



REPUBLIC OF KENYA

IN THE HIGH COURT OF AT KISII

CRIMINAL APPEAL CASE NO.193 OF 2011

SAMUEL ONGWAYE NYAKUNDI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

This is a criminal appeal by Samwel Ongwaye Nyakundi. As an accused person in a **criminal case no.557 of 2010** at Nyamira he was charged for/with grievous harm, contrary to **Section 234 of the Penal Code**.

The particulars thereof were that on the 4th day of February, 2008 at Nyambiri village in Nyamira District within Nyanza province [then], jointly with others not before court unlawfully did [cause] grievous harm to George Morara Nyaberi.

He pleaded not guilty as a result thereof the matter proceeded to full hearing at Nyamira Magistrate's Court. Six witnesses testified for the prosecution. The court found that the injuries to the complainant were grave as a result his left hand was amputated. The accused was convicted and sentenced to serve 15 years imprisonment.

The appellant being aggrieved and dissatisfied has now appealed both against the conviction and the sentence. His appeal is dated 24th September 2011.

The grounds of his appeal are as follows:-

1. **THAT** the learned magistrate erred in law and in fact by convicting the appellant on a defective charge sheet.
2. **THAT** the learned magistrate erred in law and in fact by giving undue weight to the prosecution evidence.
3. **THAT** the learned magistrate erred in law and in fact that the complainant is brother's wife who understands very well that am sick.
4. **THAT** the learned magistrate erred in not considering that am the 1st offender who could have benefited from non custodial sentence which I apply your honour court shall award your lordship.
5. **THAT** the learned magistrate erred in law and in fact in totally disregard the testimony of the appellant without giving any reason for the disregard.
6. **THAT** the learned magistrate erred in law in failing to consider my plight as portrayed in my mitigations that I am a poor man and the sole bread winner of four children who physically require my tender care.
7. **THAT** the learned magistrate erred in law and in fact by misdirecting herself and relying on

- imaginary assumptions which ought to have been produced as a basis of convicting and sentence.
8. **THAT** the learned Magistrate erred in law and in fact by convicting and sentencing the appellant to serve fifteen years with the charges which is unprofessional law.
 9. **THAT** the learned Magistrate erred in law and in fact in relying on imaginary evidence without exhibits.
 10. **THAT** the conviction and sentence is irregular and bad in law.

THE APPELLANT'S SUBMISSIONS BY MR. NYAMWANGE, ADVOCATE

The appeal seeks to have both the conviction and the sentence set aside.

1. At several places of the record of the proceeding, it is eminently clear that, it was not the appellant who cut the complainant's hand but the appellant's son, [Obedi] Obati. The complainant was attacked by a father, Samwel and his two sons, Obati [Obedi] and Ombasa.
2. It appears on record, that the appellant was armed with a panga, a rungu and a stone.

This appears, in view, improbable. The trial magistrate did not question the credibility of the witness on this issue.

3. The testimony of P.W.3 and P.W.1, are at variance regarding the injuries.
4. P.W.6-investigating officer talks of the offences. Yet the charge refers to one offence.

I submit that where the charge is at variance with the testimony, the charge cannot stand.

The learned trial magistrates did not observe, erroneously, the distinction or the cleavage between the charge and the testimony.

Therefore the appellant prays that the conviction and the sentence be set aside on the basis of the reasons set above herein by the appellant.

THE RESPONDENT'S SUBMISSIONS BY STATE COUNSEL, MALESI

The Respondent will oppose the appeal in certain respects and will, also, support, in the other respects.

The injury suffered by the complainant were those inflicted by the person the complainant clearly identified which injuries resulted in his arm being amputated. That person who caused those injuries was not arrested. He is not, definitely, the appellant in this matter.

However, the injuries inflicted by the appellant was but an assault. Three people attacked the complainant and in his judgment, the trial magistrate referred to ***"a principle of common intention, at page 28 paragraph 2 of his judgment"***

However, because it is not indicated how this principle was applied or is applicable.

Therefore I urge this court to vary the judgment of the lower court's findings under **Section 354 of C.P.C.** for the charge directed against the appellant to be an assault contrary to Section 251 of the Penal Code, as opposed to grievous harm, contrary of 234.

I refer the court to ***criminal appeal No.314 of 2011, Dickson Mwangi Munene 1st Appellant and Another –versus- The Republic***

THE ROLE OF THE FIRST APPELLATE COURT:

The first appellate court's duty is to consider the entire evidence, evaluate the testimonies as presented in the lower court, and reach an independent conclusion, bearing in mind that he neither saw or nor heard the testimonies himself, to see as to whether there was sufficient evidence to support the conviction ***[see***

Okeno –versus- Republic [1972 E.A.32

From the testimonies, it seems clear that the person who wielded a panga and inflicted grievous harm to the appellant was not Samwel Nyakundi Ongwaye. P.W.1 says, it was Opati [Obed] Samwel who having raised his hand carrying a panga to cut “**my neck**”, I raised my left hand to prevent him decapitating my head, as a consequence, I suffered grievous injuries on my left hand, in the middle, just below the elbow and above the wrist. This hand was eventually amputated.

FINDINGS AND CONCLUSION

It is true that the appellant was attacked by the appellant together with his two sons, Obed (Opati) and Ombasa Samwel. However, the appellant is not the one who inflicted grievous harm on the appellant. It was his son Obed Samwel. He is still at large, he has not been apprehended to date, along with his brother Ombasa Samwel.

I agree with the prosecution that the charge of grievous harm be varied to read a charge of assault as that is what the appellant did when he beat the complainant with a rungu made of coffee stick.

Assault is contrary to **Section 251 of the Penal Code**. This offence attracts a different penalty. The maximum penalty for assault is five years imprisonment.

CONCLUSION

This court accordingly proceeds to substitute the offence of assault with the earlier offence of grievous harm.

And therefore the appellant having served all four (4) of the 15 years imprisonment meted out on 13/09/2011, this court will allow the petition dated 24th September, 2011, and accordingly order the release of the appellant from the said sentence forthwith.

It is so ordered.

Dated and delivered at Nyamira this 17th day of November, 2015.

C. B. NAGILLAH

JUDGE

In the presence of:-

Nyamwange for the Appellant

Malesi for the Respondent

Mercy- Court Clerk