



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 147 OF 2010**

**KISEMEI KALAMBA ..... ACCUSED**

**VERSUS**

**REPUBLIC**

*(Being an appeal from the sentence of Hon. B.M. Kimemia S.R.M delivered on 30/6/2010 in Kitui  
Principal Magistrate Criminal Case No. 443 of 2007)*

\*\*\*\*\*

*(Before Hon. B. Thurairaja J)*

**J U D G M E N T**

1. The Appellant, **Kisemei Kalamba** was charged with two counts of grievous harm contrary to **section 234** of the **Penal Code**.

The particulars of the offence in count I were that on 15<sup>th</sup> day of August 2002 at about 5.00 p.m. at **Kalambani Sub-location, Mutha Location** in **Kitui District** of the **Eastern Province**, unlawfully did grievous harm to **David Kisyula Mwangi**.

The particulars of the offence in count II were that at the same time and place, the Appellant did grievous harm to **Samson King'onde Kisyula**.

2. After a full trial, the Appellant was convicted and sentenced to serve eight (8) years imprisonment in count I and four (4) years imprisonment in count II. The sentence ran concurrently.
3. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-
  - v. **The medical evidence was not supported by any documents.**
  - v. **The weapon allegedly used was not produced as an exhibit.**
  - v. **There was a delay of nine months before the hearing of the case commenced.**
  - v. **There was an existing grudge between the two families because of a land dispute.**
4. The Appellant did not make any submissions. He relied on the record.

The State was opposed to the appeal. It was submitted that the evidence of the prosecution witnesses is that of eye witnesses who knew the Appellant and had a close encounter with him at the material time. It was further submitted that the medical evidence showed that injuries were sustained and that the defence raised that this case was a frame up did not hold any water.

5. This being a first appeal, I am duty bound to re-evaluate the evidence and the record afresh and come to my own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.
6. The case for the prosecution was that at the material time, PW3 **Samson King’ombe Kisyula** the complainant in count II was on his way home. He saw his uncle the Appellant who was ahead of him cutting the late **David Kisyula Mwangu** with a panga. The late **David Kisyula Mwangu** who was under attack was the father to PW3. PW3 ran and stood between his father and the Appellant and inquired what was wrong. The Appellant did not reply and instead threw the panga at PW3. The Appellant then cut PW3 with the panga on the left leg and on the left hand. PW3 lost consciousness. When he came to he found himself admitted at **Mutomo Hospital**. His father who was the complainant in count I was also admitted at the same hospital and was still unconscious.
7. After treatment the victims of the panga attack recorded statements with the police. PW1 **Kithome Mwango**, PW2 **Paul Wambua Kisyula** and PW4 **Onesmus Ngombo Kivoko** who witnessed the attack also recorded statements. The Appellant was subsequently charged with the offences herein.
8. In his defence the Appellant gave sworn evidence. No witnesses were called. The Appellant stated that the case had taken long and as a consequence he has suffered a lot. He reiterated the evidence of the prosecution witnesses and stated that this case was frame up on him because of a land dispute.
9. PW3 **Samson King’ombe Kisyula**, a primary school teacher in his evidence described the Appellant as his uncle and the complainant in count I as his (PW3’s) father. It is PW1’s evidence that he found the Appellant attacking his father with a panga and he stood between them to inquire what was wrong. This was a very close encounter between people who knew each other. PW3 described the injuries he sustained as cuts on the head and hands.
10. PW1, PW2 and PW4 gave evidence that corroborates that of PW3. It is the evidence of PW2, **Kithome Mwango** a businessman at the market that he saw the Appellant cutting the complainant in count I with a panga on the head and thereafter attacked the complainant in count II with the same panga when the complainant in Count II went to rescue the father. PW2 knew the two complainants and the Appellant but did not know the cause of the problem.
11. PW2 **Paul Wambua Kisyula** who is a brother to PW3 and PW4 **Onesmus Ngomo Kivoko** also gave a similar account of evidence regarding the attack.
12. The evidence of PW1 – PW4 is that of eye witnesses. The witnesses knew both the Appellant and the complainants. The evidence of PW1 – PW4 establishes that both the complainant in Count I & II were assaulted by the Appellant. It has also come out clearly from both PW2 and PW3 that their father has since passed away.
13. PW6 **P.C. Isaac Wanyoike** arrested the Appellant after reading the investigations file. PW6 carried out further investigations after the complainant in count I passed away. It was the evidence of PW6 that he opened an inquest file but following advice from the **Attorney General’s** office, the charges of grievous harm were retained in Count I. PW6 produced the statement that was recorded by the complainant in count I and the death certificate as an exhibits.
14. PW5 the **Clinical Officer** who treated the complainant in count II produced the P3 form as an exhibit. His evidence is that the said complainant sustained cut wounds on the forehead, left hand and left wrist joint. He further testified that the injuries were probably caused by a sharp object. He classified the injuries as grievous harm. The evidence of the **Clinical Officer** further corroborates the evidence of the rest of the prosecution witnesses. A P3 form (exh.4) was also produced.
15. Although the Appellant in his defence talked of a frame up because of a land dispute, the same is not convincing. PW1, PW4, PW5 and PW6 are independent witnesses who had no reasons to frame up the Appellant. If the land dispute existed, then it ought to have been settled through lawful means. The evidence against the Appellant is overwhelming.
16. I find no merits in the appeal and dismiss the same. Consequently, I uphold both the conviction and sentence imposed by the trial court.

.....

**JUDGE**

**Dated and delivered at Machakos this 18<sup>th</sup> day of February 2014.**

.....

**B. THURANIRA JADEN**

**JUDGE**