



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.497 OF 2007**

*(An Appeal arising out of the conviction and sentence of Mr. Fundi – (Mr.) RM delivered on 10<sup>th</sup> August 2007 in Kibera CM. CR. Case No.2322 of 2006)*

**SAMUEL KURIA MWANGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Samuel Kuria Mwangi was charged with the offence of **causing grievous harm** contrary to **Section 234** of the **Penal Code**. The particulars of the offence were that on 11<sup>th</sup> February 2006 at Kibera Laini Saba in Nairobi, the Appellant did unlawful grievous harm to James Gichumu (the complainant). When he was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to serve three (3) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of evidence that did not establish his guilt to the required standard of proof. He took issue with the fact that he was convicted yet the weapon that was allegedly used to commit the crime was not produced into evidence. The Appellant faulted the trial magistrate for failing to take into consideration the entirety of the evidence adduced including the defence before arriving at the decision to convict him. He was of the view that the evidence adduced against him constituted latent falsehood and was inconsistent to the extent that a reasonable court would have arrived at a decision that it was incredible. He faulted the trial magistrate for failing to take into account the fact that the criminal case was brought against him after the complainant had failed in his attempt to extort money from him. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction, and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Kimeria for the Appellant and by Ms. Maina for the State. This court has carefully considered the said submission. Whereas the Appellant urged the court to allow the appeal on the grounds that the prosecution had not established its case to the required standard of proof beyond any reasonable doubt, the prosecution on its part was of the firm view that it had established its case on the charge brought against the Appellant.

Before giving reasons for its decision, it is imperative that the facts of this case be set out, albeit briefly. The Appellant in this case owned a shop at Kibera Laini Saba within the sprawling Kibera informal settlements. According to the complainant, the Appellant sold on retail both foodstuffs and other items for domestic use. The complainant testified that he was a regular customer of the Appellant. On 11<sup>th</sup> February 2006, he went to the Appellant's shop to buy a loaf of bread and Blueband margarine. He found the Appellant at the shop. He purchased the same. Some change remained. He asked the Appellant to sell to him two sticks of cigarette. Unfortunately, the change was not enough to enable the Appellant to purchase the two cigarettes. He requested the Appellant to sell him the cigarettes on credit. He promised to pay the balance at a later date.

The complainant testified that at the time the Appellant was chopping vegetables using a knife. Suddenly, without any provocation, the Appellant stabbed him with the knife. The complainant fell down and became unconscious. He was rushed by good Samaritans to hospital where he was admitted for treatment. The Appellant's explanation for this attack was that the complainant was actually a thief who at the time was stealing from his shop. PW2 Venaches Macharia Karanja and PW3 Celesta Nyangi Ngaroi testified that on the particular evening while they were at Kibera Laini Saba, they saw people gather outside the shop of the Appellant. When they went to investigate, they found the complainant had been stabbed. PW3 testified that he saw the Appellant run away from the scene while holding a knife. The two witnesses denied the allegation made by the Appellant to the effect that the complainant had been stabbed in the course of stealing from the Appellant.

The complainant testified that he was admitted for a period of a month in hospital before he was discharged. The complainant was seen by Dr. Zephania Kamau of Nairobi Area Police Surgery. He noted a small surgical scar on the left lateral aspect of the chest. The complainant also had an abdominal midline surgical scar which signified that during his admission his abdomen had been opened up. The diaphragm on the left side was perforated. A chest x-ray showed blood on the left chest cavity. Medical intervention ensured that the injuries were repaired. The doctor formed the opinion that the injury that the complainant sustained was grievous harm. The P3 form was produced by the doctor as a prosecution's exhibit.

The Appellant called witnesses DW2 Christopher Ngari Miano, DW3 Patrick Mwangi, DW4 Peter Kitheka and DW5 Joseph Gitahi Mwangi who all testified that it was the complainant who provoked the situation by attempting to steal from the Appellant's shop. They testified that the Appellant had confronted the complainant while he was in the process of stealing Blueband and cigarettes from his shop. They denied that the Appellant stabbed the complainant.

This being a first appeal, it is the duty of this court to re-evaluate the evidence adduced before the trial court and also consider the grounds of appeal put forward by the Appellant and the submission made on this appeal with a view to determining whether or not the Appellant committed the offence. In doing so, this court is required to always put in mind the fact that it neither saw nor heard the witnesses as they testified.

Upon re-evaluating the evidence adduced, it was clear to this court that the prosecution did indeed prove its case to the required standard of proof beyond any reasonable doubt. Direct eye witness testimony was adduced by the complainant to the effect that the Appellant, without provocation, stabbed him with a knife. The explanation given by the Appellant to the effect that the complainant was attempting to steal from him does not justify the stabbing. Infact, if that was the case, it was clear evidence of Appellant taking the law into his own hands. That the complainant was injured is without doubt. The injuries explained by the doctor in his evidence before the court is consistent with injuries caused by a sharp object. This was consistent with the knife that the Appellant had in his possession at the time he was serving the complainant at his shop.

To establish the charge of causing grievous harm, the prosecution must establish to the required standard of proof that it was the Appellant who caused the injury and that the injury was such that it fits the definition of grievous harm. In the present appeal, it was clear that the prosecution did establish to the required standard of proof that it was the Appellant who stabbed the complainant while at his shop. The doctor's evidence also established that the injury sustained by the complainant was by its very nature grievous. The injury required medical intervention in form of surgery to repair the cut injuries that the complainant had sustained in his chest cavity. The complainant was admitted in hospital for a period of more than a month. That is clear evidence of the serious nature of the injury that the complainant sustained. It was clear to this court that the grounds raised by the Appellant on this appeal challenging his conviction cannot hold. The prosecution proved its case. For the above reasons, the appeal against conviction lacks merit and is hereby dismissed.

On sentence, this court agrees with the Appellant that the trial court did not take into account the mitigating circumstances of the Appellant. During the hearing of this appeal, this court saw the wound in

the Appellant's leg. It is a festering one. It is apparent to this court that given the condition in prison, the Appellant is unlikely to get specialized medical treatment that the illness requires. This court also notes that since the commission of the offence, the Appellant appears remorseful and has changed his ways for the better. For the above reasons, the sentence of the Appellant of three (3) years imprisonment is hereby set aside and substituted by an appropriate sentence of this court. The Appellant is sentenced to pay a fine of Kshs.100,000/- or in default he shall serve one (1) year in prison. It is so ordered.

**DATED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JANUARY 2016**

**L. KIMARU**

**JUDGE**