



No. 237/2014

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL NO. 169 AND 182 OF 2008**

**CONSOLIDATED**

**JOHN KASYA.....1<sup>ST</sup> APPELLANT**  
**KASINGA NZAMBI ..... 2<sup>ND</sup> APPELLANT**  
**VERSUS**  
**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court Criminal Case No. 1156 of 2007 by Hon. S.K. Mutai, RM on 7/8/2008)*

**JUDGMENT**

1. By the orders of the court dated **16<sup>th</sup> February, 2010 H.CRA. No. 179 of 2008 and 182 of 2008** were consolidated with **HCRA. 169/2008**. The Appellants in the three (3) cases were jointly charged in **Criminal Case No. 1156 of 2007** with the offence of doing grievous harm.
2. They were tried, convicted and sentenced to serve **five (5) years** imprisonment. Being aggrieved by the conviction and sentence they appealed. At the time of hearing of the appeal however, the court was notified of the death of the appellant in **Criminal Appeal No. 179 of 2008 Musyoka Kasole**. The appeal therefore abated. This leaves the court to consider **Appeal No. 169/2008 and 182/2008** as consolidated.
3. The grounds of appeal summed up are as follows:-
  - i. **That** the learned trial magistrate erred in law and fact by relying on evidence adduced by the prosecution's witnesses which was unreliable, manifestly contradictory, uncorroborated, lacking evidential value that was not sufficient to sustain a conviction.
  - ii. **That** the learned trial magistrate erred in law and fact by failing to ascertain the language the appellants understood and to consider the defence put up.
  - iii. The trial magistrate erred in law and fact by failing to appreciate that there was no eye-witness to the alleged incident and that there was a land dispute and grudge against the appellant and thus the reason for framing-up the appellant.
  - iv. **That** the learned trial magistrate erred in law and fact by not finding that the appellant's right to fair trial were contravened since they were held in police custody for a period of 4 days contrary to the provision of the law.

- v. **That** the learned magistrate erred in law and fact by sentencing the appellants to **5 years** imprisonment, a sentence that was manifestly excessive in the circumstances.
4. Facts of the case were that on the **5<sup>th</sup> October, 2007**, PW1, **Kimanzi Ngui** was on his farm preparing it for cultivation. The appellants herein went there armed with weapons. They ordered him to drop down the panga he had and raised up his hands. They assaulted him and injured him. **Kitungu Singi** went to rescue him but was threatened and ordered to leave. He screamed. **Monzu Nzulaa** went to his rescue. He reported the matter to the police. He was examined at **Kitui District Hospital** by PW4 **Peter, Wambua Muthengi**, the degree of injury sustained was maim hence this case.
5. In their defence, **Geoffrey Kisinga** stated that on the material date he did not meet his co-accused because he was at their farm at **Katoleni** with his sons working on the farm. He denied having seen the complainant in the day. He was arrested at night. He saw the complainant.
6. **John Mulunga Kisiu** denied having seen or known the complainant. He was arrested at midnight and taken to the police station. He was asked to disclose names of the persons who took part in the fight. He denied having seen anybody fight. He was placed in custody.
7. This being a first appeal, it is the duty of this court to re-evaluate the evidence adduced during trial, in order to arrive at its own independent conclusions, bearing in mind that it did not hear or see the witnesses testify ( *see Okeno versus Republic [1972] E.A. 32*).
8. Contrary to submissions of **Mrs Kinyanjui** for the appellants that the appellants were charged and convicted of the offence of assault whereby the court noted that there was no evidence of injury and disregarded it; the appellants faced a charge of doing grievous harm as provided by the law. To prove the charge the prosecution called evidence of the clinical officer who examined the complainant to confirm his allegations.
9. PW1, the complainant stated that he was attacked. He was cut on the head twice with a panga. He bled from the head. He was also hit with a stick on the shoulders and back. PW4 on examining him noted that he had a deep cut wound on his forehead. The right shoulder was painful. The right elbow joint was swollen and painful. The left hip joint was painful. He assessed the degree of injury sustained as maim.
10. Maim is defined as the destruction or permanent disabling of any external or internal organ, member or sense. Evidence adduced proves that the complainant's external organs were injured. Grievous harm on the other hand is defined as any harm that amounts to maim. ( *See Section 2 of the Penal Code, Cap 63, Laws of Kenya*). Evidence adduced therefore proves beyond reasonable doubt that the complainant (PW1) was injured on the **5<sup>th</sup> October, 2007** and he suffered grievous harm.
11. The issue to be determined is whether the grievous harm occasioned on the person of the complainant was occasioned by the appellants? PW1 stated the he had known the appellants prior to the incident. They were his friends. On the material date they were in a group of about ten (10) people. He identified **Musyoka Kasole** as the person who cut him on the head with a panga. **John Kasya** hit him on the shoulder with a stick while **Kisinga Nzembi** also hit him with a stick. **Kitungu Singi** who went to rescue him was ordered to leave.
12. PW3, **Geoffrey Kitungu Singi** on hearing screams went to the scene of the incident found the complainant sitting on the ground bleeding. The appellants were at the scene and they were carrying sticks while **Musyoka** was carrying a panga. He ordered him to leave.
13. DW2, **Munzu Nzala** also found the complainant injured and the three (3) appellants were at the scene armed with weapons. The appellants and a group of people who were present surrounded him and ordered him to put the panga he had on the ground. He assisted the complainant by taking him to hospital. The question to be answered is whether the evidence lacked evidential value? Was it sufficient to sustain a conviction?
14. **Section 143** of the **Evidence Act** stipulates thus;-

***“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact”.***

The evidence adduced is clear. At the point of the complainant being attacked, other witnesses called by the prosecution were not present. Pursuant to the provisions of the law aforesaid.

15. In the case of *Ogeto versus Republic [2004] KLR 14* the Court held thus:-

**“ it is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identifying evidence of such witness especially when it is shown that the condition favouring a correct identification are difficulty.”**

16. In reaching its decision the trial court did caution itself of the need to test the evidence of PW1 with care. It went on to remark that the evidence adduced did not weaken the prosecution's case. Having analysed the evidence adduced I do not find any misdirection on the part of the learned trial magistrate. The incident occurred in broad daylight. These were people known to the complainant. He could not have been mistaken as to their identity. PW2 and PW3 similarly knew them and on arrival at the scene they were still aggressive.

17. In their defence the appellants simply denied having been at the scene of the incident. The evidence adduced by the prosecution however confirmed their presence.

**The issue to be addressed is whether the appellants could have been framed up.?**

18. **Kizinga Nzembi** did not understand why he was framed up by a person he did not know. In admitting that the complainant was injured, he denied having occasioned the injury upon him. **John Mutunga Kisio** alluded to a group they belonged to of **Nzunguni** who had a land dispute with the **Kapenguria Group** to which PW2 belonged.

19. There was absolutely no reason why they could have been framed up. Consequently, the evidence adduced by the prosecution was sufficient to sustain a conviction.

20. I have perused the record. It is clearly stated that the appellants understood Kikamba language. The charge was read in Kikamba, a language the appellants understood. They also tendered the defence in the same language. Throughout the proceedings they were accorded services of an interpreter. It has been held that judicial notice must be taken that one of the core duties of a clerk is to offer interpretation services to an accused or even to the court where it does not understand the language of the accused or a witness to the case. ( see **Said Hassan Nuno versus Republic Criminal appeal No. 322 of 2006**)

21. This is a case where the interpreter was present. The interpretation is deemed to have been done per the requirement of the law. That ground must fail.

22. The appellants were arrested on the **22<sup>nd</sup> October 2007** and arraigned in court on the **23<sup>rd</sup> October 2007**. As correctly submitted by learned counsel for the State **Mr. Mwangi**, the time within which the accused was required to be produced in court was complied with.

23. The appellants were sentenced to **five (5) years** imprisonment. The penalty provided for the offence of causing grievous harm is imprisonment for life. An appellate court can only interfere with sentence of the Lower Court if it is in the interest of justice and if the court misdirected itself. Looking at the injuries suffered by the complainant, the sentence meted out that the appellants have already served was not severe.

24. For reasons given, the appeal fails. It is dismissed.

**DATED, DELIVERED and SIGNED this 8<sup>TH</sup> day of APRIL 2014.**

**L.N. MUTENDE**

**JUDGE**