



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

CORAM: GACHUHI, KWACH & TUNOI, J.J.A.

CRIMINAL APPEAL NO. 22 OF 1993

**SAMWEL ADERO
NYAMBURIAPPELLANT**

AND

**REPUBLICRESPON
DENT**

**(Appeal from a conviction and sentence of the High Court
of Kenya at Kisii (Justice Patel) dated 30th
January, 1990
in
H.C.C.R.A. NO. 15 OF 1989)**

JUDGMENT OF THE COURT

Samwel Adero Nyamburi (the appellant) was convicted on a charge of assault causing actual bodily harm contrary to section 251 of the Penal Code and fined KShs.10,000/=, and in default he was to serve 14 months' imprisonment. His appeal to the superior court was dismissed and he now brings this second appeal to this Court.

The facts as found by two lower courts are that on 2nd May, 1987, the appellant and the complainant were among patrons who were drinking at a bar in a Homa Bay township. A misunderstanding arose over a bottle of beer which the appellant had initially ordered for the complainant but subsequently refused to pay for. This bottle was retrieved by the barman and when the complainant sought an explanation, he was told by the appellant that the latter had not bought him a drink. The appellant then became aggressive, started shouting and threatening to beat up the complainant. He was restrained by other patrons and escorted out of the bar. The appellant returned to the bar shortly afterwards and violently hit the complainant on his left ear with an empty beer bottle, and hit him with a second bottle on the forehead causing the complainant to bleed profusely. The clinical officer who examined and treated the complainant assessed the injury sustained by the complainant as harm. The appellant was arrested on 8th May, 1987 at a school where he worked as a teacher.

At his trial, the appellant pleaded an alibi claiming that he was somewhere else when he was alleged to have assaulted the complainant. This defence was rejected, and quite properly in our view, by the two lower courts and nothing further has been said about it before us. The appellant was seen at the scene of

crime, at the time he was said to have committed the crime, by people who knew him well, and his alibi was quite definitely a sham.

The submission made before us by Mr. Olago Aluoch on behalf of the appellant was that the evidence of the complainant required corroboration; that a witness who was declared hostile was not made available for cross-examination by the appellant thereby causing a miscarriage of justice to the appellant; and thirdly, that the sentence imposed by the trial magistrate was unlawful.

We can find no substance in Mr. Aluoch's first submission. The complainant's evidence was capable of standing on its own and did not require corroboration. The contradictions in the evidence of the prosecution complained of were very minor and incapable of affecting the credibility of the witnesses.

With regard to the witness who was declared hostile, it has been conceded by the prosecution that the correct procedure was not followed. Once an application has been made to the court by the prosecution to declare a witness hostile, and the application is granted, the hostile witness then becomes available for cross-examination both by the prosecution and the defence. We are satisfied that the failure to follow the correct procedure in this regard did not occasion any miscarriage of justice to the appellant as the magistrate did not take into account the little evidence the witness had given before being declared hostile. We reject this ground of appeal.

As regards sentence, Mr. Aluoch's submission that it is unlawful is plainly misconceived because under section 7(3)(a) and (b) of the Criminal Procedure Code (Cap 75), a subordinate court of the second class may pass sentences of imprisonment not exceeding two years and a fine not exceeding KShs.10,000/=.

In the final analysis, we can find no merit in any of the grounds urged on behalf of the appellant, and his appeal consequently fails and is dismissed.

Dated and delivered at Kisumu this 11th day of June, 1993.

J. M. GACHUHI

JUDGE OF APPEAL

R. O. KWACH

JUDGE OF APPEAL

P. K. TUNOI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR