



IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Madan , Miller and Potter, JJ.A.)

CRIMINAL APPEAL NO. 143 OF 1981

BETWEEN

DISHON OCHOLAAPPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Kneller, J) dated 7th November, 1981 in Criminal Appeal No.181 of 1981

JUDGMENT OF THE COURT

This is a second appeal by this appellant, his first appeal to the High Court having been dismissed, against conviction for grievous harm and assault causing actual bodily harm, contrary to sections 234 and 251 respectively of the penal Code. On the night of 14th March, 1981, the appellant was drinking in Mini Bar, Mkowe, Lamu District. So also were two Administration Police Officers named Jamlick Mwaniki and Timothy Nyamu. As is both normal and customary in and around such places of pleasure there were also a number of ladies of leisure hanging about there among them one Njeri. This lady began bragging that she was having a drink with officers of the Administration police, no doubt a rare honour for her. The appellant passed some derogatory remarks about Administrative police Officers. When Mwaniki was leaving the bar, he came face to face with the appellant. Words passed between about Njeri. A struggle ensued during the course of which Mwaniki was stabbed in his ribs with a sharp instrument. Mwaniki fell down. The appellant ran. When Nyamu tried to intercept him he was stabbed in his left shoulder. When the appellant was arrested soon thereafter by G.S.U. Chief Inspector Simon Itote no weapon was found on him.

Mwaniki's stab wound in his chest was caused by a sharp instrument which had collapsed the lung. His wound was medically assessed as grievous harm. Nyamu's shoulder wound which was not serious was assessed as harm. The medical officer who examined Mwaniki and Nyamu agreed that possibly a knife had been used to cause the two wounds.

Not only did the two lower courts make concurrent findings of fact that it was the appellant who assaulted and wounded both Mwaniki and Nyamu but the learned judge on first appeal to the High Court stated the irrefutable when he pointed out that when he pointed out that when Mwaniki and Nyamu received their respective wounds the appellant alone was engaged in combat separately with each of them and there

was no third person involved. The barman (P.W.3). testified that the appellant had a knife in his belt. He could have got rid of the knife without any great difficulty in the darkness. The magistrate erred when he said in his judgment that the last stabbing was witnessed by Chief Inspector Itote who separated the contestants. The magistrate was confused. Itote said no such thing in his evidence. However, without it also on the evidence before him the magistrate could not have come to any other reasonable conclusion but to convict the appellant as he did. The appeal is ordered to be dismissed.

Dated at Mombasa this 27th day of January, 1982.

C.B. MADAN

JUDGE OF APPEAL;

C.H.E. MILLER

JUDGE OF APPEAL

K.D. POTTER

JUDGE OF APPEAL

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of the original.**

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