

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KSIUMU
(CORAM: CHESONI, C.J. OMOLO & SHAH, J.J.A.)
CRIMINAL APPEAL NO.60 OF 1997
BETWEEN

JACOB OPIYO.....APPELLANT
AND
REPUBLIC.....RESPONDENT

**(Appeal from a Judgment of the High Court of Kenya at Kisumu (Justice Wambilyangah) dated
28th February, 1997**

in

H.C.CR. APPL. NO.463 OF 1995)

JUDGMENT OF THE COURT

Jacob Opiyo, hereinafter called the appellant, appeals for the second time to this Court after his first appeal to the superior court was dismissed. The appellant was tried and convicted on a charge of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of that charge were that on the 8th day of April, 1995 at Kolowa village in Kisumu District he had unlawfully assaulted one Elly Odanga and thereby occasioned the latter actual bodily harm. Upon his conviction the District Magistrate sentenced the appellant to pay a fine of shs.3,500/= which he paid.

This being a second appeal, the Court is only concerned with issues of law. The one issue of law which Mr. Onsongo for the appellant argued before us was put in this way.

The complainant was allegedly assaulted by the appellant on the 8th April, 1995. He was medically examined by Dr. Joseph Imbuye on the 13th April, 1995. According to the doctor when he examined the complainant, the relevant injury on him was about two days old. That would mean that the complainant was assaulted on or about the 10th or 11th April, 1994 so that the appellant's contention that though he had had a confrontation with the complainant on the 8th April, 1994 he (appellant) did not cause the complainant any injury might well be correct. Neither the trial magistrate nor the learned Judge on first appeal dealt with this point. Mr Karanja for the Republic accepted that this was a relevant factor which the two courts below ought to have considered. Failure to consider a relevant factor is itself a question of law which would entitle this Court to interfere with the concurrent findings of the two courts below. We do not know how the two courts would have resolved to point, had they considered it.

It may be that they might have come to the conclusion that Dr. Imbuye was mistaken in saying that the injuries on the complainant were two days old and that it was the appellant who had inflicted the injuries. But it may as well be that they could have found that if the injuries were only two days old on the 13th April, 1994, then they could not have been inflicted by the appellant on the 8th April, 1994 and that the complainant must have sustained the injuries much later after his confrontation with the appellant. At this stage we can only resolve that this appeal is allowed, the conviction is quashed and the sentence set aside. The fine of Shs.3,500/= if paid is to be refunded to the appellant. We so order.

Dated and delivered at Kisumu this 25th day of March, 1998.

Z.R. CHESONI

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CHIEF JUSTICE

R.S.C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR