



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL NO. 42 OF 2014

BETWEEN

ALOIS ABUYA AURO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 177 of 2013 at Principal Magistrate's Court at Ndhiwa, Hon. B. R. Kipyegon, RM dated on 8th July 2014)

JUDGMENT

1. **ALOIS ABUYA AURO** was charged with 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 7th May 2013 at Upper Kayambo Location, Ndhiwa District he unlawfully did grievous harm to Margaret Muga Okome. After the trial the appellant was convicted and sentenced to 10 years imprisonment.
2. In the petition of appeal lodged on 26th July 2014, the appellant essentially challenges the conviction and sentence on the ground that the prosecution did not prove the case beyond reasonable doubt. Counsel for the appellant, Mr Bundi, submitted that the issue of identification was critical and that the identification of the appellant in the circumstances was not free from error as the incident occurred at night and the lighting conditions were not favourable for positive identification. He contended that most of the prosecution evidence was hearsay and that conviction ought to be reversed.
3. Mr Oluoch, learned counsel for the appellant, opposed the appeal on the ground that the main witnesses PW 1 and PW 4 gave clear and consistent evidence which was favourable for positive identification and that the conduct of the appellant indicated that he was guilty. Counsel submitted that the appellant's defence was considered and that the prosecution proved its case.
4. The role of the first appellate Court is firmly established by precedent. Its duty is to examine and evaluate the facts and reach an independent determination whether the conviction and sentence should be upheld having regard to the fact that it neither heard nor saw the witnesses testify (see *Okeno v Republic* [1972] EA 32).
5. The prosecution evidence was supported by 6 witnesses. PW 1, the complainant, testified that on 7th May 2013 she was in her house cooking and at about 9.30 pm, the appellant came in and told her that she would not see the next day. He went out briefly, came back and stabbed her on the

chest with a spear. PW 4, who was in the house at the time, testified that he saw the appellant pierce his grandmother with the spear. When PW 1 raised alarm after she had been assaulted PW 2, her son, responded by going to her house and on the way he met the appellant with two spears, a rungu and a panga. Upon reaching his mother's house, he organized for her to be taken to hospital. PW 5, PW 1's granddaughter, did not witness the assault but testified that after the incident she saw appellant with two spears, a rungu and panga.

6. PW 3, a clinical officer at Ndhiwa Sub-District Hospital, examined PW 1 on 22nd July 2013. He confirmed that she had been treated at Homa Bay District Hospital on 7th May 2013 after the assault. He observed that she had a deep penetrating wound on the chest. From the records and x-ray he noted that the penetrating wound had led to the accumulation of blood in the chest cavity. He opined that the injury could have been caused by a sharp object probably a spear. He assessed the degree of injury as grievous harm.
7. PW 6, the investigating officer, testified that while on duty at Ndhiwa Police Station on 11th May 2013, he received a complaint from PW 1. The incident was initially reported on 7th May 2013 by PW 2. He issued her with a P3 form and proceeded to investigate the matter and record statements. He also arrested the appellant on 13th August 2013 in the company of other officers.
8. When put on his defence, the accused elected to give sworn testimony. He testified that on the material date at night he was summoned by his uncle and when he went he was involved in a dowry dispute whereupon he was assaulted by one Aloys Okomo. He thereafter went to his home and the next morning he went for treatment at Ndisi Health Centre and was referred to Homa Bay District Hospital. He claimed that on the morning of 13th August 2013, police officers came to his home, assaulted him and arrested him. He denied knowledge of the charge. His testimony was confirmed by his wife DW 2 who admitted that she did not witness the accused being assaulted. DW 3 testified how the accused was arrested and assaulted by the police.
9. On the basis of the evidence, the learned magistrate was satisfied that PW 1 had suffered grievous harm and that the appellant is the one who assaulted her. On the first issue whether the complainant sustained injuries, I am satisfied that the prosecution through PW 3 confirmed the deep penetrating wound on the chest which was probably caused by a sharp object which was suffered by PW 1. It was assessed as grievous harm.
10. The substantial issue for consideration in this appeal is whether the appellant was identified as the person who inflicted the injury on the complainant. The learned magistrate properly directed himself on the law as to identification stated in ***Cleophas Otieno Wamunga v Republic [1989] KLR 422***. The Court of Appeal held that evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger and that whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.
11. The circumstances under which the appellant was identified were those of recognition rather than identification. In ***Anjononi & Others v Republic [1980] KLR 59, 60*** the Court of Appeal:

The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. 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 the personal knowledge of the assailant in some form or other.

12. Although the attack happened at night, the appellant came to see PW 1 prior to the attack and he spoke to her. PW 1 immediately raised alarm after the attack and when her son PW 2 came she identified the appellant as the attacker. PW 2 had seen the appellant with spears, a rungu and panga on his way to PW 1's house. PW 4, her grandson, saw the appellant pierce his grandmother with the spear. He stated that there was a tin lamp in the house which he used to identify him and he also knew his voice. PW 5 saw the accused soon after the incident with spears, rungu and pangas. The totality of the testimony of the prosecution witnesses was that it was consistent and it affirmatively pointed to the appellant as the person who assaulted PW 1. The appellant was identified before, during and after the assault.

13. The appellant, in his defence, did not say anything about the incident that led to his arrest. His testimony though puts him in the vicinity of the assault. He also confirmed the testimony of PW 6 that he was arrested by police officers on the morning of 13th August 2013. In light of the prosecution evidence and particularly the positive identification, his defence was properly dismissed.

14. As regards the sentence, the appellant's act was deliberate, unprovoked and fell short of causing death. I am therefore satisfied that the learned magistrate exercised his discretion within the limits of the law.

15. The conviction and sentence are affirmed. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 18th day of December 2014.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.