



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 255 OF 2012

E KAPPELLANT

VERSUS

REPUBLICSTATE

(From original conviction and sentence in Criminal Case number 678 of 2010 of the Chief Magistrate`s Court at Kilgoris – Hon. B. Ochieng-PM dated and delivered on 12th October 2012)

JUDGMENT

This is a criminal appeal by **E K**, the appellant herein. He was charged at Kilgoris Criminal Case No. 2010 for **Grevous harm, Contrary to Section 234 of the Penal Code**. The particulars being that on **31st day of August, 2010** in **Transmara District** within **Narok County**, jointly did grievous harm to **A C O T**. He denied the offence. The trial proceeded and he was duly convicted and sentenced to 3 years imprisonment.

However, being aggrieved and dissatisfied with the conviction and sentence, he has appealed to this court.

His grounds of appeal are set out as here below:

- 1. That my Lords, trial magistrate erred in law and facts by not thoroughly considering that I entered a plea of not guilty and that the prosecution failed to prove its case beyond any reasonable doubt as required by law against me.**
- 2. That my lords the trial magistrate did not prove its case against the prosecutor case was riddle with salient contradictions which had the trial considered he would have ruled in favour of the appellant.**
- 3. That my lords the trial magistrate erred in law and facts, the conditions and circumstances prevailing at the scene of crime which were not conducive to sustain positive identification of the appellant.**
- 4. That my lord, the prosecution set of evidence fell short below the degree of accusing required to justify a conviction in the absence of every essential witness who were not availed by the**

prosecution to clear doubts placed upon them yet they were mentioned in the court.

5. *That my lords I now request to be furnished with a true certified copy of court proceedings to enable me highlight my grounds of appeal and also request that my appeal be heard in my presence.*
6. *That my lord, the sentence of 3 years imprisonment is overly harsh, excessive and illegal in the foregoing.*

Submissions by the appellant's counsel:

1. The magistrate arrived at a decision against the evidence on record which stated that the complainant was assaulted by mob justice after raising an alarm.

DW4- N is a sister-in-law to the 1st accused. The complainant testified that he was called by DW4 to her home to arbitrate on a dispute she had with her husband. This shows that the complainant wanted to molest N, she raised an alarm and the complainant was assaulted by the mob.

2. The appellants were operating a taxi business and was not at the scene of the incident, they had dropped a customer at Kilgoris township- a distance from the scene.

It is on record that the appellants took the complainant to the Hospital as he was their regular customer.

3. It is my submission that the appellants cannot have been the ones assaulting the complainant. The complainant and the appellants are cousins. He was their customer and a chief.
4. It is therefore my submission that the chief merely used his powers to charge the appellants for the offences they did not commit.
5. DW4 instead of being called by the prosecution, was called by the defence. She never wrote a statement to the police.
6. The Complainant says he was attacked from behind by two people. The issue of identification was not fully exercised. The incident took place at 7p.m by mob justice.

Additionally, the evidence of the complainant is not corroborated by other witnesses.

I submit that evidence of a single witness which is uncorroborated at 7p.m without identification should not be allowed to stand.

7. The evidence of DW2 & DW4 ought to be believed i.e that they were not at the scene at the material time.
8. The fact that they took the complainant to the hospital negates the fact that they had assaulted the complainant who is their cousin.

The appellants ask that the court to find that they are not guilty of the charge, allow the appeal herein, set aside the sentence and convicts.

The Respondent's Submission

1. *The 2nd accused assaulted the complainant.*
2. *This was corroborated by DW2*

E ran away when he saw the askaris

3. *In his defence E did not explain why he ran away.*

The complainant said:

“ When I was about to leave I was suddenly surrounded by persons”

The third accused hit me on the shoulder. C K also beat the complainant. He broke my leg.

4. *That taking the complainant to the hospital was not out of remorse.*
5. *The respondent asks the court, if it finds that the appeal has no merit, the sentence be enhanced to reflect the seriousness of the offence.*
6. *That the appeal be dismissed as it has no merit and the conviction be upheld.*

As to whether there was sufficient evidence to support the conviction be upheld.

As to whether there was sufficient evidence to support the conviction, this court as this is the first appellate court, is enjoined to consider the entire evidence, evaluate it and reach an independent conclusion bearing in mind that it neither heard nor saw the witnesses testify (**see Okeno vs Republic 1972 E.A. 32**)

Accordingly, having read the proceedings, the testimonies of the complainant and other witnesses, especially PW2, this court is inclined to dismiss this appeal.

The identification was unnecessary, as the complainant knew his attackers as these were his cousins. The Complainant`s evidence was corroborated by PW2 who was at the scene when the complainant was saying and pointing at his attackers, E & C.

At some point E fled when he saw askaris coming. He never explained the reasons for his flight.

The fact that appellant took the complainant to the hospital was not out of remorse, but to disguise their true intentions.

Therefore, having evaluated the evidence, I hold that this appeal has no merit, and be and is hereby dismissed and the conviction and sentence upheld. The injuries inflicted on the complainant are very serious. However, the court will not enhance the sentence as urged by the respondent`s counsel.

This judgment applies **Mutatis Mundantis** to **Criminal Appeal No. 256 of 2012**

Dated , signed and delivered at Kisii on the 12th Day of June, 2015

C.B. NAGILLAH

JUDGE

In the presence of:

Kabari holding brief for Kerosi for the appellant

Mbeletu for the respondent

Samuel Omuga - court clerk