



**REPUBLIC OF KENYA**

**IN HIGH COURT OF KENYA AT MARSABIT**

**CRIMINAL APPEAL 21 OF 2015 MARSABIT**

**SHANO SIRIKO SHANO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from the judgment of Resident Magistrate Hon. T.M. WAFULA, delivered on 6/12/2014 in Marsabit Court Criminal Case No. 585 of 2014.)*

**JUDGMENT**

He appellant was charged with the offence of assault causing actual bodily harm contrary to section 251 of penal code. The particulars of the offence are that the appellant on the 8<sup>th</sup> day of July 2014 at Marsabit township, Marsabit sub-location within Marsabit County, willfully and unlawfully assaulted **ISAAC SIRINQO**, thereby occasioning him actual bodily harm.

The appellant was convicted and sentenced to serve two years imprisonment. The grounds of appeal are that the pros didn't not prove its case beyond reasonable doubt, that the trial court ignored to take into account the wide and glaring contradictions and inconsistencies in the pros case, the trial court erred in law by discarding the circumstances of the alleged offence and failed to accord due wait to the defence, that the appellant mitigation was not considered and the sentence is harsh.

**MISS MUNA** appeared for the appellant counsel submitted that although the complainant alleged that he was hit three times on the head the medical evidence indicate that the complainant had only two cuts on the skull and lacerations on the neck. The conviction is based on the complainant's contention that he was stubbed three times. Counsel further submits that the trial court imported its own evidence. Counsel relies on the case of **HALKANO MATA BAGAJA VS REPUBLIC Meru criminal appeal number 2 of 2015**. It is further submitted that the sentence is harsh and excessive, section 251 provides for 5 years imprison in his mitigation the appellant states that he has children and he is the sole bread winner he is 56 years old.

**MR. CHIRCHIR** opposed the appeal. Counsel submits that the evidence was direct. There were eye witnesses. The complainant was cut three times on the head. The appellant was the aggressor and was not proved. The two are step brothers. Pw4 testified that there was a long protected land dispute. There were two types of injuries. One caused by blunt object and the other caused by the blunt object. The sentence is proper taking into account the nature of the injuries.

This is a first appeal and the court has to evaluate the evidence afresh and make its own findings.**PW1, ISAAC SIRIQO** was the complainant. On 8<sup>th</sup>July 2014 at about 8pm he was with his wife (pw2) and a neighbor (PW3). He had someone felling his motorbike outside the house. He came out and the appellant subbed him three times on the head with a knife. Pw2 and pw3 screamed and the appellant ran away. He was taken to Marsabit hospital and treated. A p3 form was later filled. **PW2, HALIMA GOCHA** is PW1's wife. She testified that on the 8<sup>th</sup> day of July 2014 at about 8.00pm she was with pw1 and PW3. The appellant went there and knocked down their motorbike. He entered the house and stubbed pw1 three times on the head. They screamed for help and the appellant ran away. The matter was reported at the police station. Pw3 **HAWO KATUMANGE** is PW1's neighbour . She testified that she was with pw1 and pw2 when the appellant went there and knocked down pw1's motorbike. The appellant then stubbed pw1 with a knife on the head.

**PW4, MARY SIRIQO** is a sister to the complainant. She was called on the 8th of July 2014 at about 7.30pm and informed that the appellant had stubbed pw1. It is her evidence that pw1 and the appellant reside in the same plot which belong s to their father. The appellant is their step brother. There has been an offence between the two involving a plot. **PW 5, PC ALFRED KIUSYA** was stationed at the Marsabit police station. He investigated the case and had the appellant charged. PW6 DR. **STEVE MAKORI SERETI** was stationed at the Marsabit hospital. He produced a p3 form that had been filled by Dr. IRUNGU whom he had worked with for two and a half years. PW1 had a cut on the scalp (forehead) and laceration on the frontal scalp. he also had tenderness on the right eye. So the injuries could have been inflicted by a blunt and sharp object.

The appellant gave unsworn testimony and called 2 witnesses. He testified that he is a mechanic. On the 8th of July 2014 he was called by his mother and daughter and informed that the appellant had poured all the water in the drum. He went there and tried to move the drums but the complainant went there with his wife and pulled him. In the process the metallic door of the complainant's house hit PW1's head. They have had constant wrangles over water and pw1 has threatened his children and his wife. The wrangle involves the plot. **DW2, YATE SHANO** is the appellant's daughter. She testified that on the 8<sup>th</sup> of July 2014 the appellant went to their home and told their mother not to pour water. The appellant pushed her mother. DW2 went to call her father. The complainant hit his head on the door. **DW3, ASHU HIRBO** is the appellant's wife. On the 8<sup>th</sup> of July 14 she was fetching water and the complainant went there alleging that she was pouring water on his plot. She was fasting as it was the month of Ramadhan. She reported to the village elder. She was with her daughter (**DW2**) the complainant always insults them and calls them street urchins.

The issue for determination is whether the pros proved its case beyond reasonable doubt against the appellant. The evidence of the complainant is that he was with pw2 and pw3 when the appellant went to his house had stubbed him. He sustained injuries on the head. The case was reported at the police station on the same day. Counsel for the appellant contends that the evidence on the injuries is contradictory. Whereas PW1, PW2 and PW3 testified that the complainant was cut three times on the head, the p3 form indicates that there were only two cuts. The issue at hand is whether the complainant was assaulted and suffered injuries. It is not prudent to count the number of cuts on the complainant in order to justify that in deed he was assaulted and suffered injuries. The number of cuts does not matter. What is important is whether the complainant suffered any injuries. The p3 form indicates that a larger cut was **stitched** . The complainant had multiple lacerations on the nasal bridge with swelling. It is clear that some form of injuries were suffered by the complainant. The defence evidence seems to suggest that the injuries were suffered in a different way. According to the defence the complainant was hit by his door. There is the independent evidence of pw3 who was at the scene. She testified that it was the appellant who went to the complainant's house and knocked down a motor cycle. Pw3 saw the appellant stabbing PW1 on the head. The issue of water being poured didn't come out during the cross-examination. It is possible that the dispute on water was on a different date.

From the evidence on record it is established that it is the appellant who went to pw1's house and assaulted him. The trial court came to the right conclusion. The conviction is proper.

Counsel for appellant contends that the sentence is harsh. The trial court convicted the appellant and sentenced him to two (2) years imprisonment. This was on 16<sup>th</sup> December 2014. The appellant must have served the sentence by now. I do find the sentence to be fair given the circumstance s of the case. The appellant is said to be 56 years old while the complainant was 34 years old according to P3 form. it was up tit he appellant to exercise restrained being the eldest person.

In the end I do find that the appeal lacks merit and the same is hereby disallowed.

**DATED, SIGNED AND DELIVERED AT MARSABIT THIS 24<sup>th</sup> DAY OF JANUARY 2018**

**S. J. CHITEMBWE**

**JUDGE**