



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 17 OF 2014**

**ISA IDDI MULELE ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**(Appeal arising from the judgment of [S.N. ABUYA, P.M.] delivered on 16.3.12 in the Principal Magistrate's Court at Butali in Criminal Case No.479 of 2011)**

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

The appellant was charged with two counts of causing grievous harm contrary to **section 234** of the **Penal Code**. The particulars of the two counts were that the appellant and another *on the 26.8.2011 at Lubao area, Sasala sub-location in Kakamega North District within Western Province jointly and unlawfully did grievous harm to ROSEMARY OREMO and ROSE SIMBWELA. The appellant was convicted of both counts and fined KShs.15,000/= in default to serve three years imprisonment.*

The grounds of appeal are that the sentence is harsh and excessive in the circumstances, his mitigation was not considered, he seeks leniency and will never engage in criminal activities in future. The appellant reiterated those grounds during the hearing of the appeal and stated that he has learnt carpentry up to grade I and is remorseful. Mr. Oroni, State Counsel, opposed the appeal and submitted that the case was proved against the appellant.

Before the trial court Rosemary Ngina Oremo testified as PW1. She stated that on 26.8.2011 at about 3.00 p.m. they came from a funeral with her sister by the name ANGELINE (PW5) in a motor vehicle and it was parked. They were discussing when Hesborn and the appellant attacked them using an iron rod and a rungu. The appellant hit her on her hand and she sustained a fracture. She was taken to Malava police station where the incident was reported and later at Malava district hospital. She produced her P3 form from the hospital. **PW2 ROSE SIMBWELA** testified that on the 26.8.2011 at 3.00 p.m. she was on the road when the appellant attacked her with a stick and injured her hand. She was taken to hospital by Angeline.

**PW3 TERESINA MUKUSIA OREMO** was also from the funeral and is the mother of Angeline. They stood by the road and parked the vehicle. The appellant who is her grandson went and attacked PW1 and PW2. The two were injured and Angeline went to report at the Lubao AP camp. **PW4 KIZITO SIFUNA** was based at the Malava hospital and attended to the complainants. The complainants' injuries were classified as grievous harm. He filled the P3 forms for the two complainants. **PW5 ANGELINE MALESI ALFAYO** testified that on the 26.8.2011 at 3.00 p.m. they were from a funeral and she parked her vehicle at a stage near the gate of Francis. She was talking to her relatives when Hesborn started assaulting PW1. The appellant also went there and started assaulting PW1 and PW2. She reported the matter at the Lubao AP camp and took the victims to hospital.

The appellant was put on his defence and gave sworn evidence. He stated that on 26.8.2011 he was at Lubao when he was informed that neighbours were fighting. He saw a motor vehicle belonging to his aunt. He was held and people started beating him. He was put in the boot of the car and taken to his co-accused's place. There were two police officers and he was taken to Lubao AP Camp. He was later taken to Malava police station and charged with the offence. He denied committing the offence. **DW3 EVALYNE KALAISA NDEDA** heard that there were people fighting outside. She was removing maize in her house and did not go out to witness the fight. **DW4 C M** testified that he is a standard four pupil.

The evidence is that PW5 had parked her vehicle on their shamba and they started throwing stones at each other. His father who the appellant's co-accused was hit and he fell down. Police went there and arrested the appellant.

The main issue for determination is whether the prosecution proved its case against the appellant. The grounds of appeal are that the appellant is remorseful and seeks the court's leniency. The evidence proves that indeed PW1 and PW2 were assaulted by the appellant. They sustained injuries and medical evidence was adduced showing that the complainants suffered previous harm. The defence evidence did not raise any doubt on the prosecution case. Indeed the appellant himself seems to be conceding that he is a changed man and seeks the court's leniency. The appellant is serving three years imprisonment.

I do find that the appeal on conviction lacks merit and is hereby disallowed. On the issue of sentence, I do find that three years imprisonment is a bit high compared to the amount of KShs.15,000/= imposed as fine. The appellant has now served for over two years' imprisonment. The parties are related. I do review the sentence and substitute it with the period already served. The appellant shall be set at liberty unless otherwise lawfully held.

**Delivered, dated and signed at Kakamega this 18<sup>th</sup> day of September 2014**

**SAID J. CHITEMBWE**

**J U D G E**