REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT MOMBASA
CORAM: CHUNGA, C.J., TUNOI & O'KUBASU, JJ.A.
CRIMINAL APPEAL NO. 84 OF 2001

HAWAGA JOSEPH ANUANGA ONDIASA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Waki J) dated 18th July, 2000
in
H.C.CR.A. NO. 37 OF 2000)
****

JUDGMENT OF THE COURT

The appellant, **Hawaga Joseph Anuanga Ondiasa,** was after trial convicted of assault causing actual bodily harm contrary to **Section 251 of the Penal Code** and was fined Shs.5,000/= and in default to serve 12 months imprisonment. His first appeal was dismissed by the High Court of Kenya at Mombasa, Waki, J. on 18th July, 2000. He has appealed to this Court and it follows that his appeal being a second appeal it can only be on a point of law in the express terms of Section 361 (1) (a) of the Criminal Procedure Code .

The appeal before us was ably argued by the appellant in person primarily on the ground that the judgment of the trial magistrate was brief, incomprehensible and was not prepared in the form decreed by Section 169 of the Criminal Procedure Code and was incurably defective and it amounted to a nullity. He therefore urged us to allow his appeal and quash the conviction. As for the judgment of the first appellate court, the appellant took a swipe at the learned trial Judge for writing:

> ***"... a too comprehensive judgment of more than thrice the length of that of the lower court, a clear indication that he considered matters not raised in the lower court and made findings not supported by the record."***

The evidence on record established that there was a fight between the appellant and the complainant, Omar. At the centre of the fight was Omar's wife and child. The two courts below made a concurrent finding that the appellant had without a lawful cause attacked Omar with a stick causing him injuries and that there was no justification for the appellant to resort to the use of the stick. We are of the opinion that upon the evidence the guilt of the appellant was manifest and it would be a travesty of justice to say that his guilt was not established beyond reasonable doubt.

It is true that the trial magistrate may be criticised for the perfunctory way in which he expressed himself in his judgment. However, even if we were to hold that he did not prepare his judgment strictly in accordance with **Section 169 of the Criminal Procedure Code** this would not, of itself, mean that the

conviction of the appellant was wrong or is to be invalidated. See **SAMWIRI SENYANGE V R (1953), 20 EACA 277** . We are satisfied that in the instant case, the defect in the form of the short judgment is curable as there has not been any injustice done to the appellant nor has he been prejudiced in any manner. Moreover, the first appellate court had reviewed the case on merit.

The first appellate court cannot be faulted for delving too deeply into the case because it is its duty to remember that parties are entitled to demand of it a decision on both questions of fact and of law, and it is required to weigh conflicting evidence and draw its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect**. (See PANDYA V R [1957] EA 336, RUWALLA V R [1957] EA 570).**

There are no grounds for us to depart from or interfere with the concurrent findings of the two courts below. The appellant was correctly convicted and his first appeal was properly dismissed. This appeal is without merit and is accordingly dismissed.

Dated and delivered at Mombasa this 20th day of July, 2001.

B. CHUNGA

CHIEF JUSTICE

P. K. TUNOI

JUDGE OF APPEAL

E. O. O'KUBASU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR