



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO. 748 & 343 OF 1993 (CONSOLIDATED)**

**ELISHA TINGA KARISA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Criminal Case No 2250 of 1991 of the Senior Resident Magistrate's Court at Nairobi: S O Odak Esq)**

**JUDGMENT**

Criminal Appeal No 343 of 1993 filed by the appellant in person and Criminal Appeal No 748 of 1993 filed through his counsel are consolidated.

The appellant, Elisha Tinga Karisa, was at the material time, a police constable stationed at dog section, at Kabete Police Station, Nairobi. He was charged with, and convicted of two counts for the offence of unlawful confinement contrary to section 263 of the Penal Code (count 1) and grievous harm contrary to section 234 of the Penal Code (count 2) . Upon his conviction, he was sentenced to a fine of Shs 10,000/- or in default one year imprisonment in respect of count 1 and to serve 5 years with 2 strokes in respect of count 2. His appeal to this Court is against conviction and sentence.

Briefly, the prosecution case was that on the material night, 10th April, 1991, the complainant, Samuel Karanja Muriakiara (PW1) and Jonathan Waigwa (PW3) had gone to the bar of a friend, David Muhia (PW2) at Kinoo Market. This was at about 7 pm. They were from Sigona Club where they had gone to play some golf. They then started taking drinks there till 11.00 pm when they decided to leave. On the way, they missed the correct diversion and their vehicle landed into a ditch. They were unable to get the vehicle out of the ditch and returned to the bar for assistance. Still they could not get the vehicle out and they called some young men at the nearby Uthiru Market who came to assist them and finally they took the car out of the ditch. It was the prosecution case that as the complainant and his companion were now inspecting the damages on the car, two police officers on patrol duties arrived and one of them had a dog. The police officers then immediately gave orders for them to stop saying that they were under arrest. As the police officers drew nearer, the appellant who was then holding a police dog asked for the vehicle keys but the complainant replied that he did not have the keys as the vehicle did not belong to him. He says that the appellant then kicked him on the leg and he fell down. The appellant then jumped on that leg with boots and smashed his left ankle. The complainant's companion, David (PW2) then asked the police officer what the complainant had done and he too was hit on the head with an object. The complainant then remained helpless on the ground for a long time till a Land-Rover came and he and his colleagues were then taken to Kabete Police Station where the appellant booked them for the offence of resisting arrest, drunk and disorderly; and failing to report an accident. They were locked in the cells till the

following day when the OCS released them on cash bail of Shs 1000/- each. The complainant then proceeded to Nairobi Hospital where he was admitted and operated on the fractured leg and metal plate and pins inserted for support. Upon being discharged, he went to CID headquarters and reported the incident and later the appellant and his co-accused who was with him on the material night were arrested and charged. The complainant denied that he had sustained fractured leg during a fall anywhere on the material night and mentioned that it was the appellant who had fractured it using his heavy boots to kick him.

In his defence, the appellant states that on the material night when he and his colleague were on patrol duties, they came across a Nissan car Reg No KZS 854 while being pulled from a ditch by a motor boozer. As they moved nearer to observe what had happened, the lorry drove away leaving 3 men behind. As the engine of the vehicle was on, they took away the keys and ordered the occupants to get out. It was then that he noticed the complainant lying down being supported by another but they defied his way to stop and attempted to move away. He interrogated them and placed them under arrest for causing and failing to report an accident; being drunk and disorderly; and attempting to escape from lawful custody. They stopped a passing vehicle and took the three men to Kabete Police Station where they were booked. On the following day, the said men were released but the charges he was preferring against them were not investigated. He stated that in his experience as a dog handler, if ever he had attacked the complainant as alleged, the dog which he was then holding would have

joined in the attack and yet this was not the case. He stated that he believed he had made a lawful arrest when he took the 3 men to the Police Station. He denied to have caused any injury to the complainant.

The learned trial magistrate's approach to the issues raised in the evidence was quite enormous. Without the slightest consideration by the defence case, he started off with a scalling attacks on the police generally. He stated as follows in his opening paragraph:-

“This is a most unfortunate case of injustice committed against our people by our otherwise disciplined force whose motto is well mentioned service to all. But it beats sense how officers on patrol duties could conduct themselves in the manner they did. This was a self accident reporting does not even arise.”

It is true that if the complainant's story and that of his witnesses were to be believed, then the two police officers behaved in an awkward manner which required condemnation. But the appellant is saying: “I did not behave as they are alleging. I did not cause him the injuries complained of.”

Clearly the case required an investigation not only before any decision was made to arrest the two police officers and have been charged, but even after that, by the Court which was duty bound to evaluate all the evidence before it in an impartial and objective manner.

There is no dispute that the complainant had sustained a fractured leg. This is clear from his own testimony and from medical evidence. It is not disputed that shortly before his arrest, he and his colleagues had been involved in an accident in which their vehicle had missed the road and landed into a ditch. They all explained how they tried in vain to get the vehicle out of the ditch and had to seek for help to get it out. It is not also disputed that on the very night, the complainant and his colleagues had been drinking between 7 pm and 11 pm. Although the complainant denies that he was drunk at the time of the said accident, the fact remains that he was under the influence of alcohol.

Three possibilities therefore arise as to how the complainant could have sustained the injuries complained of. First he could have sustained them during the accident when the vehicle landed into the ditch, secondly, he could have broken his leg while the other colleagues were trying to pull

the vehicle out of the ditch. In the state in which he found himself having been consuming alcohol from 7 pm to 11 pm, he could not probably stand steadily while trying to lift the vehicle out of the ditch and the possibility that he could then fall down was always there; and thirdly, he could have been kicked and brutalized by the appellant as he alleges.

It is admitted that the appellant was handling a dog during the incident. He raises a valid point which was never explored by the learned magistrate that if he had attacked the complainant by kicking him several times as alleged, the dog would have joined him in the attack but this was not the case. According to him, he found the complainant already injured and being supported by one of the colleagues. Personally, I have found it difficult that the police dog would just stare as its handler was busy kicking the complainant with his boots quite repeatedly.

Given the proximity in time of the said accident and the arrest of the complainant by the police officers at the scene of the said accident, I am not satisfied that it was not satisfactorily resolved as to how the complainant sustained the injuries complained of. I believe that the 2nd count of grievous harm was not adequately proved.

It was also, I believe, a blunder by CID officers to arrest the appellant without first investigating the arrest report outlined by the appellant in the OB. He had arrested the complainant and his colleague with specified offences which ought to have been investigated and discarded before the appellant himself could face the charges that were laid against him of unlawful confinement. He mentions that he had made a lawful arrest and it was necessary to first establish that his initial arrest of the complainant and his companion was unlawful or baseless. No attempt was made to investigate the circumstances under which he had carried out the said arrest. I think, I would be right to say that the whole case against the appellant was very poorly investigated by the CID officer who decided to arrest him. Cpl Joel Mutokaa (PW5) who arrested the appellant herein confirmed to the Court during cross-examination that the offences for which the appellant had initially arrested the complainant and others "were never investigated". It was therefore wrong to charge him with the offence of unlawful confinement as the charges which he had preferred against the complainant were not pursued or investigated. I hold that the charge against him of unlawful confinement was not proved beyond reasonable doubts.

All in all and for reasons stated, I am satisfied that the guilt of the appellant

in respect of the charges that were laid against him were not safe. I allow his appeal. I quash the conviction of the appellant and set aside the sentence that had been imposed on him. I order that he shall be set free and be released forthwith unless otherwise lawfully held. If any fines were paid, the same shall be refunded. It is so ordered.

**Dated and Delivered at Nairobi this 16th day of March 1994.**

**S.O.OGUK**

**JUDGE**