



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT HOMA BAY**  
**CRIMINAL APPEAL NO 4 OF 2017**

**(From original conviction and sentence in Ndhiwa criminal case No 145 of 2016 by BR.Kipyegon (SRM) ON 1/12/2016**

**GEOFREY ODHIAMBO OTIENO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**1. GEOFREY ODHIAMBO OTIENO** (the appellant) was convicted on a charge of grievous harm contrary to section 234 of the Penal Code and sentenced to serve 7 years imprisonment. The prosecution's case was that on 13<sup>th</sup> day of December 2015 at **ANGINYA** village in Ndhiwa sub-county, jointly with another not before the court, he unlawfully did grievous harm to **MAURICE OTIENO ORURU**. He denied the charge and prosecution called a total of six witnesses to prove its case whereas the appellant was the only defence witness.

**2. MAURICE OTIENO ORURU (PW1)** narrated to the trial court that on the aforementioned date at 11.00am while riding his motorcycle to **RONGO**, he met the area chief (**VIVIAN**) and the assistant chief of **EAST KABUOCH** who were in a group of people. When PW1 tried to pass, the appellant and one **BON OGENGO** (both were well known to him) blocked his way and cut him using a panga each. They inflicted injuries on his back shoulder and left wrist and when he asked why they were cutting him they did not respond. PW1 had not differed with them previously. He was rescued by **BOBI** and **OOKO**.

**3. JOHN OTONGO JOSEPH (PW2)** who was within the vicinity have gone to broker a truce between warring youth groups from two different villages, confirmed that as he was about to leave the venue, PW1 approached while riding a motor cycle, and he saw the appellant and one **BON** who were armed with pangas attack PW1 without any provocation.

**4. JOHN OKEYO OLALA (PW6)** was on his way from church when he encountered the crowd which had gathered near **ANGINYA** junction. He saw the appellant (whom he had known for over 30 years as his neighbour) and one **BON** attacking PW1 using pangas. He assisted in taking the victim (who was his fellow church member) to hospital

**5. NELSON WAKA (PW4)** a medical practitioner at **NDHIWA** District hospital examined PW1 On 18/04/2016 and noted that he was not able to lift his hands and elbow and there was muscle wasting on the left hand, so he could not lift or extend his left hand, he also had a right lateral chest scar, a scar on the left shoulder with muscle wasting on the left shoulder. In his opinion the weapon of assault was a sharp object and the degree of injury was maim. He referred to clinical notes by his colleague **JOSEPH ONYANGO** who attended to PW1 at the first instance and noted that the victim presented with deep pain

and profuse bleeding. He had a deep cut wound on the lateral chest to back and the left shoulder.

6. **SERGEANT LEWIS CHANYI (PW5)** investigated the matter and **APC SANDE WESONGA (PW3)** arrested the appellant.

7. The appellant's sworn defence alluded to events surrounding his arrest and on cross examination he stated he did not even know PW1 or one **BON OGENGO**. He insisted that on the material date from 9.30am he was in **KOSIR** in a market where he was doing his *boda boda* business until 6.00pm and he could not believe the allegations made against him.

8. In his judgment the trial magistrate noted that the medical records confirmed the nature of injury suffered by the complainant. Further that the eye witnesses to the incident were well known to each other as village-mates and PW1, PW2 and PW6 gave independent well corroborated versions of the incident which took place at daytime. Their testimony was described as giving a logical sequence of the events with firm consistency and no hint of bias.

9. The appellants defence was dismissed as not being plausible

10. The appellant contested these findings on grounds that he was not served with a copy of the P3 form relating to the victim's injuries so he was not able to effectively cross examine the complainant. He also lamented that the author of the P3 form did not testify nor was his defence considered.

11. The appellant canvassed the appeal by way of written submissions and there were two different medical opinions regarding the degree of injury. It was also his contention that he was not privy to the amendments made to the charge.

12. **MR OLUOCH** on behalf of the State conceded the appeal on grounds that the appellant was not served with all the witness statements and documents the prosecution relied on at the trial and this violated his right to a fair hearing. He however urged the court to order a re-trial saying there was relevant and admissible evidence, and prosecution was not responsible for the anomaly.

13. I have perused the record and confirm that on 21/06/2016, 7/07/2016 and 21/7/2016 the appellant requested for witness statements. On 15/08/2016 he requested for a copy of the charge sheet and all other prosecution documents. There is no indication in the record that the request was ever fulfilled. Even after the hearing commenced with the testimony of 5 witnesses being recorded, the appellant repeated the request for witnesses' statements on 13/9/2016.

14. This meant that the appellant had to grope for information as the trial progressed and indeed denied him the chance to adequately prepare and conduct his case. **Art 25 (c) of the Constitution of Kenya** provides that the right to a fair trial shall not be limited. From the observations made in the earlier preceding paragraphs I have no doubt that the appellant's right to a fair trial was grossly violated. The cure lies in quashing the conviction and setting aside the sentence which I hereby do. I have considered the evidence and the fact that the appellant has hardly served even a  $\frac{1}{4}$  of his sentence. The nature of the evidence presented is such that I am persuaded a re-trial will not be offering the prosecution leeway to patch up their case, and it is prudent and fair that the matter be retried before a magistrate other than the one who heard the matter initially.

15. The appellant shall appear before the Senior Resident Magistrate at Ndhiwa for trial directions on 27/06/2017.

**Delivered and dated this 20<sup>th</sup> day of June, at Homa Bay**

**H.A.OMONDI**

**JUDGE**