



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 68 OF 2017**

**MOHAMED ALI ADEN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the conviction and sentence in Garissa Chief Magistrate Criminal Case No. 61 of 2016 by Hon. M. Wachira (CM))**

**JUDGEMENT**

1. The appellant was charged in the Magistrate's Court at Garissa with grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that on 12<sup>th</sup> January, 2016 at Dagahaley Refugees Camp in Dadaab District within Garissa County jointly with others not before court unlawfully did grievous harm to Abdigedo Yerow Gedo.

2. He denied the charge. After a full trial, he was convicted of the offence and sentenced to five (5) years imprisonment.

3. Aggrieved by the decision of the trial court, the appellant filed this appeal on four grounds as hereunder:-

**1. The trial magistrate erred in law and fact in convicting him without considering that the alleged medical evidence was not credible as to how he committed the offence.**

**2. The trial magistrate erred in law and fact in shifting the burden of proof to him as seen in the judgment.**

**3. The trial magistrate erred in law and fact in denying him a lesser sentence and imposing a harsh and excessive sentence.**

**4. The trial magistrate erred in law and fact in convicting him without considering that the investigations did not establish the truth.**

4. At the hearing of the appeal, the appellant made oral submissions in court. He submitted that this was his first case in life and that he was merely arrested by the police from the restaurant where he worked and taken to the police station where he was informed that he had killed someone. He stated further that the complainant did not know him.

5. Mr. Omondi the Assistant Director of Public Prosecutions submitted that the incident occurred at around 9.30 pm but there was ample evidence that the appellant with others attacked the complainant viciously in the compound of the house of Halima Daudi after the gate had been closed. Counsel stated that there was moonlight as well as solar light from a source which was about 7 metres away and an independent witness PW2 gave clear evidence on what happened at the incident. Counsel emphasized that the injuries were serious and the offence was thus proved beyond reasonable doubt.

6. In response to the Assistant Director of Public Prosecutions submissions, the appellant said that he informed the trial magistrate that he did not know PW2 and that he lived in a different block of houses.

7. This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. See the case of **Okeno vs Republic [1972] EA 32**.

8. The appellant was charged and convicted of the offence of grievous harm. He denied the offence.

9. The prosecution called four (4) witnesses in the trial court. PW3 was Dr. Abdulmalik Wanyama who produced the P3 form and stated that the complainant was examined by Dr. Muhudin Hussein who could not attend court. I have seen the P3 form which was produced in court at the trial. Entries were made and it was dated 13<sup>th</sup> January 2016. The injuries suffered by Abdigedo were about one to three hours old and

they were classified as grievous harm. I have no doubt that indeed the complainant Abdigedo Yerrow Gedo who testified as PW1 suffered grievous harm as a result of injuries caused by a machete.

10. Was the appellant proved to be the cause of the injuries? The incident occurred at night around 10 pm. Therefore, the circumstances or conditions for positive identification would be difficult. This was because ordinarily it would be dark at the time. Courts are therefore warned to be careful in making sure that such identification at night is free from the possibility of mistaken identity. See **Nzaro vs Republic [1991] KLR 70**.

11. In the present case, the complainant PW1 stated that when he was attacked by the appellant and others, there was bright moonlight and light from solar light source which was just about 7 metres away. His evidence was supported by that of PW2 Amran Abirahan Yusuf who said that he saw the appellant and two men attacking the complainant. This witness confirmed the evidence of PW1 on the light from the moon and the solar gadget. He even told to the appellant to stop his attack on the complainant.

12. PW1 did not know the appellant before, but PW2 knew the appellant and his brother. In my view, there was no possibility of mistaken identity as the appellant was close to the two witnesses when the incident occurred and a report was immediately thereafter made to the police and the appellant arrested. Though the investigating officer who arrested the appellant did not give evidence in court, I am convinced that no miscarriage of justice was caused to the appellant. PW2 knew the appellant and his brother Mohamed Ismael and testified that the appellant later threatened him regarding the incident. I am of the view that the conviction of the trial court was proper, as the appellant was proved to have been the attacker of the complainant.

13. The sentence provided for an offence of grievous harm under section 234 of the Penal Code is a maximum of life imprisonment. The appellant was sentence to five (5) years imprisonment which in my view was not harsh and excessive. I will thus uphold the sentence.

14. For the above reasons, I dismiss the appeal of the appellant and uphold both the conviction and sentence of the trial court. Right of appeal explained.

**Dated, Signed and Delivered at Garissa this 14<sup>th</sup> June, 2018.**

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**George Dulu**

**JUDGE**