



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CRIMINAL APPEAL NO.8 OF 2016**

**MORRIS NTIRITIMI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in criminal case No.3565 of 2013 of the Chief Magistrate's Court at Maua by J.G King'ori– Chief Magistrate)*

**JUDGMENT**

The appellant, **MORRIS NTIRITIMI**, was charged and convicted for the offence of grievous harm contrary to section 234 of the Penal Code.

The particulars of the offence were that on 4<sup>th</sup> December 2001 at **Irindie** Market, in Igembe North District of Meru unlawfully did grievous harm to **DAVID KUBAI M'MITHIARU**.

The appellant was sentenced to serve 15 years imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by Mr. Mutembei, learned counsel. He raised twelve grounds of appeal that can be summarized as follows:

1. That the learned trial magistrate erred in law and fact by convicting him while relying entirely on circumstantial evidence.
2. That the learned trial magistrate erred in law and fact by convicting the appellant without sufficient evidence.
3. That the learned trial magistrate erred in law and fact by disregarding the appellant's defence.

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

The facts of the prosecution case were briefly as follows:

As the complainant was packing some miraa (khat), the appellant cut him severally with a machete. He escaped and fled. He was arrested twelve years later.

On his part the appellant pleaded an alibi.

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.**

There is nothing wrong in convicting an accused person in reliance on circumstantial evidence. The only requirement for the court is to test whether there is any other hypothesis that can be inferred from the facts. This was stated in the case of **REP V. KIPKERING ARAP KOSKEI & ANOTHER 16 EACA 135**, the Court held:

**“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”**

Then, what is circumstantial evidence? In the case of **MOHAMED & 3 OTHERS –V- REPUBLIC [2005]1 KLR 722** – Osiemo Judge explained what circumstantial evidence is as follows:

**“Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved”.**

In the instant case the learned trial magistrate entirely relied on direct evidence. The complaint is therefore not justified.

The complainant in this case is David Kubai M'Mithiaru (PW1) He testified of how the appellant cut him severally with a machete. According to him, the appellant found him squatting as he packed his miraa. Members of public at the scene intervened and the appellant fled from the scene. He eventually disappeared from the area. They got information that he was in Mombasa but they were not able to trace and apprehend him. Meanwhile he lost the hand that the appellant cut after it was surgically amputated.

John M'Rwanda (PW2) and Julius Marete (PW3), both who said were present, testified like the complainant.

The evidence of Romano Mwenda (PW4) the clinical officer is that the complainant sustained deep cut wounds which resulted in the right forearm being amputated below the elbow joint.

The appellant gave an alibi defence that the learned trial magistrate rejected after weighing it against the evidence on record. He was justified to do so. Contrary to what he (appellant) had told the court, his sister contradicted him. Salome Nkatha (DW2) testified that at the time they were not weeding for the maize and that their mother was not at home.

The upshot of the foregoing analysis of the evidence on record is that the appellant was convicted on very sound evidence against him.

From the narration of the witnesses, the attack on the complainant was not provoked. He sustained grave injuries. The sentence meted out cannot be said to be harsh. I am not persuaded to interfere with it.

The appeal is accordingly dismissed in its entirety.

**DATED at Meru 19<sup>th</sup> day of December 2016**

**KIARIE WAWERU KIARIE**

**JUDGE**