REPUBLIC OF KENYA

IN THE HIGH COURT

AT MIGORI

CRIMINAL APPEAL NO. 56 OF 2014

(FORMERLY KISII HCCR APPEAL NO. 8 OF 2013)

BETWEEN

JOHN MIRUKA JOHN.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 462 of 2011

at Principal Magistrate's Court at Kehancha, Hon. A. P. Ndege, SRM dated 3rd January 2013)

JUDGMENT

1. In the subordinate court the appellant, **JOHN MIRUKA JOHN** was charged with two others of the offence of causing grievous harm contrary to **section 234** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the charge were that on 15th September 2011 at Masaba Sub-location in Kuria West District jointly with others not before the court they unlawfully did cause grievous harm to SNN by fracturing his left hand. He was convicted and sentenced to 5 years imprisonment while his co-accused were acquitted.

2. The appellant now appeals against the conviction and sentence primarily on the ground that there was insufficient evidence to convict him. Ms Owenga, learned counsel for the State, supported the conviction on the ground that the evidence was sufficient to sustain the conviction and that the facts constituting the offence were proved beyond reasonable doubt.

3. As this is the first appeal, this court is enjoined to conduct an independent review of the evidence and reach an independent conclusion bearing in mind that it neither heard nor saw the witnesses testify (see ***Okeno v Republic*** **[1972] EA 32**).

4. The prosecution case was against the background of a land dispute between PW 2, the father of the complainant, PW 1, the appellant and his co-accused. PW 2 claimed that on 15th September 2011, he was unable to work on his land because two accused chased him from the land armed with pangas and rungus. He retreated from the shamba and went to report the matter to the Chief who then referred him to the District Officer ("DO"), Masaba. The DO assisted him by providing two police officers to go the scene.

5. PW 1 testified that he was assaulted by the appellant and two co-accused on 15th September 2011 at about 2.00 pm as he was going to school. He became unconscious as a result of the assault and when he regained consciousness, he found himself at Isebania Hospital. PW 3, a farmer in the area, heard screams and when he went there he found PW 1 had been assaulted. When he arrived at the scene he found many people. He did not witness the assault. He organized for PW 1 to be taken to hospital. PW 5, a farmer nearby, also testified that she heard screams and when she went outside she saw PW 2 being attacked by the appellant using a panga. She also saw the other accused with pangas and rungus.

6. PW 6, the clinical officer, produced the P3 form which showed that the complainant had been treated at Isebania on 15th September 2011. PW 7, a police officer at Kehancha crime office, testified that on 15th September 2011, two suspects were brought to the station by officers for Masaba AP Camp on allegations that they assaulted someone. He conducted investigations which resulted in the accused being charged.

7. At the close of the prosecution case, the accused all gave sworn testimony. The appellant admitted that while constructing on the plot he was arrested and taken to the DO's office at Kehancha. He denied that he assaulted PW 1. The other accused denied the offence and stated that at the material time they were at the DO's office. DW 4, the assistant chief of Nyankore area, testified that he received a complaint from PW 2 that morning and went to the disputed plot at about 11 am where he arrested the accused in order to prevent a fight. He took them to the DO's office and while he was with PW 2, PW 2 received a phone call informing that PW 1 had been assaulted.

8. After the defence had closed it case and the matter reserved for judgment, the learned magistrate found it necessary to call a witness whom he considered essential to the determination under **section 150** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. He expressed himself thus;

> *I feel that this matter could be decided either way depending on the evidence of how, when and where the accused clients herein were arrested. The Prosecution for unknown reasons, did not call the arresting officer whose evidence now appear so crucial to the just determination of the criminal dispute herein …*

9. He therefore summoned, CW 1, a police constable. The gist of his testimony was that on 15th September 2011 he arrested the 2nd and 3rd accused after being directed to do so by the DO who had received a report from PW 2 about the incident that had happened earlier that morning. He recalled that he was with PW 2 when he received a report that his son had been assaulted. He stated that he could not leave the two accused he had arrested so he told PW 2 to go and attend to his son. He took the two accused to the DO's officer and then to Kehancha Police Station.

10. As a result of the testimony of CW 1, the learned magistrate acquitted the two accused as they were not at the scene of the assault. He convicted the appellant as he concluded that his presence at the scene of the assault was confirmed by PW 3 and PW 4 and since he could not have been CW 1, he must have committed the act.

11. From the testimony of PW 1 and the medical evidence of PW 6, it is not in doubt that the complainant sustained injuries as a result of an assault inflicted on him on 15th September 2011. The key issue for determination in this appeal is whether the appellant assaulted PW 1.

12. The learned magistrate rightly pointed out that that the evidence of the arresting officer was critical in determining whether all the accused were involved in the assault. In the absence of the testimony of the arresting officer, there was doubt as to whether the appellant and his brother were at the scene at the material time or under arrest at the DO's office. The appellant was therefore entitled to an acquittal.

13. Even assuming that the learned magistrate was correct in summoning CW 1, as witness under **section 150** of the ***Criminal Procedure Code***, the fact that the witness confirmed that the two accused were in his custody at the time the assault occurred severely undermined the testimony of PW 1 who stated that he positively identified all the accused and that of PW 4 who saw all the accused assault PW 1. On the

whole the prosecution failed to prove its case against the appellant beyond reasonable doubt.

14. Finally, I also find that the learned magistrate erred in invoking **section 150** of the ***Criminal Procedure Code*** after both the prosecution and defence had closed their respective cases. **Section 150** provides as follows;

> *A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:*
>
> *Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.*

15. The section entitles the court to call or summon any witness at any stage of the proceedings or re-call any witness who has testified. This provision is not a carte blanche for the court to call witness at any time as there is **section 212** of the ***Criminal Procedure Code*** which entitles the prosecution to call a witness new material or matters arise out of the defence case. It provides:

> *If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.*

16. The learned magistrate admitted that the prosecution case was wanting after the defence had closed it case. It was not his duty to make up the prosecution case by calling a new witness who had not been called by the prosecution. His only option was to acquit the accused. In this regard he fell into error.

17. The appeal is allowed. The conviction and sentence is quashed.

18. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at MIGORI this 21st day of November 2014

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Owenga, Senior Prosecution Counsel, instructed by Office of the Director of Public Prosecutions for the respondent.