein testified to the effect that it was his Right Hand which was fractured. In the premises, the appellant submitted that PW4's evidence was based on hearsay as no medical notes were provided to the court to prove that the complainant was indeed treated at a hospital, and also that the P3 form produced in court cannot and could not have been conclusive evidence of the fact that the complainant was harmed as alleged. This failure by the prosecution to produce the medical and/or treatment notes dealt a fatal blow to its case and on that score alone, the accused person ought to have been acquitted. The trial magistrate erred in law and fact by relying on hearsay evidence as it is evidence from the testimony of PW5 (P.C. Rugu) contrary to **Section 33 of the Evidence Act (Cap 80) Laws of Kenya**. The appellant also submitted that the trial magistrate erred in finding that the accused intended to harm the complainant. For the offence of assault causing actual bodily harm to be proved, it had to be established that there was intention to cause harm, by the accused, and unlawful personal violence inflicted on the complainant. It was submitted that none of the ingredients of the offence was proved. In the premises therefore, the *mensrea* element was not established and therefore the offence of assault occasioning actual bodily harm was not proven beyond reasonable doubt.

10. However, in the view of this court, the appellant points only one inconsistency that being in regard to time of commission of the offence as indicated by PW1, PW2 and PW3. Noteworthy the complainant indicated he got home at 6pm on the material day. PW2 and PW3 who are eye witnesses to the assault clearly indicate that the offence was committed at around 8p.m to 8.30p.m. Their recount of how the offence was committed and the offender in question is clearly identical. As such it's not in any doubt that the accused indeed committed the offence. The exact time of the offence need not be mentioned, provided the thread of evidence point to the commission of the offence around the times in controversy. On the issue of treatment notes, PW4, a clinical officer did testify and produced a P3 form which carried very elaborate medical information regarding the complainant, including his physical condition, the injuries he had sustained and the treatment that was administered to him. The P3 form is a primary document admissible in law. Further the evidence of PW5 clearly indicated he worked hand in hand with the arresting officer. In fact the initial report was mad to PW5 and his colleague in the office and he visited the scene and issued the complainant with a P3 form. Afterwards he arrested the accused person. The issue of hearsay evidence does not arise.

11. The appellant further contends that the ingredients of the said offence of assault has not been proved and to wit the *mensrea*. However, evidence shows that the accused did confront the complainant due to some shares which were owed by their late father and which the accused person believed himself to be the rightful owner thereof. He escalated this confrontation by assaulting the complainant.

12. For the foregoing paragraphs of this judgment, the appeal herein lacks merit and is accordingly dismissed with costs. The trial court's judgment and conviction is upheld.

**DATED, SIGNED AND DELIVERED THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2016**

**E.K.O. OGOLA**

**JUDGE**

**In the presence of;**

Mr. Machogu for State

Mr. Kaluu holding brief for J.M. Kimeu for accused

Court Assistant – Mr. Munyao