



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL NO.2 OF 2011**

**BETWEEN**

**BEN MOKUA BISONGA .....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from original conviction and sentence of the SPM's Court at Nyamira in  
Criminal Case No.489 of 2010 delivered on 29th December, 2010 by Hon. J. Wanjala (SPM))*

**JUDGMENT**

Introduction

1. The appellant herein Ben Mokuwa Bisonga was the accused in Senior Principal Magistrate's court at Nyamira Criminal case No.489 of 2010. He was charged with robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The particulars of the charge were that on 23<sup>rd</sup> June 2010 at Nyangoge sub location in Nyamira District within Nyanza Province, jointly with others not before court, while armed with offensive weapons namely pangas and clubs, robbed Daniel Atinda Nyanchama of one mobile phone make Nokia 1110, cash money Kshs.11500/= and 1 Kg of meat all valued at Kshs.14,260/= and immediately before or after the time of such robbery, did use actual violence to the said Daniel Atinda Nyanchama.

The Prosecution case

2. The appellant pleaded not guilty to the charge facing him and the trial ensued. The prosecution called 5 witnesses, namely:- Daniel Atinda Nyanchama (PW1), Wycliffe Momanyi Nyangau alias Nyaribo (PW2), Lucas Mongare (PW3), Pius Mosei Maangi (PW4) and Number 71062 Police Constable Lameck Marwa (PW5). PW1 was the complainant, while PW2 was the motor cycle rider. PW3 answered to the complainant's screams during the attack while PW4 is a clinical officer attached to Nyamira District Hospital.

The facts and the Evidence

3. From the testimonies of the 5 prosecution witnesses, the facts and the evidence of this case emerge. The complainant, Daniel Atinda Nyanchama (Atinda) told the court that on 23<sup>th</sup> June 2010 at about 7.30 p.m., he was a pillion passenger on a motor cycle which was being ridden by Wycliffe Momanyi

Nyangau alias Nyaribo (Momanyi). He was being taken to his home at Nyankoge from Kebirigo Market. Near Nyankoge market, Atinda saw a group of people standing beside the road. As soon as the motor cycle passed the group of people, Atinda's phone rang, and that forced him to ask Momanyi to stop to enable him (Atinda) to answer the phone. Before he could answer the phone, Atinda saw two people who were moving very fast coming from ahead of Atinda and Momanyi. As the two people passed, Atinda was taking out his phone but before he could answer, the two people got hold of him and one of the two people hit him with an iron bar on the left shoulder. As Atinda fell down from the motor bike, Momanyi seemed to be riding off but Momanyi quickly turned back with a view to assisting Atinda. One of the two assailants ran and hit Momanyi with an iron bar. Momanyi was forced to ride away.

4. As Atinda struggled with the two people, the group of about 8 people who were standing beside the road a little earlier on came to where Atinda was being attacked. Atinda managed to recognize some of the people, as they were his village mates. He stated that he was able to identify these people with the help of moonlight. One of the people whom Atinda recognized was the appellant herein, Ben Mokua Bisonga. Others were Nicholas Mobe Changamu alias Micah, Richard Matunda Kombo alias Karuki, Ronald Morara Kombo alias George and Peter Karanio Machugu. Atinda stated that apart from the appellant who was his neighbour, the other assailants were sons to Atinda's step brothers. Atinda also stated that the appellant was armed with a long sharp knife with which he cut Atinda on the forehead. During the trial, Atinda showed a visible scar on the front part of the head. The rest of the gang were armed with sticks which they used to assault Atinda. The gang was also armed with an iron bar and a sharp knife made in the form of a panga.

5. Atinda testified that he was able to scream during the attack and his screams attracted the attention of a boy named William Nyangau who came to his rescue. As he screamed, Atinda also ran to the home of Lucas Mongare, Changamu and his wife Caren Mongina. The Mongares also screamed for help as the pair ran towards the scene. As Atinda ran towards the Mongare's compound, the appellant chased after him, caught up with him while Nicholas Mobe ran ahead of the appellant and hit Mongare with the iron bar on the hand as Mongare tried to rush to Atinda's help. Mongare's wife ran to a neighbour's home and informed that family of what was happening to Atinda.

6. The appellant and Nicholas overpowered Mongare and got hold of Atinda and took him back to the road where they continued beating him. The appellant took Atinda's mobile phone, a Nokia 1110 as Atinda continued screaming for help. After the appellant hit Atinda on the head with the long sharp knife, he (appellant) also took Atinda's Kshs.11500/= from the pocket. Atinda also lost a kilo of meat he had bought plus tomatoes worth Kshs.20/=.

7. As the appellant removed the money from Atinda's pocket, the money fell down and all the gangsters scrambled for it. During this interlude, Atinda escaped from the scene, but he could hear voices behind him saying that if he (Atinda) had left the scene alive, there was a likelihood of their being found out, but in the meantime, Atinda's neighbours, among them his cousin Paul Oigo, came to his rescue. Atinda was thereafter taken to Nyamira District Hospital for treatment.

8. At the hospital, Atinda was attended to by Pius Moseki Maangi, PW4, after Atinda told PW4 that he had been beaten by some people at about 7.40 p.m. on 23<sup>rd</sup> June 2010. On examination, PW4 noted the following injuries on Atinda:- deep cut wounds on the forehead, swollen left shoulder, swollen and painful injuries on the right and left thighs and a cut wound on the left wrist joint. There was also swelling and tenderness on the left shoulder, and a swollen cut wound on the left wrist joint. The injuries were all cleaned, stitched and dressed. Atinda was treated with anti tetanus and analgesics of antibiotics. PW4 classified the injuries as harm. PW4 produced the P3 form he filled in respect of Atinda as **P. Exhibit 1.**

9. PW5 received the report made by Atinda on 23<sup>rd</sup> June 2010 at 10.00 p.m. at Nyamira police station. According to PW5, Atinda reported that he had been attacked by thugs at Nyangoge at about 8.00 p.m. that same night and that he knew who his attackers were and that during the attack, Atinda lost his mobile phone, a Nokia 1110, one Kilo of meat and tomatoes worth Kshs.20/= plus cash of Kshs.11500/=. PW5 also stated that Atinda informed him that he had managed to identify his attackers with the help of

moonlight. PW5 spoke of the injuries sustained by Atinda. PW5 accompanied Atinda to the scene that same night, but since it was night, PW5 could not do much at the scene. PW5 escorted Atinda to Nyamira District Hospital for examination where the P3 form issued by PW5 was filled by PW4. Later, PW5 arrested the appellant after Atinda spotted the latter at the gate of Nyamira police station and thereafter reported him to the police.

10. Wycliffe Momanyi Nyangau alias Nyaribo who testified as PW2 corroborated Atinda's testimony as to what happened on the night of the attack. On how, he was able to identify/recognize Atinda's assailants on the night in question, Momanyi stated that first there was moonlight and secondly that though it was night, one could see a person since it was not very dark. He also stated that the light from the motor cycle helped him to see and identify the two people who attacked Atinda. The witness testified that he could see the people clearly because the light from the motor cycle headlights had lit the whole road. Momanyi testified further that one of the two people who attacked Atinda was the appellant herein who was well known to him because they both hail from the same area. Momanyi further testified that the second person whom he clearly saw attacking Atinda was Nicholas Mobe Changamu who also hails from the same home area but at Isicha village within Nyangoge sub location. Momanyi also told the court that the appellant was armed with a stick and a knife that is usually sheathed in a "bakora" stick, while Mobe had only a piece of wood, and that after the two saw him, they also wanted to get hold of him. Momanyi then took off to Kebirigo market to seek help from his fellow boda boda riders.

11. Three of Momanyi's colleagues accompanied him back to the scene of crime but by that time, Atinda's assailants had fled. Atinda was badly injured all over the body and his clothes were torn. He was taken to the hospital where he was treated and discharged. A report was later made to Nyamira police station and on 24<sup>th</sup> June 2010, Momanyi, Atinda and others went back to Nyamira police station and recorded their statements. During the hearing, Momanyi identified the appellant in court and confirmed to the court that the appellant was armed with a stick and a long knife as he and Mobe assailed Atinda.

12. During cross examination, Momanyi stated that he had known the appellant since he (Momanyi) was a child. Momanyi denied a suggestion by the appellant that it was him who had set up Atinda for attack.

#### The Defence case

13. At the close of the prosecution case, the appellant was put on his defence. He gave a brief sworn statement in which he stated that he knew nothing about the offence of which he was being tried. He stated that on 24<sup>th</sup> July 2010, he was arrested while he was standing outside the gate at Nyamira police station. He stated that when he eventually saw the complainant herein, he realized that it is the same person he has had a dispute with over land. He stated that Atinda wanted the piece of land that was sold to him (appellant) hence the grudge. The appellant also stated that Atinda and Momanyi who testified as PW1 and PW2 respectively were like grandfather and grandchild.

14. During cross examination, the appellant testified that though he was arrested while in the company of his two friends, George Morara and David Onyancha, he would not call them as witnesses. He also stated that sometime in 2007, he took Atinda to the chief over the land dispute and that it was the land dispute that motivated Atinda to lodge a complaint against him (appellant).

#### Trial Court's findings and Judgment

15. After carefully considering all the evidence that was adduced against the appellant and after due consideration of the appellant's defence, the learned trial magistrate was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt. The trial court dismissed the appellant's defence as being untrue. The trial court did not believe the appellant's contention that the case against him was a frame-up. The court found that an attack was visited upon the complainant by the appellant and others who were not before the court and that during the attack the complainant was injured as per the P3 form that was produced in evidence. The appellant was accordingly found guilty as charged and convicted. The appellant was sentenced to suffer death as by law provided.

## The Appeal

16. Being dissatisfied with both conviction and sentence of the learned trial court, the appellant filed this appeal seeking to have the judgment of the trial court overturned.

17. In the Petition of Appeal filed in court on 3<sup>rd</sup> January 2011, the appellant raises the following 6 grounds of appeal:-

1. *THAT the learned trial magistrate erred in law and facts by not thoroughly considering that the appellant entered a plea of not guilty and that the prosecution failed to prove its case against the appellant beyond any reasonable doubt.*
2. *THAT the learned trial magistrate erred in law and in fact by relying on evidence of speculation tendered by PW1 and PW2 whose evidence of identification was insufficient to guarantee the appellant's conviction.*
3. *THAT the learned trial magistrate erred in law and in fact in not realizing that the case against the appellant was a frame up because of bad blood existing between the appellant and the complainant.*
4. *THAT the learned trial magistrate erred in law and in fact in not accepting the appellant's strong defence that would have attracted a non-custodial sentence.*
5. *THAT the death sentence imposed upon the appellant was excessively harsh in the circumstances and was illegal.*

18. On the 4<sup>th</sup> November 2013, the appellant handed in additional grounds of appeal alongside his written submissions. Since no leave had been sought and obtained for the same, we shall consider this appeal on the basis of the grounds contained in the Petition of Appeal filed in court on 3<sup>rd</sup> January 2011.

## The Submissions

19. When the appeal came up for hearing before us on 4<sup>th</sup> November 2014, the appellant handed in his written submissions touching on the following issues:-

- *That the original charge sheet drawn under **Section 296 (2) of the Penal Code** was only but a punishment Section as it was not brought under **Section 295 of the Penal Code**.*
- *That on the particulars of the charge sheet, it was stated in part that on the 23<sup>rd</sup> day of June 2010, there was no specific time the offence was committed, therefore can one guess the time the offence was committed?*
- *That the weapons the assailants were said to be armed with were only classified as offensive weapons but not as dangerous and offensive weapons.*
- *That the evidence on record describes weapons as knife, simi, sticks, iron bar bakora (stick) piece of stick, which weapons are different from those described in the charge sheet which are stated as pangas, and clubs.*
- *That the alleged mobile phone make Nokia 1110 was not assigned a value while the value of the 1kg of meat was also not given though the total value of the items allegedly stolen as per the charge sheet was Kshs.1426/= though judgment gives a value of Kshs.14,260/=.*

20. The appellant thus submitted that the learned trial magistrate ought to have amended the charge sheet in light of the glaring omissions in the particulars of the charge and that having failed to do so, under the provisions of **Section 214 of the Criminal Procedure Code** the charge remained defective and ought to have been dismissed. Reliance was placed on the Court of Appeal decision in **Yongo –vs- Republic [1982-88] KAR 167** for the proposition that an indictment is defective not only on the fact of it, but when it does not accord with the evidence placed before the court on two fronts:- **i)** because of inaccuracies or deficiencies in the indictment or **ii)** because the indictment does not disclose the offence(s) committed or **iii)** because of failure to charge an offence which is disclosed by the evidence. On this ground alone, the appellant sought to have his appeal allowed.

21. The appellant also submitted that the evidence of identification by PW1 and PW2 did not meet the threshold of being certain that there was no mistaken identity of the person (s) who attacked the complainant. The appellant contended that the complainant did not give the appellant's full names with the first report that he (complainant) made to the persons in authority; that it was even more difficult for the complainant to pick out his assailant from a big group of 8 people and that in any event, if the complainant had properly identified/recognized the appellant, the area chief, to whom a report was given by the complainant, could not have arrested a different person from the appellant. The appellant submitted that the complainant's failure to give the names of his attackers to the police with the first report meant that he (complainant) was not sure of the person(s) who attacked him. Reliance was placed on the case of **R. –vs- Kabogo s/o Wangunyu 23 (1948) KLR 5C** and **Kiarie –vs- Republic [1984] KLR 739** for an honest but mistaken opinion as to the identity of an assailant.

22. It was the appellant's further contention that the prosecution evidence on the source of light during the attack was in doubt; that whereas PW1 and PW3 talked of using the moonlight PW2 and PW5 did not mention the moonlight and that in particular, PW5 told the court that the night was dark and as such, he could not do much at the scene of crime on that night. The appellant urged us to make a finding that the conditions prevailing on the night of the alleged attack were not conducive to proper and error-free identification of the appellant.

23. The appellant also submitted that there were material contradictions between the evidence of PW1 and PW5 as to how the appellant was arrested and that it is not clear who between PW1 and PW5 saw the appellant first and that if PW1 was to be believed that the appellant was found standing at the gate to the Nyamira police station waiting to visit some suspects within the police station at a time when he was wanted for robbing the complainant, then such conduct on the part of the appellant was completely inconsistent with the conduct of a person who had just committed a grave offence such as robbery with violence. Reliance was placed on two authorities:- **Joseph Gituku Chege & others –vs- Republic Nairobi CRA Nos.954, 955, 956 and 957 of 2003** (consolidated and unreported), and also **Stephen Wambugu Kangwathi & others –vs- Republic – Nairobi HCCRA Nos.440, 441 and 442 of 2003** (consolidated and unreported).

24. The appellant also submitted that the testimony of PW2 is rather suspect because after the alleged attack, PW2 chose to report the incident to other "boda boda" riders instead of making a report to the police. The appellant challenged the alleged report to the boda boda riders because none of them was called to testify to corroborate the testimony of PW2.

25. Finally, the appellant submitted that the learned trial magistrate fell into error when he failed to give the appellant's alibi defence the weight it deserved, and instead shifted the burden of proof of the alibi to the appellant, and that by doing so, the appellant suffered prejudice.

26. The appellant therefore prays that the appeal be allowed, the conviction quashed and sentence set aside so that he can be set at liberty.

27. The appeal was opposed by Mr. Majale counsel for the respondents. On allegations that the charge was defective, Mr. Majale submitted that the alleged defect touching on the value of the stolen items was during the robbery was not fatal because the elements of the charge were stated correctly concerning the appellants and sections of the law were also in order. In addition, that the learned trial magistrate applied the provisions of **Article 159 (2) (d)** of the **Constitution** in reaching the decision he arrived at.

28. Secondly on issue of identification, counsel submitted that the evidence of recognition is stronger than that of identification and that PW1 and PW3 having recognized appellant well made the prosecution's case watertight to support prosecution's case that the appellant was among the robbers.

29. Thirdly, on alleged material contradictions in the prosecution's evidence, he submitted that the evidence of PW1, PW2 and PW3 related to the events of the material night and further pW4 the clinical officer produced a P3 form as exhibit to show the injuries suffered by PW1.

30. Fourthly, that the appellant was arrested upon being spotted by PW1 who was the victim after the police had issued him with an order to have the appellant arrested.

31. Fifthly on grounds 5 and 6 of the appeal touching on the allegation that the prosecution did not prove its case beyond reasonable doubt, counsel submitted that the appellant in company of others had common intent and proceeded to rob and assault PW1 who was the victim.

32. Sixthly appellant's allegation that there was a grudge between him and PW1, counsel submitted that none of the witnesses called informed the court of any known grudge involving a land dispute between PW1 and appellant. Counsel urged the Court to reject this contention on the part of the appellant.

33. Seventhly, on the alibi defence raised by appellant, counsel submitted that the appellant did not inform the court of his whereabouts on 23<sup>rd</sup> June 2010, the day the prosecution said the appellant was at the scene of robbery and injured the appellant.

34. Appellant in reply reiterated that the charge sheet was defective, that the only relationship he had with PW1 was that he bought land in PW1's neighbourhood and that the perpetrators of the crime are still at large.

35. From the evidence on record, the grounds of appeal and the submissions the issues to be determined by this court are:-

*a. Was the charge against the appellant in this case defective?*

*b. Was the appellant robbed on the night of 23<sup>rd</sup> June 2010?*

*c. Was the appellant identified positively as being among the people who robbed the appellant?*

*d. Was the sentence imposed upon the appellant excessive in the circumstances?*

#### Duty of this Court

36. This being a first appeal, we are under a duty to reconsider and evaluate the evidence afresh with a view to reaching our own conclusions in the matter. As it were, we are under a duty to rehear this case, the only difference being that we have no privilege of seeing and hearing the witnesses who testified during the trial. See **Okeno –vs- Republic [1972] EA 32** and **Pandya –vs- R[1957] EA 336**.

37. Throughout his petition and submissions in court the appellant has attacked the charge sheet on the basis that the value of the goods of which the complainant was robbed was not specifically determined; that the charge sheet used the phrase dangerous weapons while the evidence showed that pangas, knives and sticks were used and the fact that the charge sheet referred to **section 296 (2)** which is the punishment section instead of **section 295** which refers to the definition of robbery with violence.

38. In **Alivi –vs- Republic [1990] KLR 188** it was held that it is not every defect or omission that constitutes a charge defective and it has been held many a time that a mere technical defect in the charge sheet which is not fundamental and does not cause a failure of justice is curable.

39. In **Kilome –vs- Republic [1990] KLR 194** it was held that the paramount consideration in determining whether or not a defect in the charge is incurable or not is whether there is prejudice occasioned to the accused in putting up his defence because of the words used in the charge sheet.

40. On the issue of the weapon used and the charge sheet omitting the words dangerous and the instruments according to the charge sheet were said to be pangas and clubs but the evidence showed knives, simi, sticks, iron bar and bakora, it was held in **Kingori –vs- Republic [2003] KLR 289** that “the charge sheet indicated that the appellants were armed with a panga whereas the police produced a sword as the weapon used during the robbery. The Court of Appeal held that the use of the word “Panga”

instead of **“sword”** in the charge sheet was not fatal to the conviction.

41. The issue of the appellant having been charged under **Section 296 (2)** instead of the defining section 295 is not also fatal as held in **Cosma –vs- Republic [1955] 22 EACA 450** where it was held that:

**“The correct procedure is to specify in the statement of the offence not the section that defines the offence, but the one that prescribe the punishment thereof.”**

42. Therefore the first issue where the appellant attacked the charge sheet as being defective has no substance and the issue is therefore decided in favour of the prosecution.

43. With regard to the second issue of whether or not PW1 sustained injury this was proved by PW4 the clinical officer who attended to PW1 12 hours after the attack. The same was also proved by PW3 who testified that he saw blood oozing out of PW1’s head. Besides the clinical officer PW3 attested to the fact that PW1’s clothes were torn and had blood on them. All this clearly points to the fact that PW1 had been attacked. The only issue that remains to be decided is whether the appellant was positively identified as the one who inflicted those injuries upon the complainant.

44. Regarding the issue of identification of his assailants, PW1 stated during cross examination that:

**“I know you. For this short period you have stayed in our place I know you for about 2 years. You stay in your home. Time was 7.30 p.m. I used my eyes to see you. There was moonlight and the motorbike had light on. You passed from the left hand side of the lights from the motorbike shown at you. You bought land where you are staying. You stay in your home and I stay in my home”**

PW2 (the motor cycle rider) stated thus during evidence in chief:

**“When the customer was pulled he fell down that is when I turned and showed the bike’s lights and I saw the customer being beaten by two people. I could see clearly because the light was showing the whole road..... I identified and recognized Ben Mokuia Bisonga. I knew him very well because he is from my home area at Nyangoge ..... Ben Bisonga had a stick and a knife that is kept in a bakora stick.”**

PW3 (PW1’s neighbour) stated as follows:

**“I do not know how many people they were. Nicholas Changamu I heard his voice. He was calling Ben Bisonga..... Ben Bisonga was on the road about 30 metres from where Nicholas Changamu was calling Ben Bisonga to arrest Daniel Atinda.**

On cross examination by appellant PW3 revealed that:-

**“I have known you for long. You stay at Menyinkwa area. Daniel saw you. Nicholas called your names.”**

45. All the above evidence points to one crucial fact: that PW1, PW2 and PW3 all knew the appellant as one of their village mates. They all knew the appellant before the day of the attack; so that on the material night, it was not a matter of identification of the appellant, but it was a matter of recognition. PW1 said he recognized the appellant with the help of lights from the motor bike head lamps as the appellant and Nicholas walked towards the motor bike. PW1 also did the same. The second time they said they recognized the appellant was after the initial attack when PW2 turned the lights upon the appellant and other after realizing that PW1 was being attacked.

46. In Peter Musau Mwanzia –vs- Republic [2008] e KLR, Tunoi, Bosire & Onyango Otieno JA held:-

**“For evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example that the suspect has been known to him for sometime, is a relative, a friend or somebody within the vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not to be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.”**

47. In the instant case, PW1 stated clearly that he was attacked by the appellant and was able to recognize him by the light from the moon and also by the lights from the motor bike that was shone by PW2’s motor bike. PW1 was also not a stranger to the appellant as he had known the appellant for 2 years as not only a neighbour but a cousin. Pw1’s evidence on recognition of the appellant was corroborated by PW2 and PW3 whose evidence was consistent on the fact that they all recognized the appellant whom they knew before attacking and robbing PW1. In the circumstances, we are satisfied that recognition was proved beyond reasonable doubt.

48. In the case of Anjonon and others –vs- Republic [1980] KLR 59, it was held that:-

**“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 personal knowledge of the assailant in some form or other.”**

49. In the instant case, the basis for recognition was clearly laid by PW1, PW2 and PW3, and their encounter with the appellant need not have been for a very long time on the material night.

50. The appellant contended during submissions that both PW1 and PW2 did not give the appellant’s full names to the authorities with the first report or at all. During his testimony, PW1 stated that on the same night of the attack, he together with PW2 and PW3 went to Nyamira police station and reported the incident. He went on to state: **“Then I was told to come the following day to record a statement. The following day 24<sup>th</sup> June I came with Wycliffe Nyangau who was riding the motor bike when we were attacked and Lucas Mongare Changamu and we recorded our statements.....I told police that I identified some of the attackers..... I was issued with an order of arrest which I took to the area Assistant of Nyangoge sub location.”**

51. Though no names appear to have been given by PW1, it is clear from the evidence that PW1 knew some of his attackers, among them the appellant herein. PW1 stated further that he had no powers to arrest the appellant and that he could only wait for those with the powers to do so to arrest the appellant and they did that on 24<sup>th</sup> July 2008, nearly a month after the attack. PW1 denied a suggestion that the case against the appellant was a frame-up because of a land dispute. PW1 also denied the suggestion that there existed such a land dispute between himself and the appellant who was a son to PW1’s cousin.

52. The appellant also complained that Pw2 never reported the incident to the police. However, there is evidence by PW1 that after he was treated and discharged that night, he was accompanied by PW2 and PW3 to Nyamira police station where they made a report of the incident. PW2 also testified that after PW1 had been treated and discharged, he accompanied him to Nyamira police station to make a report,

after which they went home. PW2 also denied a suggestion by the appellant that he (PW2) and PW1 were drunk that night and that it is PW2 who had planned the attack on PW1.

53. In a nutshell, all the combined evidence placed before the court by the prosecution places the appellant squarely at the scene of crime and displaces the appellant's alibi defence. We have ourselves also examined and reconsidered the appellant's alibi defence and find that it carries no probative value and is easily countered by the prosecution evidence.

54. In conclusion, we find that the appellant's appeal lacks merit, is unwarranted and is accordingly dismissed in its entirety. R/A within 14 days.

**Dated, signed and delivered at Kisii this 24<sup>th</sup> day of July, 2014**

**RUTH NEKOYE SITATI**

**E.M. MURIITHI**

**JUDGE.**

**JUDGE.**

**In the presence of:**

Present in person for Appellant

Mr. Majale (present) for Respondent

Mr. Bibu - Court Assistant