REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 39 of 2008

ONESMUS KYUMWA KIMULI ……...…..…… APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

(Being an appeal from the conviction and sentence of B. Ochieng PM delivered on 7/2/2008 in Makindu Principal Magistrate Criminal Case No. 14 of 2005)

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(Before B. Thuranira Jaden J)

J U D G M E N T

The Appellant, **Onesmus Kyumwa Kimuli,** was charged with the offence of assault causing actual bodily harm contrary to **section 251** of the **Penal Code**.

The particulars of the offence were that on the 25th December 2004 at about 11.00 a.m, at **Matiliku** Location, **Matiliku** Division of **Makueni** District within the **Eastern** Province, unlawfully assaulted **Mutuku Maweu** thereby occasioning him actual bodily harm.

After a full trial, the Appellant was convicted and fined Kshs.10,000/= in default six months imprisonment.

The Appellant was aggrieved by the conviction and sentence and appealed to this court on the following grounds:-

Ø **The complainant took four (4) days before reporting the alleged offence to the police and seeking treatment thereby raising doubts as to whether the alleged offence was committed.**

Ø **The medical evidence adduced was hearsay.**
Ø **There were contradictions in the prosecution case.**
Ø **The trial magistrate erred in failing to believe the defence case.**
Ø **The alleged blood stained clothes were not produced as exhibits.**
Ø **The burden of proof was shifted to the defence.**

The firm of **D.M. Ndungi** appeared for the Appellant while **Mr Mwenda** the State Counsel appeared for the State.

During the hearing of the appeal, it was submitted that **section 200** of the **Criminal Procedure Code** was

not complied with by the Magistrate who succeeded the initial one. It was further pointed out that the Clinical Officer who treated the complainant first did not testify, hence the medical evidence on record being termed as mere hearsay. The rest of the submissions made on behalf of the Appellant essentially reiterated the grounds of appeal.

The State Counsel in his submissions conceded to the appeal due to the lack for compliance with the provisions of **section 200 (3)** of the **Criminal Procedure Code**.

The prosecution sought orders for a retrial which was objected to by the Appellant's counsel due to the lengthy period the trial had taken before the lower court.

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**.

The complainant, **Mutuku Maweu** testified that on the material date at about 11.00 a.m. he was herding his employer's livestock at his employer's land. The Appellant who was the area chief who was riding a bicycle went to where the complainant was. The Appellant who almost ran over the complainant with the bicycle insulted the Appellant, grabbed him and placed him on the steering wheel of the bicycle and slapped him on the left ear and on the right ear then hit him on top of the head with the bicycle pump.

The complainant was treated at **Matiliku Health Centre**. He reported the matter at **Sultan Hamud Police Station** where he was issued with a P3 form and obtained further treatement at **Makindu Hospital** and the P3 form duly filled.

According to the complainant, he had not differed with the Appellant but he had reported that the Appellant had harvested some papyrus reeds belonging to his boss.

PW2 **Peter Mutisya,** a fellow herdsman who shared the same employee with the complainant testified that he was called to the scene and found the complainant on the ground bleeding from the right side ear and asked the chief why he wanted to kill the Appellant. PW 2's evidence is that he did not witness the actual beating.

PW3 **Phoebe Wanza Makali** testified that she was the one who called PW2 to the scene. It is PW3's evidence that she saw the Appellant assaulting the complainant.

PW4 **Joel Meka Mbole** who was the complainant's employer received the report of the assault. His evidence is that he had not differed with the Appellant but he was aware that the complainant had refused the chief to harvest papyrus from his (PW4's) land.

The complainant's evidence is therefore corroborated by that of PW3. The report to PW2 and PW4 immediately after the assault is also consistent with the complainant's evidence.

PW5 **Dr Hesbon Macharia** testified that the complainant had sustained soft tissue injuries on both cheeks and the lower back was still tender. The doctor assessed the age of the injuries as five days and gave the type of weapon used as probably blunt. PW5 indicated that he saw the patient on 30/12/04 although the complainant had earlier on been treated at **Matiliku dispensary**. The evidence of the doctor cannot be termed as hearsay. The doctor saw the patient and ascertained the injuries.

The Appellant described himself as the chief of **Nzau Location**. He denied having assaulted the Appellant. According to the Appellant he saw the complainant grazing in his (Appellant's) shamba and told him to drive the animals away. The Appellant stated that he has a land dispute with the complainant's employer. The Appellant further stated the **District Officer (D.O) Matiliku Division** where the complaint was lodged had a problem with him as he had released some suspects who the Appellant had arrested. The Appellant also denied having seen PW2 and PW3 at the scene.

There are no reasons given why PW2 and PW3 would give false evidence against the appellant. Although

the Appellant has denied having assaulted the complainant, it comes out clearly from the doctor's evidence that the complainant was assaulted.

Having re-evaluated the evidence that was adduced before the lower court, I find the prosecution discharged its burden of proof. The complainant's evidence is corroborated by that of the other prosecution witnesses including the medical evidence. The defence raised did not cast any reasonable doubts on the prosecution case.

One of the issues raised in this appeal is the lack of compliance with **section 200 (3)** of the **Criminal Procedure Code**.

Section 200 (3) of the **Criminal Procedure Code** provides as follows:-

"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."

The succeeding trial magistrate herein did not comply with **section 200 (3)** of the **Criminal Procedure Code**.

I have however considered the provisions of **section 200 (4)** of the **Criminal Procedure Code** which provides as follows:-

"**Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."**

Taking into account the full circumstances of the case, including the fact that the Appellant who was duly represented by counsel before both magistrates and fully participated in the same, I am of the opinion that the Appellant was not materially prejudiced to warrant orders for a retrial. I am aware of precedents that take a different position but I have also taken into account **article 159 2 (d)** of the **Constitution** of the Republic of **Kenya** which provides as follows:-

"justice shall be administered without undue regard to procedural technicalities …..".

This court's conclusion is that the Appellant's conviction was based on sound evidence. I therefore, uphold the conviction. The default sentence of six months however exceeds the maximum provided for under section 28 of the **Penal Code**. I therefore, correct the sentence to read Kshs.10,000/= in default three months imprisonment.

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B. THURANIRA JADEN

JUDGE

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Dated and delivered at Machakos this **9th** day of **May** 2013.

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JUDGE