



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NOS. 300 & 301 OF 2013**

*(From original conviction and sentence in Criminal Case No. 497 of 2010 of the Principal Magistrate's Court at Narok, C. A. Nyakundi, P.M.)*

**BONIFACE MUNORU GEORGE.....1<sup>ST</sup> APPELLANT**

**SIMON MUNORU GEORGE.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. On the 6<sup>th</sup> May, 2014 High Court Criminal Appeal No. 300 and 301 of 2013 in this court were consolidated. They both arose from the Principal Magistrate's Court at Narok in Criminal Case No. 497 of 2010 where the Appellants Simon Munoru George and Boniface Munoru George were jointly charged with the offence of grievous harm contrary to Section 234 of the Penal Code, and an alternative charge of assault causing actual bodily harm contrary to Section 251 of the Penal Code.

After a full trial the court found each one of them guilty and sentenced them to serve jail terms of 5 years for the 1<sup>st</sup> accused, Simon Munoru George and 2<sup>1/2</sup> years for the second accused Boniface Munoru George.

2. Being dissatisfied with the trial courts conviction and sentence, they lodged an appeal to this court on six grounds as appears on the face of the Petition, that may be consolidated and argued together as follows:

1. *(Grounds 1, 2, 3, 4 and 5)*

*That the learned trial magistrate erred in law and fact in convicting the appellants on an uncorroborated evidence thus arrived at a wrong decision.*

*2. That the learned trial magistrate erred in law and fact in convicting the Appellants against the weight of evidence.*

*3. That the learned magistrate erred in law and fact in meting out an excessive sentence in the circumstances of the case.*

3. During the hearing of the appeal Advocate for the Appellants, Mr. Otieno argued grounds No. 1, 2, 4 and 5 together, and zeroed them to issue of identification of the Appellants by the complainants and

corroboration of the complainants evidence.

4. Brief background of the case is that the complainants Daniel Munyira (PW1) and George Munoru (PW2) are step brothers to the Appellants by their father George Munoru (PW3) but different mothers. The Appellants live at Enkare Narok North District in their fathers land with their mother (DW4). The complainants live in Embakasi Nairobi with their father. It was alleged that there was a land dispute involving the two houses, and the Area Chief (PW6) had been helping to arbitrate the dispute with the father of the brothers.

5. On the material date, the 15<sup>th</sup> May 2010, the family was to have a meeting to arbitrate the land issue. The complainants had travelled from Nairobi to Enkare-Narok where the father had already gone.

6. It was the complainants case that when they alighted from a vehicle from Nairobi, at the Mai Mahiu/Enkare Junction and while walking towards their father's home, the two Appellants attacked them with rungu, sticks and swords whereof they were injured before they were rescued by their father and neighbours.

The evidence on record shows that the 1<sup>st</sup> complainant Cyrus Ngige Keronga was attacked by the 1<sup>st</sup> Appellant with a rungu and a panga, and he sustained a cut on his right side of the head with the panga. He testified that he saw the 2<sup>nd</sup> Appellant Boniface Munoru George cut his brother with a panga on the left eye and hitting him with a stick on the hand. They screamed and their father came to rescue them, and neighbours too responded to the screams. They threatened to harm their father for shielding the complainants. Later they were taken to hospital for treatment. The weapons used to cut the complainants were Masai swords and not pangas as clarified by the 1<sup>st</sup> complainant who said he was bleeding from the head.

7. PW4, a Clinical Officer who examined the complainants confirmed that PW1 had sustained a deep cut wound on the right hand and had 12 stitches done and x-rays showed fracture on the head, and a swollen bruised left lower arm. He assessed the degree of injury as grievous. The 2<sup>nd</sup> complainant had a cut wound on the left eye region, was swollen and tender, and 5 stitches were done. The Clinical Officer filled the P3 forms on the 15<sup>th</sup> May, 2010 and produced them in court as exhibits.

8. The Investigating Officer who visited the scene of incident recovered the blood stained clothes of PW1 and PW2 and the Masai sword which were produced as exhibits. The Appellants were thereafter arrested and charged with the offences appearing on the charge sheet. In their defence, the Appellants in their sworn evidence denied knowing the complainants and called them strangers but admitted that PW3 was their father. They did not deny that PW3 was their father and he came to answer screams from the step-brothers.

9. The 1<sup>st</sup> Appellant (DW1) Simon Munoru George stated that while at the shamba on the material date, he heard screams of 3 people saying that they were going to evict them, and telling them to vacate the land. He confirmed that the three people were the 2 complainants and their father. He confirmed that his father had a second wife and that they did not relate well. It was his evidence that it was members of the public who beat them up since they were strangers. He denied knowledge that complainants were his brothers. He stated that it was PW1 who had a rungu and a stick while PW2 had a rungu and a sword. He confirmed that the two complainants were injured at their home.

10. The 2<sup>nd</sup> Appellant Boniface Leteipa George on his part testified on oath that he was at home when he heard noise from their tenants following the complainants who had told them to vacate their houses. He told the court that he had never met the complainants and did not talk to his father that day but stated that the father had a sword while the other two had rungu, sticks and a sword. He denied attacking the complainants whom he called strangers, save his father who was not a stranger. He even denied that the Area Chief (PW6) had arbitrated on the land issue with their father. He denied injuring the complainants, but confirmed that they were beaten at their home, and that he did nothing to help them. The mother of the Appellants (DW3) Naipanoi Kironya denied knowing the complaints, and complained

that the father of the Appellants had abandoned them and that she was not at home when the offence was allegedly committed.

11. The trial court analysed the evidence as tendered by both the prosecution and the defence and made a finding that indeed the Appellants committed the offences as charged, and discounted their alibi defence that they were not present when the offences were committed, and that the Complainants were assaulted by members of the public. 2<sup>nd</sup> Appellants evidence was clear that he was at home when the scuffle started and he saw and participated in it.

The court concluded that the prosecution had proved its case against the 2<sup>nd</sup> Appellant on Count 2, and that the 1<sup>st</sup> Appellant had committed the offence as stated in Count 1, that is causing grievous harm to Cyrus Ngige Munoru, the 2<sup>nd</sup> complainant. The trial court convicted them and sentenced them to serve 5 years imprisonment in respect of the 1<sup>st</sup> Appellant, and 2<sup>1/2</sup> years imprisonment in respect of the 2<sup>nd</sup> Appellant.

12. I have considered and analysed the whole evidence by the Appellants, the complainants and all the witnesses. I find the Judgment of the trial court very well reasoned and coordinated.

The Appellants main complaint is that of identification and corroboration of the complainants evidence.

13. On the issue of identification, the Learned trial magistrate, had this to say, that the defence had raised a defence of alibi that they were not at the scene, and that the complainants were assaulted by members of the public, but did not give cogent evidence on the issue. The submissions by the Appellants Advocates is that the court made an hasty finding of the Appellants guilt, on the basis that there were no independent witnesses who confirmed the happenings of the day.

In the case of **Cleopas Otieno Wamunga -vs- R (1989) KLR**, the court had the following to say -

***“.. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimise this danger ... the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.”***

14. In this case, the court notes that the Appellants and the complainants are step brothers as aforesaid. The offence was committed during the day, at about 9.30 a.m. at the Appellants homestead. The 2<sup>nd</sup> Appellant stated that he was at home when he heard noise. During the scuffle, the parties' father appeared in answer to screams by the complainants, and also neighbours went to answer to the screams. The father tried to shield 1<sup>st</sup> complainant whereof the 2<sup>nd</sup> Appellant threatened to spear the father who was shielding the 1<sup>st</sup> complainant. The neighbours gathered and the Appellants retreated to their house. It was at the parties homestead. The father poured sugar on the 1<sup>st</sup> complainant's wound as first aid. 1<sup>st</sup> complainant stated in his evidence in chief that he had seen the Appellants in 2009 for the first time, and had visited for more than 5 times thereafter.

15. The 2<sup>nd</sup> complainant stated that he knew the Appellants as they were his brothers. He described vividly what each of the two Appellants were holding when they attacked. He too stated that their father came to rescue them and 2<sup>nd</sup> Appellant dared the father who was shielding them. He stated clearly that he was attacked by the 2<sup>nd</sup> Appellant only, and that he threatened to spear their father.

16. PW3, George Munoru is the father of both the Appellants and the complainants. He stated that on the material day, he was at its Enkare home and had intended to arbitrate on the land problem between his two wives. The complainants had called to tell him that they had arrived. When he heard screams he ran to the scene and found Appellants chasing the 1<sup>st</sup> complainant with a sword and that he had already cut him on the head, and he had fallen down, and had gone to rescue him. He further stated that Appellant No. 2 had a spear and he dared him with a spear if he intervened.

17. On cross-examination, he stated that the 1<sup>st</sup> Appellant had a sword and 2<sup>nd</sup> Appellant had a spear and both had a rungu and a stick when he arrived at the scene of the offence, his homestead from his cousins house.

18. From the above evidence, it is very clear that the two Appellants were not only positively identified but also recognised by the complainants and their own father. No better person could have recognised them better than their father. His evidence was vivid and it cannot be faulted at all. The circumstances surrounding the commission of the offence are not in dispute. The circumstances under which the offences were committed establish that, the Appellants were not strangers as they were indeed step-brothers and sons to the complainants and PW2 their father. There was no mistake as to identification. Having so said, I find that the two were positively identified and recognised. See case **Criminal Appeal No. 227 & 228 of 2012 Ronald Maracho Mokaya & Douglas Omwenga Mokaya -vs- R.**

19. The other ground of appeal is on corroboration. The Appellants in their submissions state that the trial court convicted the Appellants on an uncorroborated evidence.

The evidence on record shows that PW1, 2, 3 and 5 were corroborated by that of PW6 the Area Chief who when summoned rushed to the scene of crime and called the Police who arrested the Appellants.

PW6, Samuel Leposo Kodonyo stated that he knew the Appellants and went to the scene where they had assaulted their step brothers. He also confirmed that PW3 their father, had requested him as the Chief, to find a solution to the land dispute, and had been called to represent the District Officer, though Appellant No. 2, Boniface Leteipa George denied that the chief arbitrated on the land dispute.

20. The injuries sustained by the complainants were confirmed by the Clinical Officer (PW4) who assessed the degree of injury as harm. As stated by the trial magistrate, evidence on the weapons used by the Appellants was corroborated, as they were recovered and produced as exhibits by the Investigating Officer.

21. A careful analysis of the whole prosecution evidence points to the fact that all the prosecution witnesses corroborated each other. An Appellate on first appeal is entitled to scrutinize the evidence as a whole and subject it to a fresh and exhaustive examination, and came up with its own decision. This I have done. I have weighed the conflicting evidence and find overwhelming evidence in support of the trial court's findings and conclusions.

22. The Appellants defence that they did not assault the complainants who they stated were strangers, and that they were assaulted by the public could not be believed, nor supported by any credible evidence. For instance, the evidence of the Appellants father, PW3, was not controverted at all. It was their evidence that it was their tenants, members of the public who assaulted them, as they wanted to evict them from their houses. They even denied knowing them, yet they were their step-brothers.

Appellant No. 1 stated that he did not relate well with his father but did not give any reasons. Appellant 2 stated that he related well with his father and confirmed that there was a second wife, whom he said he did not know, and that his father had refused to educate him.

It is evident that there was bad blood between the Appellants and their father, but this did not give them the right to attack and injure their step- brothers. I find that the appeal fails in respect of grounds No. 1, 2, 3, 4, 5 in their entirety, and I find no reason to interfere with the trial courts finding on conviction.

23. On ground No. 6, the trial court meted a five year sentence of imprisonment on Appellant No. 1, Simon Munoru George and a 2<sup>1/2</sup> years imprisonment on Boniface Munoru, the 2<sup>nd</sup> Appellant.

It has been argued that the above sentence is harsh and excessive in the circumstances.

24. The two Appellants were charged with the offence of causing grievous harm contrary to Section 234 of the Penal Code in the first count, and assault causing actual bodily harm contrary to Section 251 of

the Penal Code on the second count. Count 3 was creating disturbance in a manner likely to cause a breach of the peace contrary to Section 95(1) of the Penal Code.

The sentence prescribed by law for the offence, if convicted in Count 1 is imprisonment for life. On Count 2 as stated above, upon conviction, a sentence of 5 years imprisonment is prescribed. On Count 3, if convicted, a sentence of imprisonment for six months is prescribed.

The trial court convicted the 1<sup>st</sup> Appellant to serve 5 years in prison on Count 1 and 3. 2<sup>nd</sup> Appellant was convicted under count 2 and 3, and sentenced to 2<sup>1</sup>/<sub>2</sub> years imprisonment.

25. In their mitigation, both Appellants were not remorseful. They stated that their father left them and went to marry a second wife, mother of the complainants, and that he had neglected them with their mother.

26. I must state here that differences between parents should not cause siblings to settle scores by fighting. There is no justification at all. I am minded that these offences were committed apparently due to the family dispute on land between the two houses where the Appellants took the law in their hands to settle scores with the step-brothers. As stated by the trial court, these offences are serious and must be discouraged. However, both Appellants are first offenders. The trial court ought not mete maximum sentences on first offenders, but circumstances of each case must be considered. This was stated in the case **Otieno -vs- R (1983) KLR 295.**

27. I have considered all the circumstances appertaining hereto, and the sentences meted. The Appellants and the complainants are step-brothers. Though not the maximum sentence, the sentence to Simon Munoru George of five years imprisonment was excessive and harsh in the circumstances. I shall reduce the same to 2<sup>1</sup>/<sub>2</sub> years. Sentence of 2<sup>1</sup>/<sub>2</sub> years imposed on Boniface Munoru George of 2<sup>1</sup>/<sub>2</sub> years will not be interfered with, and shall be confirmed. In making the above decision, I am informed by the fact that both Appellants had a common intention and participated jointly to commit the said offences.

28. The upshot of the above is that the appeal on conviction is dismissed. The appeal on sentence succeeds to the extent above mentioned and is thus substituted. The Appellants shall serve the remaining period of imprisonment, which runs from the date of sentence. It is so ordered.

**Delivered, dated and signed at Nakuru this 20<sup>th</sup> day of March 2015**

**JANET MULWA**

**JUDGE**

**Judgment delivered in open court in the presence of:**

Rugut for State

Otieno for Appellants

Omondi - Court clerk