



**IN THE HIGH COURT AT MIGORI**

**CRIMINAL APPEAL NO. 08 OF 2014**

**BETWEEN**

**DANIEL MOSETI MUREMI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case No. 308 of 2013 at Principal Magistrate's Court at Kehancha, Hon. C.M.Kamau, Ag SRM dated on 10<sup>th</sup> February 2014)*

**JUDGMENT**

**1. DANIEL MOSETI MUREMI** was convicted and sentenced to three years in prison on two counts of causing actual bodily harm contrary to **section 251** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge are as follows:

*Count 1.. On 20<sup>th</sup> June 2013 at 2115 hours in Kuria West District within Migori County, [he] assaulted UCK thereby occasioning her actual bodily harm*

*Count 2.. On 20<sup>th</sup> June 2013 at 2115 hours in Kuria West District within Migori County he assaulted EMG thereby occasioning him actual bodily harm.*

2. In petition of appeal dated 9<sup>th</sup> May 2014, the appellant has raised the following five grounds:

1. *The learned trial magistrate erred in law and in fact by entering a conviction against the appellant though he did not plead guilty.*
2. *That the learned trial magistrate further erred in law and in Fact by not calling upon the testimony of the investigating officer, a very crucial witness in this case who could have appraised the court on investigations pertaining to the case beforehand*
3. *The learned trial magistrate erred in law and in fact by failing to specify which section of the Penal Code he invoked his sentence causing miscarriage of justice*
4. *The trial magistrate further erred in law and in fact by failing to sufficiently consider the appellants defence which apparently was based on the fact that the complainants were first to attack the appellant and that the appellant only acted in self defense*
5. *The trial magistrate further erred by relying on the evidence of PW3 the medical officer who failed to bring to court an X-ray form to ascertain the extent of the purported injury , the previous medical history of the victim to corroborate his evidence hence convicted the appellant on an excessive and extreme sentence causing gross miscarriage of justice.*

3. The grounds as set above call for this court to review and evaluate the evidence. It is now established that as the first appellate court the high court must conduct an independent evaluation of the evidence as

to reach its own conclusion bearing in mind that it neither saw nor heard the witness.

4. To prove its case, the prosecution marshalled five witnesses. PW1, the first complainant, is the wife of PW2, the second complainant. PW1 recalled that on 21<sup>st</sup> June 2013 at about 9.15 pm, her husband called her to open the gate. She opened the gate and her husband and friend, PW4, came in. She left briefly to go to the toilet while the two proceeded have dinner. When in the toilet, which was outside the house, she saw someone with a raised panga. Although she had a spotlight, she did not recognize him immediately. The two began struggling. The person bit her arm. Her screams attracted her husband and PW2.

5. PW2 testified that when he reached home on that day, his wife went to the toilet after setting dinner for him and his friend. Within about 3 minutes, he heard PW1 screaming for help. He immediately went to the toilet where he found his wife had grabbed the assailant while the assailant wanted to use the panga to cut her. When PW1 saw him, she left the assailant. The assailant then turned to PW2 and hit him with the blunt side on the panga. PW2 grabbed the panga and in the process he was cut on the right wrist and fingers. PW2 testified that he struggled with the appellant while his wife was screaming.

6. At this stage, PW4 who had come to the house with PW2, joined them and they pinned the assailant down. Members of the public came in response to PW1's call for help. PW2 testified that at the time he had not recognized the assailant, however, after members of the public came, the person identified himself as Moseti, whom he recognized as his neighbor. He was then taken to the police station.

7. PW4 confirmed that on the material day, he was with PW2 at his home when he heard PW1 scream after she had left to go outside. He followed PW2 and found an assailant had grabbed PW1. He saw PW2 being hit with a blunt side of the panga. He stated that he also screamed for help and neighbors came. The appellant introduced himself and the witness recognized him. He was taken to the police station.

8. PW5 heard screams on the 20<sup>th</sup> June 2013 at about 9PM. He was in his house watching television. He went outside and found several people. He found PW2 holding the appellant on the ground. He was given the panga by an elder to take to the police station.

9. PW3, a clinical officer from Isebania Sub- district Hospital, examined PW1 and confirmed that he had a human bite on the right upper hand. He assessed the injury as harm. He also examined PW2 and confirmed that he had a wound on the right hand thumb, 2<sup>nd</sup> and third fingers and a human bite on then left hand. He classified the injury as harm.

10. When the accused was put on is defence, he gave an unsworn statement. He denied the offence and stated that on 20<sup>th</sup> June 2013 he was attacked by PW1 and PW2 who took him to the police. He claimed that he was fabricated due to domestic differences.

11. The duty of the prosecution is to prove that the appellant is the one who assaulted PW1 and PW2 as the incident occurred at night, the court has to be satisfied that the appellant was properly identified. In **Francis Kariuki Njiru & 7 others v Republic CA Cr. Appeal No. 6 of 2001 (UR)** where this Court of Appeal stated as follows, *“The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinised carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R. v Turnbull [1976] 63 Cr. App. R. 132)....”*

12. In this case although PW1 and PW2 did not immediately identify the assailant. It is only after he was subdued that he identified himself self as Moseti that PW2 recognized him as a neighbor. PW4 also confirmed that the appellant identified himself. The case of mistaken identity was also negated by the fact that PW2 and PW4 apprehended the assailant and handed him over to the police. PW5, who was an independent witness, confirmed that the appellant had been captured after he heard the screams and went to the scene of the incident.

13. The appellant contends that the prosecution did not produce X-rays to prove the extent of the injuries. PW1 and PW2 gave consistent evidence of their injuries which were confirmed by the examination conducted by PW3. It was unnecessary to provide or produce X-rays to determine the extent of the injuries.

14. The appellant complains that the investigation officer was not called to testify as he was a crucial witness. In appreciating this concern, the learned trial magistrate observed as follows, *“I have also noted that the investigation officer was not called as a witness. He is usually the witness who appraises the court of investigations conducted and summaries the evidence against the accused person. Failure to call him reflects poorly on the prosecution especially when no explanation is given. However this omission on its own is insufficient to invalidate the trial or cause the acquittal of the accused person. In UP vs. Anil Singh, (AIR 1988 SC 1998) where the Indian Supreme Court had this to say ‘it is necessary to remember that a judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. one is as important as the other. .... it is unfortunate that investigating officer has not stepped into the witness box without any justifiable ground. But this conduct of the investigating officer or any other hostile witness cannot be the ground for discarding the evidence of PW5 and PW7 whose presence on the spot is established beyond reasonable doubt. They have suffered injuries and their evidence is corroborated by medical evidence’ ....”*

15. The reasoning of the learned magistrate was correct. Moreover, under **section 143** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, states that, *“no particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any facts.”* In **Bukenya & Others v Uganda [1972] EA 549**, the court held that where essential witnesses are not called, the court is entitled to draw an inference that if their evidence had been called, it would have been adverse to the prosecution case.

16. In my view, taking the totality of the prosecution evidence, there is ample evidence that PW1 and PW2 were assaulted by the appellant. The assault was confirmed by PW3, PW4 and PW5. The investigating officer will only come to confirm that the appellant was arrested and probably produce the weapon used by the appellant. The available witnesses were sufficient to prove the charge and I therefore find that the failure to call the investigating officer was not fatal to the prosecution case.

17. The defence by the appellant founded on a grudge between him, PW1 and PW2 cannot stand. At no time in his cross examination of the witnesses did he raise the issue of the grudge or any relationship with the complainant. The evidence I have outlined is inconsistent with the self defence as it is the appellant who attacked a helpless PW1 while she was in the toilet.

18. The sentence of three years imposed on the appellant on both count, is neither harsh nor excessive in view of the brutal, unwarranted and vicious attack the appellant subjected the complainants.

19. Having evaluated the evidence, I affirm the conviction and sentence.

20. The appeal is dismissed.

**DATED and DELIVERED at MIGORI this 15<sup>th</sup> August 2014**

**D.S. MAJANJA**

**JUDGE**