



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**HCCRA NO.13 OF 2015**

**JOSEPH ATEKA KINANGA.....ACCUSED**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**Introduction**

This is an appeal by **Joseph Ateka Kinanga**, the appellant herein. It is an appeal from the conviction and sentence of **Hon. J. Wanjala – Chief Magistrate, in Nyamira Chief Magistrate’s Court, Criminal Case No. 53 of 2008 dated 2013.**

The genesis of the case was in Nyamira, Principal Magistrate’s Court where seven people, namely:

- **Joseph Ateka Kinanga**
- **Kennedy Sigira Riachi**
- **Mary Nyaboke Ongera**
- **Isaiah Mogaka**
- **Peter Moturi**
- **Henry Abere**

Abuga Morendi were jointly charged for attempted murder contrary to **Section 220(a) of the Penal Code –Count I.**

Particulars thereof [being that] on the 16<sup>th</sup> day of December 2007 at Boisanga Sub-location in Nyamira District within Nyanza Province, jointly unlawfully attempted to cause the death of Robin Morendi by cutting him with pangas thereby occasioning him grievous harm.

**Count II** charged them for grievous harm contrary to **S. 234 of the Penal Code.**

Particulars thereof [being that] on that 16<sup>th</sup> day of December, 2007 at Boisanga sub-location in Nyamira District within Nyanza Province, jointly unlawfully did grievous harm to Robin Morendi.

**Count II** charged them for Arson contrary to **Section 332 (a) of the Penal Code.**

Particulars thereof [being that] on the 16<sup>th</sup> day of December, 2007 at Boisanga sub-location in Nyamira District within Nyanza Province, jointly willfully and unlawfully set fire to a building namely a dwelling house belonging to Robin Morendi.

The appellant of the seven people was the only one who was convicted and sentenced to 20 years imprisonment on **Count II**.

### **The Appellant's Case**

The appellant being dissatisfied and aggrieved by the conviction and sentence has appealed. His appeal sets out (9) grounds of appeal, as follows:

1. **The learned trial magistrate erred in law and in fact in convicting the appellant against the weight of the evidence.**
2. **The learned trial magistrate erred in law and in fact in not finding that the circumstances prevailing at the alleged time of the commission of the offence could not favour a positive identification of the assailants at all.**
3. **The learned trial magistrate erred in law and in fact in failing to find that the evidence adduced in regard to the identification and/or recognition of the assailants was unsafe and/or insufficient to support a conviction.**
4. **The learned trial magistrate erred in law and in fact in convincing the Appellant on the basis of uncorroborated and contradictory evidence.**
5. **The learned trial magistrate erred in law and in fact in shifting the burden of proof to the Appellant.**
6. **The learned trial magistrate erred in law and in fact in rejecting the evidence adduced by the Appellant without reasons.**
7. **The conviction and hence the sentence was unlawful.**
8. **The learned trial magistrate erred in law in not acquitting the Appellant as she did his co-accused.**
9. **The sentence meted out against the Appellant was manifestly excessive, harsh and oppressive in the circumstances of the case.**

The learned counsel, Madam Asati filed her written submissions on 6<sup>th</sup> October 2015.

- On grounds **1, 4, 6 and 8** she submits that weight of evidence supported an acquittal PW1 & PW2 state that they were attacked by the assailants, the Appellant being one of them, and that the Appellant caused grievous harm to PW1.

However, the defense's version of the event states that PW1 & PW2 attacked the children of PW2 by his first wife by setting their house on fire and that it was one of those children who had caused grievous harm to PW1. PW4 & PW5's evidence supports the Defence version and corroborates the same, especially DW3 **page 118 of the Record, DW7 on 135 –D 140 of the Record.**

- That the evidence of the prosecution is full of inconsistencies and contradictions, more so:
  - i. **on the way the alleged assailants were armed**
  - ii. **On their relationship with the appellant**
  - iii. **On condition of PW1 immediately after the alleged attack**
  - iv. **On arrest of the appellant and his co-accused**
  - v. **On who called the police to the scene of the alleged incident**

Those inconsistencies and contradictions go to the credibility of the witnesses.

- **No independent witness** was called as the prosecution main witnesses PW1 and PW2 were brothers
- **The investigating officer** did not testify
- **On grounds 2 and 3 of the petition:**

The evidence on identification and/or recognition

The circumstances prevailing at the alleged time did not favour a positive identification or recognition as:

- **It was at night**
  - **Attack was sudden**
  - **Many people were involved**
  - **There was commotion**
- i. **Source of light, was it moonlight or torches or both.**
  - ii. **Names and number of attackers, the prosecution are not unanimous on the exact number of the attackers**
  - iii. **The court did find that the circumstances were not favourable.**

This finding by the court that the circumstances were not favourable should have led to acquittal of the appellant.

The court erred in shifting the burden of proof to the Defence.

### **The Opposition by the Respondent**

The learned Counsel Mr. Malesi submits that:

- i. **The inconsistencies and contradictions although admitted, are not serious enough to vitiate the prosecution case.**
- ii. **Failure to call an independent witness does not vitiate the prosecution's case.**
- iii. **Failure to call the investigating officer to testify is not fatal to the prosecution's case.**
- iv. **That the appellant, his co-accusers and the complainants were relatives and therefore well known to one another.**
- v. **The finding the court that defence witness unreliable does not amount to shifting of burden.**

Therefore I urge the court to confirm the conviction and the sentence as passed the trial magistrate and therefore dismiss the appeal herein dated 24<sup>th</sup> April, 2013.

### **The role of the first appellate court**

This appeal being the Appellant's first appeal, the role of this appellate court of first instance is well settled. It was held in that case of **Okeno –vs- Republic [1972]EALR** that this court is bound to revisit the evidence tendered before the trial court a fresh, evaluation it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence at the time which advantage the first appellant does not have.

### **Findings and determination**

The question to be asked is this, can the evidence as adduced by the testimonies confirm or sustain the conviction and sentence of the appellant? Or is it unsustainable?

If the evidence is sustainable, it must, additionally, be so beyond reasonable doubt. If however, an iota of doubt creeps in court's mind after due consideration of the totality of the evidence by the prosecution, then, the appeal must succeed.

The appellant raised several issues in respect of:

- i. Identification and/or recognition. The incident occurred at night at 8.00 p.m., the attackers were seven in number but PW1 – the complainant –says it was the appellant who caused grievous harm (who infact cut him with a panga). With so many attackers pursuing the complainant at night in the tea bushes, in a state of terror and night, it is probable that P.W.1 even if he was armed with a

torch, in that state, he would be unable to focus it on the crowd pursuing him.

ii. The trial court did find the circumstance of recognition equally doubtful. The court says:

**“This casts doubt what DW8 said that he saw his father cutting his uncle Robin Morendi. If he was hiding from them under the tea bushes, and it was at night about 8.30p.m. and he did not have a torch – he could not have seen who was cutting his uncle.”**

iii. There are many contradictions and inconsistencies which can only be construed against the credibility of the witness.

There were seven accused persons, and all were acquitted on **Count I** and **III**, all again were acquitted on **Count II** except the appellant.

The total evidence against the appellant is not proved beyond reasonable doubt. Some element of doubt lingers in the testimonies.

For reasons above referred, this court finds that there is merit in its appeal, consequently the appellant's appeal dated 24<sup>th</sup> April, 2013 be and is hereby allowed, the conviction is accordingly quashed and the attendant sentence of 20 years imprisonment is also set aside.

It is so ordered.

**Dated this 23<sup>rd</sup> February, 2016.**

**C.B. NAGILLAH**

**JUDGE**

**In the presence of:**

Nyamwange hold brief for Madam Asati for the appellant

Malesi for the Respondent

Mercy court clerk