



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**  
**CRIMINAL APPEAL NO. 13 OF 2015**  
**CONSOLIDATED WITH 17 & 18 OF 2015**

**BETWEEN**

**ERICK AKASA ODEK ..... 1<sup>ST</sup> APPELLANT**

**DAVID OWUORI NYAKOI ..... 2<sup>ND</sup> APPELLANT**

**PHOEBE ATIENO DAVE ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. C. Rugut, RM in Oyugis Senior Resident Magistrates Court Criminal Case No. 226 of 2014 dated 13<sup>th</sup> March 2015)*

**JUDGMENT**

1. The appellants, **ERICK AKASHA ODEK**, **DAVID OWUOR NYAKOI** and **PHOEBE ATIENO DAVID** were charged with the offence of causing grievous harm contrary to **section 234** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge were that on 10<sup>th</sup> May 2014 at Riat Area in Kanyikela location, Ndhiwa District of Homa Bay County, they jointly and unlawfully did grievous harm to **MICHAEL OMONDI AENDA**. The subordinate court convicted and sentenced them to 10 years imprisonment. They now appeal against the conviction and sentence.
2. As this is a first appeal, I am obliged to review and evaluate the evidence afresh and reach an independent conclusion as whether to uphold the conviction. In so doing allowance should be made for the fact that I neither heard nor saw the witnesses testify (see *Pandya v Republic [1957] EA 336* and *Kariuki Karanja v Republic [1986] KLR 190*). I shall therefore outline the evidence presented in the court below.
3. The complainant, **MICHAEL OMONDI AENDA**, testified that on the night of 10<sup>th</sup> May 2014, he was with his friends at a pub watching football. At about midnight he left the pub and as he was walking towards his home he met three men, two of whom he knew and whom he identified as the 1<sup>st</sup> and 2<sup>nd</sup> appellants. As he proceeded home he met the 3<sup>rd</sup> appellant. He recognized her as there was moonlight and he shone his phone-torch. The 3<sup>rd</sup> appellant shouted in Dholuo, “*Ndio huyu maliza yeye.*” When he reached home, he found his door broken and the padlock cut. He tried to

look for his lamp but it was not there. He switched on his phone torch and saw two men whom he identified as the 1<sup>st</sup> and 2<sup>nd</sup> accused enter the house. The 1<sup>st</sup> accused slapped him with a panga on the left shoulder. The two assailants then tied his hands behind his back with a cloth and placed them on a seat cushion while at the same time demanding money. PW 1 stated that at the time he had been expecting money from the sale of cane.

4. PW 1 further narrated that while the 2<sup>nd</sup> appellant was standing by the door, the 1<sup>st</sup> appellant took out a mineral water bottle from his pocket, poured some fluid on his hands, buttocks and legs, took out a match box and proceeded to set him on fire. The fire caused the PW 1 to sustain burns on his hands, buttocks and legs. PW 1 managed to untie his hands and grabbed the piece of cloth that was covering the 1<sup>st</sup> appellant's face and asked him why he was killing him. The 1<sup>st</sup> appellant responded that the 3<sup>rd</sup> appellant had hired him to kill him. PW 1 testified that when he recognized the 1<sup>st</sup> appellant, the 1<sup>st</sup> appellant called out the 2<sup>nd</sup> appellant and they both left. At the time the 3<sup>rd</sup> appellant was standing about 20 metres away from the house. After the ordeal, PW 1 raised alarm which attracted neighbours. He was taken to Rakuoro Hospital then to Rongo Hospital for treatment. He was later admitted to Homa Bay District Hospital where he stayed for 3 months while undergoing treatment.
5. Police Constable Wilson Cheruyot (PW 2) was the investigating officer in the matter. He recalled that on 17<sup>th</sup> May 2014 at 7.00 am he was requested by his Commanding Officer to visit PW 1 who was then admitted at Homa Bay District Hospital undergoing treatment as a result of an attack which occurred on 10<sup>th</sup> May 2014. He found PW 1 had sustained injuries on the left hand and fingers, right leg and buttocks. He took the PW 1's statement and issued a P3 form. He thereafter caused the appellant to be arrested and charged after investigations.
6. Michael Ochola (PW 3), a clinical officer, at Homa Bay District Hospital filled the P3 form in respect of PW 1. He confirmed that PW 1 sustained superficial burns on the face, upper limbs, fingers, left and right buttocks and right soles of the feet whereupon he was admitted to the hospital for treatment. He assessed the degree of injury as grievous harm.
7. After the close of the prosecution case, the appellants were put on their defence. The 1<sup>st</sup> appellant elected to make an unsworn statement in which he denied that he had committed the offence. He stated that PW 1's sister, one Dinah, is the one who led to their arrest and that she had sent him a phone text message telling him that she knew what had taken place. The 2<sup>nd</sup> appellant elected to give sworn testimony. He stated that on the material night he was asleep with his wife, the 3<sup>rd</sup> appellant, when he was awoken by neighbours screaming. He went to the scene and found PW 1 lying outside. He stated that the accused could not point to any of the assailants although he was present with his wife. When cross-examined, he stated that he was a neighbour to PW 1 and that they lived in the same compound and they had no differences.
8. The 3<sup>rd</sup> appellant stated that she was the wife to the 2<sup>nd</sup> appellant and on the material day she was asleep with her husband when they heard screams at about 3 am. The 2<sup>nd</sup> appellant went out and when he came back, he told her that PW 1 was lying outside his house. She recalled that she asked her husband to call her mother and explain what was happening. After a while people came to take PW 1 to hospital. She further recalled that the 2<sup>nd</sup> appellant was arrested after 5 days as one of the people who assaulted PW 1. She denied that she had anything to do with the assault.
9. The principal issue in this appeal is whether the appellants were properly identified. The prosecution case was based on one identification witness in difficult circumstances. It has been said time and again that the court ought to warn itself of the danger of relying on the evidence of such a witness and should scrutinise the evidence carefully before proceeding to convict the accused. This principle has been reiterated by the Court of Appeal in several cases following the Court of Appeal for Eastern Africa decision in *Abdalla Bin Wendo & Another v Republic* [1953] 20 EACA 166, the Court stated as follows;

*Subject to certain well known exceptions, it is trite law that a fact may be proved by the 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 following 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 possibility of error.*

10. Likewise in **Wamunga v Republic [1989] KLR 424 at 426**, the Court of Appeal reiterated that:

*[I]t is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.*

11. This was not a case of identification of a stranger but rather one of recognition as he knew the appellants. In **Anjononi & Others v Republic [1980] KLR 59, 60** the Court of Appeal stated as follows concerning recognition:-

*The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.*

12. Even in cases of recognition, the court is enjoined to examine the circumstances of such recognition closely as mistakes may also be made. I have reviewed the testimony of PW 1 and the intensity of moonlight or the phone torch or even the intensity of the fire was not explored by the prosecution to enable the court determine whether it was of such intensity as to allow for clear recognition. PW 1's testimony was also very scanty on how he knew the appellants and for how long although it emerged from the evidence that PW 1 and the appellants lived in the same locality. What is more disturbing is the fact that the incident occurred on 10<sup>th</sup> May 2014. From his own testimony PW 1 was able to call his neighbours after his ordeal on that night. According to the charge sheet, the appellants were arrested on 16<sup>th</sup> May 2014 and it is on the next day that PW 2 was called upon to investigate the matter. The time taken to arrest the appellants and circumstances of their arrest was important since the prosecution case was that they were known to the appellants hence they could have been arrested immediately if indeed a report was made by the people who attended to PW 1 on the night of the incident. Moreover, there is a glaring contradiction on the date of arrest emerging from the evidence as PW 1 testified that when he was in hospital he heard that the appellants had been arrested after 3 days yet the appellants were arrested after 5 days.

13. Having reviewed the evidence in light of the principles applicable, I find that the prosecution case against the appellant was not watertight. I therefore allow the appeal. The appellants are released unless otherwise lawfully held.

**DATED and DELIVERED at HOMA BAY this 19<sup>th</sup> October 2015.**

**D.S. MAJANJA**

**JUDGE**

Mr Okoth instructed by G.S. Okoth & Company Advocates for the appellant.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.