

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 27 OF 2013

BETWEEN

ELLY OKOKO OGOLLA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 210 of 2011 of the Senior Principal's Magistrates Court at Oyugis, Hon L. K. Mwendwa dated 12th September 2013)

JUDGMENT

1. The appellant in this case was charged with the offence of assault causing actual bodily harm contrary to **section 251** of the **Penal Code (chapter 63 of the laws of Kenya)**. The particulars were that on 15th February 2011 at Koderia Location in Rachuonyo South District within Homa Bay County, jointly with another not before the court he unlawfully assaulted, Jared Odhiambo Owino thereby occasioning him actual bodily harm. He was convicted and sentenced to 2 years in prison.
2. He appeals against the conviction and sentence on grounds, inter alia, that the evidence was contradictory and could not sustain a conviction. Learned Counsel for the State, Mr. Oluoch, agrees that the conviction is not safe and concedes the appeal.
3. Counsel pointed to the contradictory evidence of PW1 and PW2 which are not clear whether the accused actually assaulted the complainant. Likewise the evidence of PW3 is hearsay that could not support the fact of assault. I have considered the record and agree that the evidence is contradictory. PW 1 testified that the appellant assaulted him with a jembe. Although PW 2 testified that she saw the accused assault Jared. In cross-examination she admitted that she did not see the assault and was only told by her son Jared of the assault. PW 3 testified that on one hand she saw the assault take place but she stated that she was informed by PW 1 that he was assaulted by a walking stick and by the appellant's son with a jembe.
4. Furthermore, I agree with the Counsel for the State, that although the medical evidence in the form of the P3 was properly admitted, the doctor did not make an assessment of the injuries sustained to support the charge.
5. In light of the above errors, the conviction is quashed. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 16th day of July 2014

D. S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.