



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CRIMINAL APPEAL NO. 127 OF 2017

LUCAS ODINGA ONYANGO.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the Conviction and Sentence dated 6.12.2017 in Criminal Case No. 835 of 2013 in Siaya Law Court before Hon. J.O. Ogondo – P.M.)

JUDGEMENT

1. The Appellants Lukas Odinga Onyango and one Benta Onyango were charged with the offence of grievous harm contrary to **Section 234 of the Penal Code** and **assault causing actual bodily harm contrary to Section 251 of the Penal Code** respectively.
2. The facts as per the charge sheet are that on 1st of November, 2013 at Barsauri Sub-location in Gem, Siaya County, Lukas Odinga unlawfully did grievous harm to William Onyango Orera while on the other hand the 2nd Accused Benta Onyango unlawfully assaulted Margaret Akumu Orera thereby occasioning her actual Bodily Harm.
3. After full trial the Appellant -Lukas Odinga Onyango was found guilty of count 1and convicted under **Section 215 of the CPC** while for the 2nd Accused-Benta Onyango, the court found that the contradictions in regard to injuries occasioned placed doubt as to whether the offence of assault was committed and accordingly the 2nd Accused-Benta Onyango was acquitted the under **Section 215 of the CPC**. Thus, I shall only consider the case against Lukas Odinga leading to this Appeal by him.
4. Aggrieved and dissatisfied with the judgment and conviction, Lukas Odinga – the Appellant filed this Petition of Appeal dated 20/12/2017 raising the following grounds
 1. *The Learned Trial Magistrate erred in law and in fact and misdirected himself by not taking into account evidence by the Defendants’ witness 3 and 4.*
 2. *The Learned Trial Magistrate erred in law and in fact and misdirected himself by ignoring/dismissing the Appellant’s sworn statement and his witnesses.*
 3. *The Appellant’s defence was not given any due weight and consideration but was dismissed without reason.*
 4. *The learned Trial Magistrate erred in law and in fact and misdirected himself by not considering the contradiction in PW4’s testimony which indicates the left arm was cut and*

PW5's testimony of the right arm.

5. The Learned Trial Magistrate erred in law and in fact by not taking into account that the investigation officer didn't testify although required to do so thus prejudicing the Appellant's Case.

6. The Learned Trial Magistrate erred in law in awarding a sentence of 5years imprisonment which was excessive in light of the circumstances of the case.

5. In determining this Appeal, the court must fully understand its duty as the first Appellate court as stated in the case of **Okeno v. R** which is to subject “*the evidence as a whole to a fresh and exhaustive examination* and for this court to arrive at its own decision on the evidence, it must weigh evidence and draw its own conclusions and its own findings while making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.

6. This is what transpired during the pendency of the case in lower court. **PW1**, William Onyango Orera and the Complainant in the case stated in evidence that on 1st of November, 2013 while he was slashing grass and weeds in his farm at Barsauri village using a slasher. That on nearing the boundary that separated his farm from that of his neighbour Onyango Siro, Lukas Odinga the son of Onyango Siro came and started to push him telling him to stop slashing the farm but he William Orera did not understand why yet it was his farm. It was his evidence that Lukas Odinga left only to return with a panga shortly thereafter and cut him on his right arm adding that when he raised his arm to guard himself from the panga, he saw the mother of Lucas Odinga behind Lucas, he then stated that he screamed and a crowd formed, on seeing the crowd, Lukas and his mother ran towards their homestead and hid there and he was assisted by the crowd and taken to hospital by his brother James Okello where he was treated and admitted and for 3 days.

7. During Cross-examination by the advocate for the accused, William Orera gave evidence stating that he had title to **Parcel No. 213** which he inherited from his father. That he is a farmer and has also been a Village Elder for the past 12 years who has never quarreled anyone.

8. He averred that upon inquiry by Lucas as to why he was slashing the land, he told him to go the Chief as he was infuriated by the fact that he was pushing him. He adds that he could not make peace because Lukas cut him and denies having confronted Lukas and that Lukas wanted to cut him then he held the slasher which cut his left hand.

9. He added that he reported the matter to the police when they visited him at hospital but also says that it's James Okello who made the first report to the police, that James was not a witness and neither did he record a statement though his wife did. Adding that during the lifetime of Lucas's father, the two never had a boundary dispute and that he was not slashing their fence plus he never wanted to cut Lukas with the slasher he had.

10. On Re-Examination, he reiterates that he was slashing grass not a fence and that Lucas cut him using a panga which he stated was with the police, he further averred that he was before court for the assault on him not a boundary dispute case.

11. **PW2**, Margaret Okumu Orera, stated that William Orera Onyango was her son, that she recalls on 1/11/ 2013 at about 8 a.m. while she was digging on her farm ,she had a noise from her home which was nearby and decided to rush back only to see Odinga slashing her son with a panga. Avers to having known Odinga before the incident as they are neighbours. Says that Odinga was first alone then the mother arrived later adding that she screamed for help when she saw what Odinga was doing and a crowd gathered, she further states in reiteration to what PW1 had said that Odinga cut her son on the right hand.

12. She reiterated the above averments of Pw1 stating that they went to Yala level-4 hospital where they were treated and she was discharged her son William was admitted. Stating further that they all reported to Yala Police Station. She also identified the panga and the stick referred to.

13. During Cross Examination, she confirmed with clarity that she was present when William was assaulted. She also states that the weapons (stick and panga) were recovered from the house of Odinga and not at the scene of the crime as they had ran away with them. She adds, that she could identify the panga and that it even had blood stains on it although then, the stains had dried up. She confirms that she went to the hospital first then to the police station.

14. **PW3**, Mary Okello Akumu, stated in evidence that Pw1-William Orera is an in-law and that pw2-Margaret Akumu Orera is her mother in law. States that she recalls on 1/11/2013 in the morning, she had people quarrelling at a homestead between Margaret Akumu's home and that of Benta Onyango (the 2nd accused) and that when she approached the scene, she saw that William had been assaulted and clearly saw Benta use a stick to hit Margaret (the 2nd complainant).

15. She stated further that while she was there, she saw William being cut by Odinga and that if she saw the panga and stick used, she would identify them then again states that she is not able to identify the panga and the stick.

16. On Cross-Examination, she averred that the two Accused persons (Lucas Odinga and Benta Onyango) are known to her as they belong to her clan. Says also that the 1st Complainant is her brother in law, adding that if William told court that nobody saw while he was assaulted, he lied as she was present. She further states that Margaret was the first to be assaulted and that she went to record her statement at the Police Station after 3 days adding that when she arrived at the scene, she found one veronica at the scene and that they were four people.

17. **PW4**, Veronicah Anyango Onyango, states she is the wife of William Orera and recalls on 1/11/2013 while at home, she had a noise at about 7.a.m and that the noise was from the home of Lucas. She says she had Lucas say that "you will not slash grass here". Then adds that she saw Lukas jump over a fence and **then cut William Onyango on his left arm** and that Lucas told William he will do nothing to him because his poor. She states also that after Benta also came to beat William. It's her evidence that a crowd came, Lukas cut William then ran to the police and Benta was arrested.

18. On cross examination, she states that if William told court that he was all alone with Lucas it would be not correct as a crowd gathered and adds that a report was made to the Police at 10 a.m.

19. **PW5**, Thomas Ochongo Onyango, stated that he is Lucas's brother and it is his evidence that he is involved in community policing at Barsauri Yala and that on 1/11/2013, he was in his farm which is near that of William planting when he heard footsteps as though someone was running and when he looked up, he says he saw Lucas Odinga passing with a panga in his right hand, that Lucas passed behind him and ran towards the farm of William.

20. He stated that he followed Lucas and saw William was weeding trees. That the 1st accused- Lucas moved towards William quarreled with William as he asked William why he is always quarrelling his mother. It's his evidence that William ignored Lucas and Lucas used the flat side of the panga he had to slap William on his back once, it is then that William got up and struggled with Lucas and in the struggle, is when Lucas cut the right hand of William causing Pw5 to scream as William had collapsed. Pw5 adds, that Lucas then ran towards their home as he pw5 followed him screaming and that he kept screaming even as a crowd gathered.

21. He added that Lucas escaped but he later surrendered to the police. Stating that he was among the people that helped to take William to hospital as the 2nd Accused continued to quarrel with the mother of William, adding that Lukas is not his real brother but the 2nd accused is his real mother and it is his evidence that this was not the first time the two were having a dispute and on cross examination by the 2nd Accused, he avers that he saw the 1st Accused pass him while armed with a panga and that he saw him cut William with that panga.

22. **PW6**, Everlyne Atieno Odhumo, a Clinical Officer at Yala Sub County hospital avers that on

1/11/2013 a patient came to the hospital called William Onyango Odera, aged 60 years then. It is her evidence that William had been assaulted over a land dispute and that a panga was used causing him severe pain and bleeding profusely from his right hand. She goes on to say that he had a deep cut wound on the upper 1/3 of the right hand of the fore arm and that she saw the patient two hours after the alleged assault and it's her evidence that she termed the injury as grievous harm and that William had a nerve palsy resulting in loss of function of the arm and avers that William was admitted four 4 days and continued to attend physiotherapy.

23. She further added in her evidence that, on the same day, William was accompanied by one Margaret Akumu Odera who had also been assaulted on her face with a piece of wood.

24. On cross-examination by counsel for the 1st Accused, she reiterated the above averments adding that the patient - William was coherent though in pain and that he did not tell her the name of the person that assaulted him.

25. The remaining person was the Investigating Officer. However this particular witness never testified as a consequence of too many adjournments from the prosecution side. Ruling on case to answer was then made on 27/7/2017 and the Accused persons placed on their defence.

26. DW1, Lucas Odinga Onyango, stated in defence that he was at home on the 1/11/2013 in the company of Felix Oduor and Benard Ochieng who had come to visit him. That as he escorted them, he heard as if someone was clearing their fence and it is then that he left the two on the record to go see. It is his evidence that he got William armed with a panga clearing off the fence and that upon his inquiry, William retorted that he would clear him as he was doing the fence, that he approached William and that as William approached him to cut him (Lukas), he ducked causing William to cut his left hand.

27. He went on to aver that they are neighbours and that William is left handed and avers that the mother was near when he cut himself and that he left the scene but was later arrested while William was taken to hospital.

28. On Cross-examination, he answered that William held his left hand and cut his right, that he ducked and the panga hit him on the right hand.

29. Dw2, Benta Onyango, testified that Lucas Odinga is her son and refutes having assaulted Margaret. She alludes in evidence that she was in her house on the material day when she had noises among them was the voice of Lucas, on reaching where they were, she found PW1 making noise and Margaret was carrying a Jembe. That she saw Margaret advancing at her and William was going to cut Lucas but Lucas ducked and William cut his hand and during Cross-examination she said Lucas ducked using scouting skills as William had aimed at his head.

30. DW3, Allan Ochieng, says he knew the accused, it's his evidence that on the material day between 8-9 a.m. while with a fellow brother Charles Owino went to meet as a group and that as Lucas was escorting them, they heard someone clear the fence and Lucas decided to go nearer and found the old man William clearing the fence. He states that when William saw Lucas, he aimed to cut his head and that Odinga bent and the panga cut his right hand. He adds during Cross-examination that William was using his left arm to clear at that time.

31. Dw4, Charles Oduor Owino, reiterates the above averments by DW3 adding that after Odinga had ducked, he screamed and his mother Benta came, then shortly after another woman came with a jembe and that Benta told that other woman to restrain her son from cutting Odinga and on cross examination he says that Lucas Odinga – (A1) screamed attracting Benta who is accused 2 and that Benta came after William had been cut. However during Re-examination, he states that the home of the Accused and the scene were 50 metres apart thus one cannot see.

32. The matter was concluded by way of written submissions and before judgment could be read the Prosecution brought the courts attention to the fact that the 1st Accused –Lucas Odinga was a first

offender while his Advocate on the other hand stated that Lucas was remorseful and regretted the incident. Stating that it is unfortunate that the same occurred as a result of a boundary dispute and pleaded with the Court for leniency and in the case of sentence, he be given a non-custodial sentence.

33. Judgment was read on 6/12/2017 by the Trial Magistrate and its judgment, the trial court Magistrate gave a brief recap of the case that is a summary of the above case by the Prosecution and defence witnesses and in the court's analysis, it noted that the accused persons by their own evidence placed themselves at the scene and proceeded to examine whether the accused persons attacked and injured the victims. It was the Lower Court's position that the evidence of PW4, Veronica Anyango who stated that she saw Lucas (A1) jump over the fence armed with a panga with which he viciously attacked William with injuring his right hand was corroborated by Pw5, Thomas Ochongo who stated that he saw Lucas (A1) pass him quickly while armed with a panga and went straight to attack Pw1 cutting William on the right hand. The court too considered evidence of Pw6, Everlyne Odhune- the Clinical Officer which indicated that Pw1 suffered a cut injury on the upper limb 1/3 right forearm which she classified as grievous arm.

34. It's on the backdrop of the foregoing that the Trial Court found that the evidence against Lucas Odinga (A1) was overwhelming and satisfied itself that the Prosecution had proved the offence of grievous harm against him in Count 1 beyond reasonable doubt accordingly, after having noted the mitigation by the Prosecution in his favour convicting him under Section 215 of the CPC to serve a 5 year term hence this appeal.

SUBMISSIONS ON APPEAL:

35. The appeal was canvassed by way of oral submissions on 11th June, 2018. Mr. Ochieng Advocate counsel for the Appellant submitted in support of the appeal herein as filed by the appellant in person on 20/12/2017 as follows:

36. On ground 5, it was submitted that the Investigating Officer did not testify when required to do so. Reliance was placed on the case of **HCRA 217/2013 Andrew Munika Kalusi vs R** decided by L.N. Mutende J where a police officer was not called to testify and neither were exhibits produced in that case. The exhibits which were recovered were never produced as exhibits though they were marked for identification. Non-production of exhibits by the Investigating Officer led to the defence counsel being unable to cross-examine the Officer over the handling of panga and stick.

37. It was submitted that the Appellant herein in his defence stated that the Complainant tried to cut the Appellant and in the process injured himself; and that therefore if the panga was produced, the court could have decided on who had handled the panga.

38. On grounds 1 & 2 of the Petition, the Appellant's Counsel urged that the trial Court did not consider evidence of defence witnesses; and that no reason was given in dismissing the Appellant's own statement and that of his witnesses.

39. On ground 4, it was submitted that the testimony of PW4 was contradictory with that of PW5. Further, that the judgment indicated that the injuries were sustained by the Complainant on the right hand yet PW4 stated that the injury was on the left hand. On the other hand, it was submitted that PW5 testified that the complainant sustained injury on the right arm.

40. The Appellant's counsel relied on the decision in the case of **Andrew Mulika Kithusi Vs R case [2014]eKLR citing the Okeno** case and submitted that albeit failure to call police is not fatal to the Prosecution's case, but that non-production of alleged weapon of assault and where the Investigating Officer was not called to testify, was adverse to the Prosecution's case.

41. On ground 6, it was submitted by Mr. Ochieng that the 5 year imprisonment sentence imposed on the appellant was harsh. Counsel urged the court to allow the appeal herein.

42. In opposition to the Appellant's appeal, Ms. **Odumba Prosecution Counsel** submitted that the Sentence imposed on the Appellant by the trial Court was proper, as the offence attracts a maximum of life imprisonment. It was submitted that the Complainant was 60 years old yet the Appellant is a very young person and that the cause of the problem was an alleged boundary dispute.

43. On the cited case, Counsel for the state submitted that in that case, it was held that it is not fatal not to call the Investigating Officer and that it all depends on circumstances of each case.

44. She maintained that failure to call the Investigating Officer was not fatal to the conviction of the Appellant by the trial Court as it was not adverse to the Appellant. It was further submitted that there was sufficient evidence of grievous harm in that, the Complainant was admitted in Hospital for 4 days and a P3 form and discharge summary were produced.

45. It was further submitted that PW6 testified that the probable weapon used to injure the Complainant was sharp and that non-availability of the Investigating officer made it impossible to produce the panga but that that is not fatal to the Prosecution's case. Counsel submitted that the Appellant had an Advocate throughout and that the Prosecution's witnesses were recalled to be cross-examined. It was further contended that there was no submission in the Lower Court on the aspect of failure to call the Investigating Officer or to produce the panga. In addition, it was contended that the depth of the cut caused nerve injury. It was submitted that the evidence adduced by PW6 was overwhelming and show how serious the injury was on the Complainant, as it led to the Complainant losing function of the arm.

46. It was further submitted that the Appellant was at the scene of crime and that as the incident happened at 8.00am in day break, the accused was recognized by all witnesses who knew him and who saw him assault the Complainant.

47. On allegations that there was a contradiction on the place where the complainant was injured, it was submitted that the alleged contradiction is not material because PW6 the Clinical Officer was clear that the injury was on the right hand and that albeit the witness said that the injury was on the left hand, the contradiction is minor and does not affect the conviction. Counsel urged the Court to uphold the conviction and sentence meted out on the Appellant and dismiss the appeal.

48. In a brief rejoinder, Mr. Ochieng Counsel for the Appellant, submitted that the Investigating Officer should have given evidence indicating who handled the said panga as per the Accused's evidence and that failure to do so prejudiced the Appellant's case.

DETERMINATION:

49. The issues for determination in consideration of the appeal, grounds of appeal, evidence adduced by both sides and the trial Court's judgment are;

1. ***Whether the Appellant attacked and injured William Orera the complainant;***
2. ***Whether the Trial Magistrate did not take into account evidence by the Defendants' witnesses 3 and 4;***
3. ***Was the evidence of PW4's manifestly different from that of PW5's testimony?***
4. ***Was the presence of the Investigation Officer vital to the case?***
5. ***What orders should this court make?***

50. On issue 1, whether William Orera was attacked and injured, as seen from the treatment records produced in Court alongside the evidence of the witnesses particularly that of PW6. To put the issue differently, the question would be did the Appellant-Lucas Odinga attack William or did William supposedly cut himself and is now framing the Appellant without further ado into the intricacies of the

whole event, in the discussion as to who else saw the incident, from the evidence of DW1, that William's mother was near when he cut himself places PW2 at the scene and her that she saw William being cut by Lukas remains uncontroverted. Noting also that two people (PW5 and PW4) saw Lucas Odinga the Appellant carrying the weapon used-panga-.

51. The foregoing seems to water down issue 2 as raised in the Appellant's grounds of Appeal or it indirectly answers it. Though it was the evidence of DW3 and DW4 that when William saw Lucas, he aimed to cut his head and that Odinga bent/ducked and the panga cut his right hand. DW4 however during Re-examination, states that the home of the accused and the scene were 50 metres apart thus one could not see.

52. Moreover, I concur with the Lower courts finding that the evidence of PW4, Veronica Anyango who stated that she saw Lucas (A1) jump over the fence armed with a panga with which he viciously attacked William with injuring his right hand was corroborated by PW5, Thomas Ochongo who stated that he saw Lucas (A1) pass him quickly while armed with a panga. Thus I believe the evidence of DW3 and DW4 was considered but was overlooked or not written down for all to see as the Court in its mind having relied on the evidence of PW4 and PW5 which displaced the evidence adduced by DW3 and DW4 didn't deem it fit to write out.

53. On issue 3, PW4 says it was the left hand that was cut as opposed to the other contentions by all witnesses both for the prosecution and the defence including that of PW5. The doubt or contradiction as to which arm was injured has been elaborately clarified by the Clinical Officer who not only says that William had a deep cut wound on the upper 1/3 of the right hand of the fore arm but also was bleeding profusely from his right hand.

54. Also the evidence adduced by DW1 (Lucas Odinga) is too not accurate as he also contradicts himself since on one hand he says William is left handed but wanted to cut him (Lucas) with the right hand and instead **cut his left hand** and while being cross-examined by the Prosecution Counsel, he now says that William held his left hand and **cut his right**, that he ducked and the panga hit him on the **right hand**. Adding that at the time he held the panga on the left hand which makes this court believe that the evidence by PW4 of the left arm having been cut was an oversight on her part or that she did not see as clearly as PW5 and other defence and Prosecution witness.

55. On issue 4 which appears as one of the grounds of the Appeal herein, I find that though the rule is that failure to call a vital witness presupposes that the person would have given adverse evidence to the caller in the present case, the evidence of the parties was sufficient to sustain a conviction and the court was not in doubt as to what actually transpired so in my view what the I.O's evidence was going to do was just to reaffirm/ reinforce what had been said in testimony and his presence would have only been vital if the court still needed some clarity. In the case of *Aden Dahir Nuno v Republic [2015] eKLR* where the Appellant complained that the Investigating Officer was not called to testify in court, the court in support of the above view stated ***“even if this was true, in my view the failure of an investigating officer to testify in court is not fatal to a conviction. Provided the evidence on record is sufficient to sustain a conviction, the failure of an investigating officer to testify cannot vitiate a conviction.”***

56. This Court's view is that a case can be won or lost just on the evidence of one witness if it is cogent enough. More witnesses would be needed for purposes of making the Prosecution case more water tight. Many witnesses are meant to attest to the veracity of the purported action.

57. On the evidence adduced as a whole, this Court is satisfied that the Prosecution proved its case against the appellant herein beyond reasonable doubt. There is more than sufficient evidence that indeed the Complainant William Orera sustained injuries as shown by Medical records and the Clinical Officer's testimony. The testimony of the Complainant was believable and there is nothing on record suggestive of a ploy by the Complainant to fix the Appellant with an imaginary offence. The evidence on record was sufficient to sustain a conviction. If the Accused had felt that there was a boundary dispute with the complainant's family, there are more amicable means of resolving such disputes and not through vicious attacks on the life of a human being which could easily have led to loss of life or limb.

58. For the above reasons, I find the appeal herein on conviction not merited. I dismiss it and uphold the decision of the Lower Court.

59. On the issue of the sentence meted out to the accused, I find that it was quite lenient in the circumstances considering that the Complainant William had a nerve palsy and in the words of Pw6, it resulted in loss of function of the arm and that William was admitted four 4 days and continued to attend physiotherapy. The trial court considered the mitigating factors and sentenced the appellant to serve only 5 years in prison. Maximum sentence for grievous harm is life imprisonment. In the circumstances, I find that the sentence meted out was lawful and lenient. The appeal against sentence is accordingly dismissed. I uphold the sentence meted out on the Appellant by the trial court, considering the gravity of the Appellant's actions and the resultant effect it had on the Complainant.

60. In the end, I find no merit in the appeal herein. The same is dismissed. Conviction and sentence of the lower court is upheld. The Appellant to serve the sentence meted out.

Dated, signed and delivered at Siaya this 27th Day of August 2018.

R.E.ABURILI

JUDGE