



**REPUBLIC OF KENYA**

**High Court at Kisumu**

**Criminal Appeal 132 of 2010**

**REPUBLIC .....APPELLANT**

**VERSUS**

1. **VITALIS NONGA SHUMA**
2. **MICHEAL MURUKA OTENG**
3. **EDWIN ODHIAMBO OLENGO**
4. **LEONARD OKUMU OBONYO**

5. **JARED ANDINGA OLAKA.....RESPONDENTS**

6. **PATRICE SAGAYO OBONYO**
7. **MORRIS NUDI ADHALA**
8. **DALMAS OKETCH OHUMA**
9. **MARGARET ACHIENG NUNGA**
10. **JANET ALOO OKETCH**

**JUDGEMENTS**

\_\_\_\_\_ This is an appeal by the State against the judgment of the Resident Magistrate Siaya in RMCC No.841 of 2005 delivered on 5th March, 2010. In that case the accused persons were Vitalis Nonga Shuma, Michael Muruka Oteng, Edwin Odhiambo Olengo, Leonard Okumu Obonyo, Jared Andinga Olaka, Patrice Sagayo Obonyo, Morris Nudi Adhala, Dalmás Oketch Ohuma, Margaret Achieng Nunga and Janet Aloo Oketch. They had all been charged with the Offence of Assault causing actual bodily harm contrary to Section 251 of the Penal Code.

They all pleaded not guilty to the charge and the matter went for full trial at the end of the trial they were all acquitted. The State was dissatisfied with the judgment which then triggered this appeal on the grounds that the trial magistrate erred in law in acquitting the respondents under Section 215 of the Criminal Procedure Code based on a wrong decision.

At the hearing of the appeal the State was represented by learned Principal State Counsel

Miss Mary Oundo and the respondents by Mr. Aringo Advocate. As at the time of hearing respondents No.6 & 9 were deceased.

The learned State Counsel in her submissions stated that the acquittal was based on wrong decision and her appeal was purely based on law in line with Section 348 of the Penal Code. She argued that the evidence of Assault was clear as the assault was occasioned during broad daylight as evidenced by the testimony of PW3 & PW4. There was a P3 form that confirmed injuries sustained yet the court faulted the fact that the investigating officer was not a witness, yet lack of his evidence did not in any way water down the prosecution evidence. It was her argument further that the prosecution proved a criminal intent by the respondents and subsequent injuries sustained and that the P3 form was an indication of the said injuries. She further submitted that there was no gap in the prosecution case that would have necessitated an acquittal.

The defence counsel opposed the appeal on the grounds that the trial court evaluated the evidence on record and found the same wanting. It was his argument also that the said evidence was full of contradictions, further the court found the evidence of PW3 & PW4 lacking in probative value in which case the court found the absence of the investigating officer weakened the prosecution case.

This being the first appellate court it has the duty to re-consider the evidence afresh, evaluate and analyse the same in order to arrive at its own opinion.

The evidence on record was as follows:

**PW1 KENNEDY ODUOR OTIENO** recalled that on the 3/1/2005 at about 8 a.m. As he was on his way to Ralak Thim Primary school where he was a headmaster he received news that some people were waiting for him to block him from entering the school on the allegation that he had misused funds from the school. He reported the information to O.C.S. Siaya Police station and was advised to go to school but return if the group was there. He went and on reaching the gate he found the group which comprised of the respondents. He passed them as he rode his bicycle and the group that was armed with sticks and other weapons followed him, got hold of him and beat him seriously. He recalled that the first beating was from the 1st respondent and the 8th respondent stepped on his chest and lit a fire they were to burn him with. It was also his testimony that he saw the group well. The group also tore his coat and damaged a bag he was carrying; a phone Siemens CSO, Kshs.12,250/= and his wristwatch were stolen. He reported the matter to Siaya Police Station, he went to Siaya District Hospital where he was treated, discharged and was issued with a P3 form.

**PW2 PETER OWITI** – A clinical officer at Ratuoro Health Centre and previously of Siaya District Hospital. He did not prepare the P3 form in this case but treated PW1 and wrote the medical/treatment notes. It was his evidence that the said person at the time of treatment had sustained injuries due to an assault. He had bruises to the right leg, tenderness at the chest and buttock. He was also known to the persons who signed the P3 form and knew his signature. The person had been transferred.

**PW3 IBRAHIM ODUOR OGOLA** – on the 3/1/05 he was a student. He saw a group of people assault PW1. He identified 1st, 2nd and 5th respondents whom he saw with rungu and fire. He recalled his father asking them not to kill PW1 near their home.

**PW4 ISAAC ODHIAMBO**. He recalled that on 3/1/05 while working on his shamba he heard noise coming from Ralak Primary School. He recalled seeing 1st, 2nd, 8th 9th respondents and others beating a person who was a teacher near his compound.

The court at the close of the prosecution case found the respondents had a case to answer and they were put on their defence.

**DW1 – VITALIS NONGA** - gave a sworn statement as follows:

He knew the complainant who was a teacher at Ralak Primary school which is about 5 metres from his

home and where his children attended. He did not assault the complainant. He is known to his co-respondent who are his relatives. In cross-examination he stated that parents were not happy with the management of the school further that although there were people near the school gate however he was not there.

**DW2 MICHAEL MURUKA OTENG** also gave sworn statement as follows:

He knows the complainant a teacher. He did not assault him as alleged as on the material date he was working in his shamba. In cross-examination he said that people were not happy with the management of the school and that is why PW1 was chased.

**DW3 EDWIN ODHIAMBO OLENGO** gave a sworn statement. He was also known to the complainant. He denied assaulting the complainant.

**DW4 LEONARD OKUMU** also gave a sworn statement. He denied the assault.

**DW5 JARED AMUNGA** also gave a sworn statement also known to the complainant. He equally denied assaulting the complainant.

**DW7 KENNEDY ODUOR** gave unsworn statement. He is known to PW1 but denied the assault and so did DW8, DW9 and DW10.

The 6th respondent had died and therefore the case against him was withdrawn.

Having considered the record and submissions by counsel the issue for determination is whether or not PW1 (the complainant herein) was assaulted and if so whether there evidence linking the offence to the respondents (accused persons)

There is no doubt in my mind that the complainant was assaulted by a mob on the 3rd of January, 2005, for alleged misuse of funds in Ralak Primary School where he was then a headmaster. There is ample evidence from both the prosecution and the defence that there was an allegation of misuse of school funds. PW2, PW3 & PW4 testified to the injuries sustained. PW2 was a Clinical officer who examined PW1 a day after the incident. He found him with injuries to the chest, buttock and the right leg. I find this to be consistent with the evidence of PW1 who stated that he was attacked by a mob, and hit at the back initially by 1st respondent. I do find the evidence of PW2 credible and reliable. Indeed his evidence clearly shows “bodily harm” consistent with Section 251 of the Penal Code. PW3 & PW4 saw the incident and testified to have seen some of the respondents further corroborating the evidence of assault. I therefore as a matter of fact find that the complainant was assaulted and indeed suffered injuries.

However the principle issue is whether there was any evidence linking the respondents to the crime. PW1 the complainant stated that he identified the respondents as part of the group. His evidence is corroborated by that of PW3 and PW4 who gave names of some of the respondents. What I find interesting is the admission by all the respondents who testified to the fact that people were angry due to the allegation of his management of school funds but with the same breath they all denied having assaulted the complainant, I disbelieve their denial. I see no reason why out of a large group, PW1 and his witnesses would pick on only a few if indeed they did not participate in the assault. It may be true that all of them may not have assaulted PW1 but they were part of the gang that decided to take the law into their hands, they are deemed to have committed the offence.

Section 21 of the Penal Code provides:

**“where two or more persons form a common intention**

**to prosecute an unlawful purpose in conjunction with**

**one another, and in the prosecution of such purpose an  
offence is committed of such a nature that its  
commission was probable consequence of the prosecution of  
such purpose each of them is deemed to have committed  
the offence.”**

I have also considered the provisions of section 20 of the Penal Code and I am convinced that all the respondents were guilty as charged.

The investigating officer in my view would merely have corroborated the evidence of the prosecution witnesses, who witnessed the commission of the offence. There were no loss ends for the investigating officer to have tied and I do, therefore I do fault the trial court on this and consequently I set aside the judgement acquitting the respondents and I find each one of them guilty of the offence.

Before passing sentence I will ask each one of them to make their mitigation.

**Dated and delivered this 6th day of November 2012**

**ALI-ARONI  
J U D G E**

**In the presence of:**

.....**State counsel**

.....**Counsel for the respondents**