



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CRIMINAL APPEAL NO. 31 OF 2016**  
**HENRY KOBIA KABERIA.....APPELLANT**  
**VERSUS**  
**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in criminal case NO. 3292 of 2013 of the Chief Magistrate's Court at Maua by A.G Munene – Senior Resident Magistrate)*

**JUDGMENT**

The appellant, **HENRY KOBIA KABERIA**, was convicted for the offence of grievous harm contrary to section 234 of the Penal Code.

The particulars of the offence were that on the 21<sup>st</sup> day of September 2007 at Antuambui location in Igembe North District within Meru County, unlawfully did grievous harm to **FRANCIS NKUJA**.

The appellant was tried and convicted for the offence. He was sentenced to three years imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by Mr. Muriuki, learned counsel. He raised eight grounds of appeal which can be summarized as follows:

1. That the learned trial magistrate erred in law and fact by failing to appreciate that failure to call the investigating officer was fatal to the prosecution case.
2. That the learned trial magistrate erred in law and fact by failing to make a finding that there were contradictions and inconsistencies in the prosecution case.
3. That the learned trial magistrate erred in law and in fact by convicting the appellant without sufficient evidence.
4. That the sentence meted out was excessive in the circumstances.

The state opposed the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the prosecution case briefly were as follows:

while the complainant was working in his land, the appellant in company of others went to him. The appellant after demanding to be paid, attacked the complainant with a hoe stick.

The appellant offered to keep mum after the court ruled he had a case to answer.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC 1972 EA 32**.

I was urged to make a finding that failure to call the investigating officer was fatal to the prosecution case. In the case of **Jeremiah Gatuiku Kiriungi v Republic [2009] eKLR** the court of appeal held:

**So that, the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to that prosecution unless the circumstances of each particular case so demonstrate.**

My opinion is that the failure by the prosecution in this case to call the investigating officer is not fatal to their case.

There were contradictions and inconsistencies which were introduced by Stanley Kamweti (PW3). He testified that the complainant was being beaten by three people who were armed with clubs. It emerged that this witness lied on very basic issues such as having an identity card. The court of appeal in the case of **NDUNGU KIMANYI -V- REPUBLIC [1979] KLR 283**, (MADAN, MILLER and POTTER JJA) said the following about such a witness:

**“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”**

Since he discredited himself, I am making a finding that his evidence cannot be relied upon.

Having dismissed the evidence of PW3, I am left with the complainant's evidence about the incident. In the case of **Kiilu & Another V. Republic [2005]** the court of appeal held:

**“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.”**

In the instant case the incident happened in broad day light. There is no issue that the complainant may have been mistaken. The appellant and the other two were people he knew before. They asked to be paid before the attack. The learned trial magistrate had sufficient evidence on record, even without the evidence of PW3, on which to found a conviction on.

It was contended that the sentence was excessive in the circumstances. The complainant suffered fractures and a sentence of three years cannot be said to be excessive in the circumstances of this case. Though there was an issue of debt, this cannot be a justification. In civilized societies debts owed are pursued through a civil court process. I will therefore not interfere with the sentence by the learned trial magistrate.

The upshot of the foregoing is that the appeal must fail. The same is dismissed.

**DATED at Meru 20<sup>th</sup> day of December 2016**

**KIARIE WAWERU KIARIE**

**JUDGE**