



REPUBLIC OF KENYA

Ndirangu v Republic

Court of Appeal, at Nairobi ..... 1990  
Masime, Gicheru & Kwach JJA

Criminal Appeal No 72 of 1987

On .....1990, Masime, Gicheru & Kwach JJA delivered the following Judgment.

In this second appeal, the points of law arising therefrom are whether the appellant's convictions on the two counts of assault causing actual bodily harm contrary to section 251 of the Penal Code were sustainable in the absence of medical evidence; and whether his being armed with a simi and an iron bar at about 2.00 am on 6th August, 1985 was with intent to commit a felony contrary to section 308 (1) of the Penal Code, an offence for which he was also convicted.

The appellant was alleged to have assaulted Francis Muli (PW 1) and Hapi Jilo (PW 2) in the course of a struggle with them in the house compound of the Manager of Kigwe Estate at 2.00 am on 6th August, 1985. This compound was fenced. He was armed with a simi and an iron bar whose one end was pointed. He too complained of having been assaulted. The assaults complained of were not supported by medical evidence. In the absence of such evidence, they were no more than common assaults contrary to section 250 of the Penal Code if the circumstances obtaining were such that such assaults were proved. Those circumstances do not ascertain such proof. The appellant's conviction on the two counts of assault causing actual bodily harm contrary to section 251 of the Penal Code cannot therefore stand. The same are/quashed and the sentences in respect of them set aside.

As relates to the charge of preparation to commit a felony contrary to section 308 (1) of the Penal Code, the appellant was found in the fenced house compound of the Manager of Kigwe Estate at about 2.00 am on 6th August, 1985 armed with the weapons mentioned above. These were dangerous weapons. He had been accompanied by two other persons who ran away when they saw PW 1 . His presence in the house compound above mentioned cannot have been innocent. His being so armed in the circumstances then obtaining indicated that he was so armed with intent to commit the felony of burglary. He was properly convicted for this offence.

In the result therefore, we allow the appellant's appeal on the two counts of assault causing actual bodily harm contrary to section 251 of the Penal Code but dismiss his appeal in regard to his conviction for the offence of preparation to commit a felony contrary to section 308 (1) of the Penal Code.