



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 356 OF 1995**

**ISAAC MAUTI ATEMBA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant in this case was charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code in that on 26<sup>th</sup> day of March, 1994 at Bokanga sub location within Kisii District of Nyanza Province, he unlawfully assaulted Zablon Osongo Atemba. Although he denied the offence, he was found guilty and sentenced to 1 year's imprisonment. The appellant now appeals against conviction and sentence.

Briefly the facts as per the prosecution witnesses were that the complainant, a brother of the appellant, was going to his home from nearby shops on 23<sup>rd</sup> March, 1994 at about 6:30 p.m. He was in the company of 2 other brothers, namely Kennedy and Nyabuto. When the appellant and his team were about 200 metres from home, they met the complainant. The appellant according to the prosecution witnesses was carrying a torch and a panga. The appellant then asked the complainant to say what he wanted. Before the complainant could reply, the appellant raised the panga and cut him on the head. When the appellant told him that he had injured him, he again cut him on the left hand. According to the complainant, they were terrified and ran back towards the shops they had come from. The complainant then ran to his house while screaming for help.

When the complainant reached his house, he found his children. According to the complainant, the appellant returned when he got to his house. Members of the public then came to when he got to his house. Members of the public then came to his aid and took him to the hospital. After the hospital, he reported the matter to the police station and the chief's office who eventually arrested the appellant and had him charged with the offence herein. According to the complainant on the day the attack took place he had had a dispute with the appellant at 3:00 p.m. over a land boundary. The complainant also stated that it was still daytime and had recognized the appellant facially and by voice as well.

The prosecution called only one witness namely Kennedy Ombiri, who is one of the brothers who was with the complainant on the material day. According to him the incident took place on the 26<sup>th</sup> March, 1994 and not 23<sup>rd</sup> March, 1994. He substantially corroborated the complainant's evidence save that he did not witness any quarrel between the complainant and the appellant nor was he aware of any standing dispute between them. In cross-examination, he stated that he did not rescue the complainant nor did he take him to the hospital. According to him when the appellant attacked the complainant, he

ran to his house which is beyond the complainant's and that the complainant ran into a house near the place where the attack took place.

He did not state that he ran back to the shops as stated by the complainant but 'ahead to his house.'

In addition to the above evidence, a medical P3 for was produced which showed that the attack had been reported to the police on 29<sup>th</sup> March 1994 at 5:00 p.m. The allegation was that the appellant had been assaulted on 26.3.94 at 6:30 p.m. The report also showed that when the appellant was examined the wound was about 4 days old and consisted of a cut wound on the forehead and on the left hand.

When the appellant was called upon to defend himself he denied having had any dispute with the complainant on the 23<sup>rd</sup> March 1994 or on 26<sup>th</sup> March 1994 nor was he aware of any dispute between him and the complainant. He specifically denied having assaulted the complainant as alleged or at all and stated that on the 26.3.94 at 6:30 p.m. He was some 2 and a half miles from the place where the attack allegedly occurred. He heard of the attack on the 27<sup>th</sup> March 1994 and went to see the complainant on the evening of that day but found that he had been taken to hospital. His alibi witnesses were not of much use as they gave evidence relating to 27<sup>th</sup> March, 1994 and not 23<sup>rd</sup> or 26<sup>th</sup> March, 1994 when the attack is said to have occurred.

The main ground on which the conviction is challenged is that according to the recorded evidence, the complainant is said to have said that he was assaulted on the 23<sup>rd</sup> March 1994 and not on 26.3.94 as stated by his only witness, the charge sheet and the medical report.

In reply, the learned counsel for the state submitted that this was a mere discrepancy, which should not affect the case, as it was minor in nature. He also stated that PW 2 Kennedy Ombiri had corroborated the evidence of the complainant and the conviction was therefore safe.

It is conceded that in disputes amongst related persons especially brothers, evidence is usually difficult to come by. In the current case, for example there is no reason advanced as to why the other brother who was present was not called and the only presumption was that if he were called he could have given unfavorable evidence. It must however be noted that this being a criminal case it was up to the prosecution to prove their case to the satisfaction of the court, which must as usual be beyond reasonable doubt.

It is also noteworthy that while the complainant states that he ran to his house, his witness states that he took cover in a nearby house and that he and his other brother went to their own houses. If they had been terrified by the weapon the appellant was carrying with him there has been no explanation given as to why they did not call for the assistance of the police. The only other witness denied there being any dispute between the complainant and the appellant.

I believe that if the discrepancy in the sequence of events, the failure to call the brother as witness, and at least a member of the public or the complainant's children or wife as a witness and the extra-ordinary behavior of the brothers of the parties herein (appellant or complainant) had been drawn to the attention of the court, it would have created some doubt in its mind.

For myself, looking at the evidence afresh with the aforesaid discrepancies alive in my mind, I am far from satisfied that the matter was proved beyond reasonable doubt. The evidence falls short of satisfying me that the appellant could have suddenly attacked his brother without any provocation at all.

The gaps left in the sequence of events or contradicting therein would suggest a frame up which could easily arise as the complainant apparently believed that he has a dispute with the appellant. In my view it would be unsafe to convict an accused on such evidence.

In the result, this appeal is hereby allowed. The conviction is quashed and the sentence imposed on the appellant is set aside. I order that the appellant be released forthwith unless otherwise lawfully held.

Orders accordingly.

**Dated and delivered at Kisii this 11<sup>th</sup> day of December , 1995**

**G.P MBITO**

**JUDGE**



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