



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**CRIMINAL APPEAL 136 OF 2008**

**REPUBLIC .....APPELLANT**

**VERSUS**

**CHARLES MAKAU MUOKI**  
**DANIEL MUTUKU MUOKI**  
**KIOKO MAKAU**

**EDWARD KIENI MUOKI.....RESPONDENTS**

*(Being an appeal from the acquittal in Machakos Chief Magistrate's Court Criminal case No. 4319 of 2004 by Hon. D.G. Karani, R.M on 24/6/2008*

**JUDGMENT**

The respondents faced a charge of assault causing actual bodily harm contrary to section 251 of the Penal Code before the Chief Magistrate's Court, Machakos. It was said that on 30<sup>th</sup> November 2003 at Kasayani sub-location, Kikumbulyu location, they jointly assaulted **Stephen Kyalo Mbuti** thereby occasioning him actual bodily harm. The 3<sup>rd</sup> and 4<sup>th</sup> respondents faced a second charge of malicious damage to property contrary to section 339(1) of the Penal Code in that on 30<sup>th</sup> November, 2003 at Kivutu village Kathyaka sub-location, Kikumbulyu location of Makueni District within Eastern Province, they willfully and unlawfully jointly damaged maize plants the property of **Stephen Kyalo Mbuti** by uprooting them. The respondents denied the charges and were soon put on trial.

PW1, hereinafter "*the complainant*" testified that on 30<sup>th</sup> November, 2003, at about 9.00am, he received information from one, **Eric Mbuti** to the effect that he had seen two people in his farm cutting down his maize. He and a brother, **Bernard Mbuti** ran to the farm and saw the 3<sup>rd</sup> and 4<sup>th</sup> respondents thereat. Both had bicycles. The 3<sup>rd</sup> respondent was removing the fence around the farm. On seeing them they all ran away leaving behind their bicycles. The complainant took one of the bicycles to Makindu Police Station and filed a complaint. On his way back he met eleven people all known to him. The 1<sup>st</sup> respondent was amongst them. He ordered them to kick him and they set upon him verociously. They were armed with pangas. However, they did not use them. He screamed and one, **Tabitha Katuku** came to his rescue. Whereas 1<sup>st</sup> respondent held his neck 4<sup>th</sup> respondent hit him with a rungu. Other respondents were using their blows to assault him as the 2<sup>nd</sup> respondent pulled his testicles. They were demanding for the bicycle that he had taken to the police station. The 1<sup>st</sup> respondent proceeded to take a court order from his pocket plus a land certificate which he said he had been looking for. Attracted by the

commotion, some people came from a church and pleaded with the respondents to leave the complainant alone. They complied. The complainant following this incident again reported the encounter at Kibwezi Police Station and was referred to Makindu Sub District Hospital for treatment. The respondents were later arrested and charged.

PW2 in the meantime was at Kasayani market where she had gone to buy drugs. On her way home, she heard someone shouting. She went to the scene and found PW1 on the ground. There were nine bicycles and nine people. She identified four of them as the respondents. On the bicycles were pangas but the people were using rungus to hit the complainant and that villagers told them to stop it. She did not know the cause of the fight. Otherwise the complainant was bleeding from his face and 1<sup>st</sup> respondent took some documents from his pocket.

On his part PW3, 30<sup>th</sup> November, 2003 at about 9.30 a.m. was at home when his son, **Eric Munyao** came and reported to him that some two people had chased him away from where he was grazing his goats and that they had entered PW1's farm. He and PW1 went to the farm and found 3<sup>rd</sup> and 4<sup>th</sup> respondents. Whereas the 3<sup>rd</sup> respondent was destroying the fence, 4<sup>th</sup> respondent was busy uprooting maize seedlings. On seeing them they ran away and left behind a bicycle. He advised the complainant to go and report to the police. He went to church and after service the same **Eric** came and reported to him that some eleven people had gone to their home and beaten the complainant's wife. He waited till they had left and after a while the complainant's wife went to him and confirmed that indeed she had been beaten. At about 2.30 p.m, PW2 told him that the complainant had also been assaulted by some people. He ran to the scene and found the complainant just after the brawl. He had a bandage on the eye and was limping.

PW4 on the material day at about 2.30pm was at home when she heard screams. She went to the scene and found the complainant being beaten by eleven people. She recognized two of them. They were strangling him and were armed with rungus. She was able to recognize the 2<sup>nd</sup> and 3<sup>rd</sup> respondents among them. While the 1<sup>st</sup> respondent was strangling the complainant the 4<sup>th</sup> respondent was pulling his private parts. The 1<sup>st</sup> respondent pushed her away. She screamed and several people came from a church. The respondents had pangas on their bicycles. In the process the 1<sup>st</sup> respondent took some documents from the pocket of the complainant.

PW5 said that on the said date she heard people shouting and calling out the name of the complainant. They were asking where he was so that they could fight. She recognized 1<sup>st</sup> respondent among them. It was about 12.00 p.m. He was armed with a panga and two stones and was demanding for his bicycle. She told him that PW1 had taken the bicycle to Kibwezi Police Station. 1<sup>st</sup> respondent threatened to kill PW1 so that she could be widowed. She ran away when 1<sup>st</sup> respondent called some people who started harassing her.

PW6 saw two people enter the complainant's parcel of land and began to uproot maize. They were 3<sup>rd</sup> and 4<sup>th</sup> respondents. They also chased away one **Eric** who was grazing goats nearby. They ran away when they saw the complainant approach, and in the process left behind a bicycle. Later at about 12.00 p.m 1<sup>st</sup> respondent accompanied by a group of people went to the home of the complainant and asked PW5 where he was. They chased PW5 and 4<sup>th</sup> respondent beat PW6.

PW7 on 30<sup>th</sup> November, 2003 was grazing goats when 3<sup>rd</sup> and 4<sup>th</sup> respondents chased him away. He went and reported them to the complainant.

PW9, a clinical officer attended to the complainant and produced the P3 showing injuries sustained by PW1. He assessed the degree of injury as harm.

When put on their defence, the respondents denied the charges. In his sworn statement in defence, 1<sup>st</sup> respondent told the court that on 30<sup>th</sup> November, 2003 he had gone to the home of the complainant to

enquire about a bicycle that had been left behind by 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents. He was informed that the same had been taken to Kibwezi Police Station by complainant. He decided to go to the station and on the way he met the complainant who confirmed that he had in fact taken the bicycle to the station. He asked him to go and sign for it but on the way he, (*the complainant*) ran away and went to a neighbour's house where he asked for a panga. He did not get it. He went on to tell the court that he snatched an envelope from the complainant's pocket and refused to hand it back to him. He was arrested on the same day and charged with the present offence. He denied having assaulted the complainant on his part stated that he, 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents went to the home of the complainant to enquire about a bicycle that had been left behind by 3<sup>rd</sup> and 4<sup>th</sup> respondents after they were attacked by the complainant and another person. They learnt from a child of the complainant that the bicycle had been taken to Kibwezi Police Station by the complainant. They decided to go to Kibwezi Police Station and on the way they met the complainant who asked the 1<sup>st</sup> respondent to go to the station for his bicycle. On the way the complainant ran and entered a homestead. He refused to accompany them to the station. That 1<sup>st</sup> respondent snatched some documents from his pocket who screamed and attracted a group of people who were in a nearby church. He denied having assaulted him.

The statements of 3<sup>rd</sup> and 4<sup>th</sup> respondent in their defence echo those of 1<sup>st</sup> and 2<sup>nd</sup> respondents in material and fact. I need not reproduce them here.

The learned magistrate having carefully considered the evidence on record was not persuaded that the prosecution had proved its case against the respondents. Accordingly he acquitted them under section 215 of the Criminal Procedure Code. This acquittal triggered this appeal by the State. In faulting the judgment of the learned magistrate, the State advanced 4 grounds to wit:-

***“1. The learned trial magistrate erred in law in***

***acquitting the Respondents when the prosecution had proved its case to the required standard.***

***2. The learned trial magistrate erred in law when he failed to comply with the term of section 200(3) of the Criminal Procedure Code.***

***3. The trial magistrate erred in law in considering extraneous matters which matters were not conversed (sic) or relevant in the determination of the case.***

***4. The learned magistrate erred in law and fact in holding that the prosecution's case was shrouded in inconsistency and contradiction when it is very clear from the evidence on record that the prosecution's witness corroborated each other in the case”.***

When the appeal came up for hearing before me on 11<sup>th</sup> June 2012, **Mr. Mukofu**, learned State Counsel submitted that the State was not satisfied with the acquittal of the respondents. There had been non-compliance with section 200(3) of the Criminal Procedure Code. The prosecution case had been heard by **Hon. Ireri**. She took the evidence of 8 witnesses. **Hon. Karani** then took over the case on 16<sup>th</sup> October, 2007, heard the defence case. However, in doing so, he had failed to comply with the mandatory provisions of section 200(3) of the Criminal Procedure Code. The acquittal was in the circumstances a nullity and this court should so hold. He however prayed for a retrial.

The respondents on their part were not averse to the order for retrial. The 1<sup>st</sup> respondent however, pointed out that they should not be penalized for the omission of the trial magistrate and this court should bear in mind that there were many cases between the respondents and the complainant.

The only ground urged by the State in support of the appeal is that the trial court erred in law when it failed to comply with the terms of section 200 (3) of the Criminal Procedure Code. That section is in these terms-

***“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 re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right”.***

As it can be readily seen, that section is for the protection of the accused and not the prosecution. The incoming magistrate owes a duty to the accused to inform him of his right to have the witnesses(s) who had previously testified re-summoned and reheard. That duty is neither reciprocal nor transferrable to the prosecution. In this case, much as the incoming magistrate did not comply with those mandatory provisions of the law, they suffered no prejudice. They were after all acquitted. They have not complained regarding their acquittal. Nor did they demand that the witnesses be re-summoned and reheard and the trial court refused. All fair trial provisions both in the Constitution and in the Criminal Procedure Code are aimed at the protection of the accused person and not the prosecution. Those provisions and ofcourse section 200 of the Criminal Procedure Code is one of them, cannot be used against the accused, the appellants in this case by the prosecution.

This being the only ground urged by the State in support of the appeal and which I find unmeritorious, leaves me with no option but to dismiss the appeal. Order accordingly.

**JUDGEMENT DATED, SIGNED and DELIVERED at MACHAKOS this 12TH day of JULY, 2012.**

**ASIKE-MAKHANDIA  
JUDGE**