



REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 74 of 2010

DAVID KILUNJA KILONZO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of C.Obulutsa PM delivered on 6/4/2010 in Kangundo Principal Magistrate Criminal Case No. 697 of 2007)

(Before B. Thurania Jaden J)

J U D G M E N T

The Appellant, **David Kilunja Kilonzo**, was charged on two counts as follows:-

Count I: Assault causing actual bodily harm contrary to **section 251** of the **Penal Code**.

The particulars of the offence were that on 18th day of October 2007 at **Kambai village, Kangundo Location in Kangundo District** of the **Eastern Province**, unlawfully assaulted **Muli Kilonzo** thereby occasioning him actual bodily harm.

Count II: Creating a disturbance in a manner likely to cause a breach of the peace contrary to **section 95 (1) (b)** of the **Penal Code**.

The particulars of the offence were that on the 18th day of October 2007 at **Kambai village, Kangundo Location in Kangundo District** of the **Eastern Province** created a disturbance in a manner likely to cause a breach of the peace by chasing **Julius Ngove Musembi** with a panga threatening to cut him. The appellant pleaded not guilty to the charge. After a full trial, the Appellant was convicted and sentenced to serve four years in count I and six months in Count II. The sentence ran concurrently.

The Appellant was aggrieved by the conviction and sentence and appealed to this court on the grounds that the prosecution evidence was contradictory. That the Appellant was also assaulted by the complainant. He further stated that the sentence of four years was excessive and prayed for a non-custodial sentence.

The Appellant was represented by **Mung'ata Advocate**. The State Counsel, **Mr Mwenda** appeared for the State.

During the hearing of the appeal, the Appellant's counsel relied on the written submissions. The submissions essentially expounded on the grounds of appeal. It was further submitted that orders made for the Appellant to be taken for a mental examination by a psychiatrist were not complied with.

The State Counsel conceded to the appeal. He submitted that the Appellant's mental status was not assessed. He also pointed out that the Appellant was also injured by the complainant.

This being a first appeal, I am duty bound to re-evaluate the evidence and the record afresh and come to my own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.

PW1, **Muli Kilonzo** the complainant testified that the Appellant is his younger brother. It is the evidence of PW1 that he was at home at about 1.00 p.m. on the material date when he saw the Appellant who was with three other people working on his (PW1's) farm. The complainant told them to stop working on his farm. The complainant moved near where the work was being carried out and the Appellant and his colleagues left. The Appellant threw a jembe at the complainant. The jembe hit the complainant on the left hand and damaged the complainant's wrist watch. The complainant fell down. The Appellant picked one of the other jembes and hit the complainant with it on the right leg at the ankle. The complainant held on to the jembe and dragged the Appellant.

The village elder, PW2 **Julius Ngove Musembi** who was attracted to the scene by the commotion separated them. The Jembe blow left the complainant with a fractured leg. The Appellant took a panga and chased away the village elder, threatening to kill him. The village elder ran up to his gate. In the process the village elder's shoes came off. The Appellant cut the shoes into pieces. The village elder blew a whistle and members of public helped the village elder in arresting the Appellant and escorted him to the chief's office.

The matter was reported to **Kangundo police station**. The complainant was issued with a P3 form and treated at **Kangundo District Hospital** where he was admitted.

The Appellant in his defence gave sworn evidence. He stated that the complainant was his elder brother. The Appellant stated that he was working on his land which he inherited from his father when the complainant ordered him to leave. That the complainant threatened him with a panga. The Appellant hit the panga with a jembe. A struggle ensued. The complainant hit the Appellant on the shoulder with a stick. In the process a tree stump hit the complainant on the leg, injuring him. The village elder appeared at the scene and was told not to collect the panga. The village elder left the scene. The Appellant later reported the matter to the police then went home. Members of public then attempted to ambush him and tore his clothes in the process. The Appellant was detained at the police station for two days and ordered to give the complainant Kshs.200,000/= and a piece of land. The Appellant was then charged. According to the Appellant, there was a land dispute.

The complainant's (PW1) evidence that the Appellant attacked him with a jembe and fractured his leg is corroborated by that of the village elder (PW2) and a passerby, PW3 **Pius Mutinda Kisini**.

Both the village elder and the passerby were eye witnesses who have testified on the struggle between the complainant and the Appellant. Although the passerby found the complainant's leg already broken, the village elder's evidence is that he hit the complainant with a jembe on the leg. According to the village elder, the leg was fractured and the bone was protruding.

The village elder's evidence that the Appellant chased him away with a panga is corroborated by the evidence of PW3 the passerby. The evidence of PW4 **David Maina** a police officer from **Kangundo Police Station** confirmed that a report was made at the police station and investigations carried out.

PW5 **Dominic Mbindyo**, a Clinical Officer produced the complainant duly filled in P3 form. According to the Clinical Officer, the complainant had a fractured tibia and a painful hip.

PW6 **Dr Mwangi** produced X-ray report that showed the fractures sustained by the complainant.

Although both the Clinical Officer and the doctor were not the officers who made the documents that they produced, the said officers were familiar with the handwritings of their colleagues who had made the documents in the normal course of their duties but were no longer available to testify. There were

therefore no procedural flaws and no prejudice was occasioned to the Appellant.

On the other hand, the evidence by the Appellant that during the struggle with the complainant a tree stump hit the complainant's leg does not clearly indicate how the tree stump came to hit the complainant's leg. The Appellant gave unsworn evidence. No witnesses were called. There are no reasons why the village elder and the passerby would give false testimony against the Appellant.

Although the Appellant testified that there was a land dispute, it behoved on the parties to solve their differences lawfully.

The Appellant's advocate submitted that the Appellant was also injured. However, there is no evidence to that effect. According to the accused it was the people who arrested him who tore his clothes.

Although this case proceeded from 24/10/2007 to 6/4/2010, with the Appellant appearing before several magistrates, there was no entry of any observations by any of the magistrates to warrant referring the Appellant for a mental examination. The defence counsel on 14/10/2008 requested that the Appellant be escorted to a psychiatrist for a mental examination. The counsel stated that the Appellant had **"no co-ordination in his mental faculties"**. Subsequently on 26/11/2009 the counsel withdrew from acting for the Appellant due to what he termed as difficulties in communication due to the Appellant answering **"questions in a manner showing he is not normal"**.

Although the court made orders for the Appellant to be examined by psychiatrist for a mental evaluation, this was not done. There is no such entry captured on the record. The case thereafter proceeded with the remaining of the prosecution witnesses followed by the defence case. The Appellant gave his evidence in a manner that a reading of the same appears coherent. The Appellant also cross-examined the medical officers on the nature of injuries sustained by the complainant.

Although it would have been prudent to have the Appellant examined by a psychiatrist, the allegations by the defence counsel *per se* cannot lead to a conclusion that the Appellant had any mental problems. If the defence was keen on pursuing that avenue that they could have made an application under the provisions of **section 358** of the **Criminal Procedure Code** which stipulates as follows:-

"In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court."

After analyzing the evidence adduced before the lower court, I am satisfied that the prosecution case was proved to the required standard. The defence raised did not cast any reasonable doubts on the same.

The circumstances of this case were aggravated. The sentence meted out was therefore not excessive.

The appeal has no merits and is dismissed.

Consequently, I uphold the conviction and sentence in both count I and II. Orders accordingly.

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B. THURANIRA JADEN

JUDGE

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Dated and delivered at Machakos this 7th day of May 2013.

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JUDGE