



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL APPEAL NO. 25 OF 2016**

**BERNARD KIPKIRUI CHERUIYOT.....1<sup>ST</sup> APPELLANT**

**ROBERT KIPYEGON CHERUIYOT.....2<sup>ND</sup> APPELLANT**

**HILLARY KIPNGETICH CHERUIYOT.....3<sup>RD</sup> APPELLANT**

**=VERSUS=**

**REPUBLIC .....RESPONDENT**

**(Being an appeal from the original judgment and conviction in Criminal Case No. 695 of 2013 Sotik PM's Court- Hon. Omwansa – PM)**

**JUDGMENT**

The three appellants were convicted and sentenced to a fine of Kshs.8,000/= in default two years imprisonment in respect of the 1<sup>st</sup> and 2<sup>nd</sup> appellant and Kshs.3,000/= in default two years imprisonment all for the offence of grievous harm Contrary to Section 234 of the Penal code.

The particulars being that on the 5<sup>th</sup> day of October 2013 at Koiwa location- Bomet County jointly unlawfully did grievous harm to KENNEDY TESOT.

The prosecution in this case called three witness in support of their case.

The defence called seven. This is the first appellate court. Being so, it has a duty to evaluate and consider the evidence on record with a view to arriving at its own conclusion but bearing in mind that it did not have the opportunity of observing the demeanour of the witnesses – Okeno vs R 1972 EALR.

The learned trial magistrate at paragraph 4 page 1 of his judgment observed, “I have keenly perused the evidence adduced by both sides and I am convinced that there was a fracas between the accused persons and also the complainant. It also comes out well from the evidence adduced that the genesis of their problem was a land dispute. It is thus my considered opinion that while the two sides had this feud. The accused persons used excessive force by inflicting the complainant grievous harm. The prosecution had demonstrated that the complainant suffered grievous harm PW1’s evidence is corroborated by the evidence of PW3...”.

The learned trial magistrate did capture the situation that obtained at the scene aptly.

Both the complainant and the appellants are relatives. There is in existence a land dispute between the two parties. It is this fact that triggered the events of 5/10/2013. The learned trial magistrate refers to the event as a fracas but what did take place was not a fracas but a serious fight between the complainant and the accused persons which left them with serious injuries. The complainant was issued with a P3 form which was filled by a clinical officer who classified the injuries as grievous harm.

The first appellant in his sworn statement did testify that it is the complainant who attacked them while at their fathers farm LR Kericho/Konoin/64. He was issued with a P3 form. 2<sup>nd</sup> appellant also testified to have been attacked by the complainant. He was also issued with a P3 form on 6/10/2013.

3<sup>rd</sup> appellant testified to have been attracted to the scene when he heard the complainant shout that he was to kill somebody. He saw the complainant cut the other appellants with a panga. He went there and snatched the panga from the complainant who ran away.

In his evidence in chief the complainant did testify to have been attacked while he was heading to bake bricks. He was in the company of Erick, Leo Kipchumba and Emmanuel when Bernard Robert and Hillary attacked him and injured him by cutting him with a panga. It is not

clear whether the attack happened in the disputed land or whether it took place in the bushes. It is also not clear whether it is the complainant who was the aggressor or it was the appellants. This is an area that the investigating officer would have embarked on so as to establish who was the aggressor. The investigating officer did not avail himself to testify in this case.

This being a family land dispute, there was need for calling of independent witnesses.

In the present case, it was the complainant and PW2 who testified. PW2 was a child aged 10 years. The complainant had testified to have been in the company of Erick, Leo Kipchumba and Emmanuel.

Erick and Leo Kipchumba were not availed to testify in this case which could lead to the presumption that there evidence would have been adverse to the prosecution case. Ref Omwanya Mokuia –Vs- Republic CRA 6 of 2016.

Having carefully evaluated the evidence on record I am of the considered view that the prosecution did not prove this case beyond reasonable doubt. Both conviction and sentence were not safe. They are quashed and set aside accordingly. The fine paid to be refunded to the appellants.

**Judgment delivered dated and signed in open court this 31<sup>st</sup> day of January 2018 in the presence of learned counsel for the prosecution Mr. Barasa learned counsel for the defence Mrs. Kirui.**

**Court assistant Rotich.**

**M. MUYA**

**JUDGE**

**31/1/18**

Certified copies of the judgment to be furnished to the defence and the prosecution.

**M. MUYA**

**JUDGE**

**31/1/18**