



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 94 of 1998

JOSEPH LUMUMBA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From Original conviction and sentence in criminal in case No.4319of 1996 of the Chief Magistrate's court at Mombasa).

JUDGEMENT

Appellant was convicted on 24.4.98 by Miss J. Siganga - SRM of the offence of causing grievous harm contrary to S.234 of the Penal Code and sentenced to some 2 years imprisonment and to suffer 4 strokes of the cane. 3 prosecution witnesses gave evidence for the prosecution.

PW 1 the complainant said that on the 9.6.96 or about 8 pm. while approaching his residence farm wall, he was stopped by 3 men by one of whom asked him where he came from and then they asked him about what he had said the previous night, he responded that he had told the lady not to close the door as his child was out. He recognised the man questioning him as JOSEPH LUMUMBA his neighbour. The accused hit him with a hammer and he fell down but they continued hitting him. When he screamed, neighbours came out but the attackers fled. He was taken to a clinic for treatment then he reported at the Changamwe Police Station where he was given a P 3 form. His collar bone was fractured. It would appear that the appellant disappeared and was only arrested on 13.12.96.

He could identify the accused appellant because from a nearby open window was a chimney lamp light which lit up the scene and made him see accused's face.

PW 2 Charles Ouma Makonde reiterated when PW 1 said in some particulars and said that he had just talked with the PW 1 at about 8 p.m. as he walked to his block which was neighbouring theirs. He heard commotion and with another neighbour near went to the scene. He saw as he flashed his torch 2 people run away but a third entered into PW 1's adjacent block. PW 2 and his companion followed the one who entered the building adjacent and found appellant standing by his door with a hammer in his hands. He threatened them. PW 2 flashed his torch and recognised the appellant. He knew him as he was a neighbour he had seen him for 9 months before. They then took PW 1 to the Hospital. PW 3 P.C. Samuel Okoth recorded the report in 9.6.96 at 8 p.m. of the incident and gave PW 1 P3 form to take to a Doctor. He said the appellant went underground and was not traced until December, 1996.

The appellant gave sworn statement saying that the complainant had abused his wife the previous night but because it was late on that day he left the matter for the next day so when they met the next day near

the gate to their house at about 7 p.m. the complainant abused him, grabbed him and fell him down he in turn pushed the complainant who fell down, neighbours came and separated them. He denied hitting PW 1 or that he was in company of any other person.

DW 2 Janet Atieno said that complainant PW 1 abused appellant's wife on 9.6.96 when the wife of appellant unknowingly locked out the son of the appellant but her story corroborated that of appellant that the next day appellant met PW 1 at the door and struggled with him. They fought and the appellant hit the complainant. They were separated but then later PW 1 went to appellant's house and challenged him to a fight to death but a Mr. Charles Otieno separated them.

DW 3 the wife confirmed that complainant abused her and she told her husband who next day told her PW 1 beat him and he decided to return to the house

The Learned Magistrate accepted the prosecution evidence and rejected the denials of the defence witness. She found that the appellant hit the complainant and caused him such injuries as a result of a fight both had entered into. She found that the appellant had wanted to subdue PW1 for used excessive force.

The appeal against the same was argued by Mrs. Amadi for the appellant who argued the appeal for the 6 grounds on 3 clusters. First she said the P3 Form was irregularly produced by a police witness instead of the doctor who filled it and she relied on the Court of Appeal decision in the case of RAJAB ABDALLA in R v Cr. Appeal No. 86 of 1997.

Secondly, that the evidence of PW 1 and PW 2 did not corroborate each other and the Learned Senior Resident Magistrate erred in believing it as there was material contradiction.

She also said that evidence shows that there was a scuffle and so they should have both been charged with a felony but Mr. Ng'eno, State Counsel supported the conviction and said that the prosecution tried to bring the doctor who executed P3 form but was not available as he was not there and could not be found.

There is no doubt that the evidence established that both appellant and the complainant took part in a fight. It is also not in dispute that the fight was physical and the complainant was pushed and fell down and hurt himself thereby. Grievous harm is described in S 4 of the (Penal Code as:- "any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely to injure health or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ membrane or sense". Then the offence created under S.234 says any person who unlawfully does grievous harm to another is guilty of a felony.

For this proof of grievous harm, medical evidence is essential and much more so because offences under S.237 and thus under Chapter 24 particularly common assaults and assault causing actual bodily harm in Sections 250, 251 require medical diagnosis to identify.

The doctor did not produce the P3 form. The Learned Magistrate accepted the evidence. Normally the law is that such a admission would be wrongful according to that judgement and such a wrongful admission had in fact deprived the accused of a reasonable chance of acquittal in such a case. It has occasioned injustice but the question is whether in law it is a wrongful admission of evidence. When one relies on: S.77 of the evidence Act which clearly says that:-

"In criminal proceedings any document purporting to be a report under the hand of Government Analyst Medical Practitioner or any ballistic expert document executor or any Geologist upon any person, matter or thing submitted to him for examination may be used in evidence."

I believe the Senior Resident Magistrate could use P3 forms submitted as having been signed by a doctor.

Secondly, the Doctor was summoned but could not be found such that the P3 form was admissible under S.33 of the Evidence Act.

It is my view that notwithstanding the decision of Abdala case I do not think the admission of the evidence was against that decision.

It is therefore quite clear that the evidence of grievous harm was then proved

But Mrs. Amadi has argued that the two persons engaged in affray. It is provided under S.92 of the Penal Code that:

It is a fray where a person takes part in a fight in a "public place".

"Public place" as described under S.4 of the Penal Code as including:-

"any public way and any building place or conveyance to which for the time being the public are entitled or permitted to have access either without any condition or upon condition of making any payment"

Here there is evidence that no fight took place in open area in front of the building. It is no doubt to me that was a public place. The question to ask is who hit the complainant on the soldier.

There is no direct evidence other than that of the complainant who said accused hit him with a hammer, but this evidence was corroborated by the presence of the appellant with use of the appellant at his door clutching on a hammer and on the Doctor's finding that the instrument used is a blunt instrument.

I think there was evidence to support the conviction and I accept the findings of the SRM. I dismiss appeal against conviction.

As for sentence, the Penal Code provides a life sentence, but the Learned SRM did not give an option of a fine. I think she should have. Both the appellant and the complainant actually engaged in a fight and this is a case which was almost in the border-line between the offence charged and affray. Contrary to Section 92. I have looked at the motive of the quarrel, the domestic nature of the matter, the mitigation of the accused, I think without altering the period of sentence I would give an option of a fine in the amount of Ksh.15000/= and in default, the period of 2 years imposed be served by accused.

Delivered this 19th day of february 1999.

A.I HAYANGA

JUDGE