



**REPUBLIC OF KENYA**

**High Court at Garissa**

**Criminal Appeal 53 of 2012**

**SWALEH IBRAHIM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**From original conviction and sentence in Hola Resident Magistrate's Court Criminal Case Number 219 of 2011(M.O Obiero)**

**JUDGEMENT**

1. Swaleh Ibrahim (the appellant) was tried for the offence of causing grievous harm contrary to section 234 of the Penal Code. The offence was alleged to have been committed on 27<sup>th</sup> day of August 2011 at Lenda village Tana River District in the same County. He was sentenced to two years imprisonment and being dissatisfied with the conviction and sentence he has brought this appeal. In his grounds of appeal he is challenging the following:

- i. Production of the P3 form by a doctor who treated the complainant and filled the form and failure by the trial court to allow production of the P3 form in respect of his injuries
- ii. Failure by the prosecution to call for the investigating officer to testify
- iii. Relying on contradictory evidence
- iv. Failure to consider that there was a family grudge
- v. Discrediting the appellant's defence

2. The appellant relied wholly on his written submissions and asked the court to allow the appeal and order his release. He has submitted that the prosecution witnesses lied to court that there were no crops in the farm; that there were indeed crops on the farm as stated in the evidence of Zena Saidi (DW3). He further submitted that the fight between the complainant and the appellant started because the appellant had attempted to drive complainant's cattle from DW3's farm; that he did not cut the complainant with a panga but that both of them were injured after they fell on tree stumps as they fought; that he also sustained injuries from the fight and reported the matter to the police, was referred to hospital for treatment and was issued with a P3 form; that Dr. Mwangi, the doctor who treated the complainant and filled his P3 form is the same one who treated and filled his P3 form; that he was denied a chance to cross examine Dr. Mwangi because the trial court allowed a different doctor to produce the P3 form.

3. The appellant further submitted that the case was not investigated since Police Constable Elkana

Kipchumba was the arresting officer and he did not perform any investigation duties; that the trial court disregarded the appellant's defence even after the appellant testified that he was also injured in the fight and that PW4 confirmed that the appellant had sustained injuries and that he (PW4) has issued him with a P3 form.

4. The learned state counsel, while opposing the appeal, made oral submissions to the effect that the appellant injured the complainant and there was no mistake in identifying him as the person who inflicted injuries on the complainant; that the prosecution evidence is well corroborated; that the findings of the trial court was founded in law. He asked the court to dismiss the appeal.

5. The case for the prosecution is supported by evidence of five witnesses while the defence called three witnesses in support of its case. The evidence is clear and simple. **Salim Ali Babuya** (PW1) testified that he was in the company of his wife **Fatuma Salim** (PW2) herding cattle on 27<sup>th</sup> August 2011 when they spotted the appellant hiding in the bushes. PW1 passed the appellant and after a few steps the appellant emerged. Without talking to PW1 the appellant attacked him and cut him with a panga at the back of his head. PW1 fell down. The appellant hit him on the forehead and mouth. PW1 claims that he became unconscious after the attack. PW2 raised alarm attracting people in the neighbouring farms. The appellant ran away on seeing these people. PW1 was assisted to Hola Police Station where he reported the matter and was referred to hospital. He was later issued with a P3 form that was completed and returned to the police. It was produced as part of the evidence. **Ali Omar** (PW3) who testified that he was nearby cutting grass told the trial court that he saw the appellant hiding in the shrubs where he emerged from to attack PW1 after PW1 passed nearby.

6. On the defence side, the appellant (DW1) testified that on the 27<sup>th</sup> August 2011 at about 1.00pm he was at the farm when PW1 took his cattle to graze on the farm. He drove the cattle away and remained on the farm to guard the crops. After a short time PW1, armed with a spear, went to ask him why he had driven his cattle away. The appellant claims that he was seated at the time. He stood up and caught the spear. He struggled with PW1 and both fell down where there were tree stumps sustaining injuries. Zena Saidi raised alarm attracting the people who were nearby. PW1 left and he too left with the spear he had managed to snatch from PW1. He met police officers on his way to Hola who took away the spear and told him to go to hospital and thereafter report to the police station. He went for treatment, and later went to the police station where he was issued with a P3 form.

7. Maro Umuru (DW2) told the court that on the same day he was at the river with PW3 fishing at about 1.00pm when he saw PW1 grazing cattle on the appellant's mother's farm. PW1 and the appellant started fighting. DW2 claims he raised alarm and that in company of the appellant's mother they assisted the appellant to hospital where they found PW1 claiming that he had injuries. DW2 further testified on cross examination that PW1 was armed with a spear and a panga and that he used the spear to pierce the appellant on the hand.

8. The evidence of Zena Saidi (DW3), who told the court that she was the appellant's mother, is that on 27<sup>th</sup> August 2011 at about 1.00pm she was on the other side of the river with her son the appellant; that the appellant crossed the river to drive cattle that had been grazing on her farm away; that after a short while she heard some noise and saw PW1 and the appellant arguing with the appellant driving the cattle away and PW1 returning them to the farm. She claims that she crossed the river in company of DW2 and PW3. On reaching the scene they did not find PW1 but found the appellant carrying the spear. She testified that they assisted the appellant to hospital; that they met police officers at a place known as Kone who took the spear from the appellant; that at the hospital they found PW1 and that both PW1 and the appellant were treated.

9. The trial court analysed this evidence, believed the evidence of the prosecution witnesses as having been well corroborated that the appellant had attacked PW1, doubted the evidence of the defence and convicted the appellant. The trial court also noted that both PW1 and the appellant sustained injuries but failed to address the issue as to the cause of the appellant's injuries.

10. I have re-examined and re-evaluated all the evidence on record as required of this court when sitting

on first appeal. I believe that the facts of this case did not fully come out. PW1, PW2 and PW3 testified about the appellant lying in the bushes and attacking PW1 after the latter passed nearby. While they admitted that PW1 was grazing his cattle on the farm belonging to the appellant's mother, they denied there were crops growing on the said farm. They seem to be saying that the appellant attacked the PW1 for no apparent reason. Among the people mentioned by PW2 as having witnessed the attack are PW3 and DW2. Indeed DW2 testified that he was with PW3 at the time the attack took place. DW2 said he was fishing while PW3 said he was cutting grass. DW3 was also mentioned as having been present. However the evidence of these three witnesses is varied. PW3's evidence tallies with that of PW1 and PW2 that the appellant emerged from the bushes and attacked PW1 cutting him with a panga while DW2 said PW1 and the appellant started fighting without saying who attacked the other first.

11. The evidence of the appellant, DW2 and DW3 is that PW1 was grazing his animals on crops growing on the farm. These witnesses also stated that the appellant has driven PW1's cattle away from the farm but PW1 returned them to graze on the crops. They seem to state that this is the cause of the fight between PW1 and the appellant. The defence witnesses stated further that PW1 had a spear which he attacked the appellant with and that the appellant took the spear from him and further that the spear was taken by the police.

12. That the appellant sustained injuries is a fact. The appellant has stated so in his evidence; DW2 and DW3 state the same in their respective testimony before the trial court and PW4 confirms this evidence. He stated on cross examination that **"You had sustained injuries. It is true I issued you with a P3 form..... I saw injuries"**. In normal practice, police officers do not issue P3 forms without justification. Even though the appellant was not the complainant in this case as far as the prosecution case is concerned, PW4 gave him a P3 form and he confirmed having seen injuries on the appellant. This court believes that PW4 had very good reasons for issuing the appellant with a P3 form. This reason was that the appellant had injuries that required medical attention. The police failed to establish the cause of those injuries or if they did, they omitted to testify to that cause. This P3 form must have been completed by a doctor as the appellant states in his evidence. He claims that the same doctor, Dr. Mwangi, who treated PW1 and completed his P3 form, is the same one who treated him and completed his P3 form. If this is true, and this court has no reason to doubt this evidence, then the appellant was denied a chance to cross examine this doctor. I have noted with concern that this doctor was not summoned to testify. The record shows that from 3<sup>rd</sup> November 2011 to 7<sup>th</sup> March 2012 the trial court adjourned the case six times on account of Dr. Mwangi. The reasons advanced by the prosecution for non attendance of Dr. Mwangi were that he had not been served with summons. The reasons why the doctor was not being served with court summons are not given. The court went along granting one adjournment after another and finally, without laying the ground why another doctor should testify on behalf of Dr. Mwangi the prosecution called Dr. Sultana to give evidence. The appellant was not asked if he had an objection and it is only after testifying that the court asked the appellant if he had any objection to the production of the P3 form by Dr. Sultana. The appellant objected stating that he needed to ask Dr. Mwangi some questions. This was denied by the court citing delay of the matter as the reason.

13. The evidence of Dr. Mwangi who treated both PW1 and the appellant and completed their P3 forms was crucial to defence case. This is so because of the fact that the appellant had sustained injuries from his encounter with PW1. This confirms that the facts of this case are not as presented by the prosecution witnesses. There must have been a fight between PW1 and the appellant. It is not clear who was carrying what weapon and there is no solid evidence that the appellant had a panga. While noting that there is nothing wrong with another doctor producing the medical evidence, it is the view of this court that where the defence objects for good reason as in this case, the court ought to listen and summon the doctor who prepared the medical report (see section 77 of the Evidence Act).

14. My reading and understanding of the evidence is that this case was not investigated and if it was, the investigations were shoddy. PW4 states on that issue in his evidence in chief:

**"I do remember on 27<sup>th</sup> August 2011, I was on duty at the police station. One Salim Babuya came and reported that he had been attacked by one Swaleh Ibrahim. He had sustained injuries on the head and on the mouth. He also complained of pain on the left finger. I referred him to Hola**

**District Hospital. I also issued him with a P3 form which was filled by a doctor. Later I arrested the accused and charged him with the offence before the court”.**

15. On cross examination by the appellant he stated as follows:

**“You also came to the police station on the same day. You had sustained injuries. It is not true that you brought a spear. I did not visit the scene. I did discover the cause of the problem between you and the complainant. Salim told me that you were hiding in the shrubs and you ambushed him and cut him. .... I recorded your statement and statements of the other witnesses. That is all.”**

16. In my view the action taken by PW4 cannot be termed as investigations. More was required of him to confirm what the PW1 and the appellants as well as the other witnesses had stated. For instance the cause of the attack or fight; whether there were crops on the farm; whether the appellant took PW1’s spear; who else was present and what they saw; the issue of injuries on the appellant, who had caused them, among other issues. There is a fatal error on the part of the police in not investigating this case. Evidence of an investigating officer is a very essential part of a fair trial. The Court of Appeal in **Criminal Appeal No. 213 ‘B’ of 2004 Josphat Mbege Onyango v. Republic** had this to say in this respect:

**“An investigation officer is a very essential witness for the prosecution in a criminal trial. He sums up the case for the prosecution and is normally at the forefront in determining whether or not sufficient evidence has been collected to prefer a charge against a suspect. He is an integral part of the prosecution’s case and failure to call him as a witness is fatal to the prosecution. What is astonishing in this case is that despite the seriousness of the charge facing the appellant the prosecution either due to laxity or sheer carelessness failed to avail the investigations officer.”**

17. I have noted from the record that PW1 is related to the appellant. PW1 stated that the farm on which he was grazing his cattle belonged to his aunt. However despite the two being related, I did not see any evidence on the issue of a family grudge between the two. If such grudge existed, it was not displayed by evidence.

18. My evaluation of the evidence in this case discloses that the appellant was denied a fair trial. The burden of proving a criminal case lies with the prosecution and the standard of proof is that the case must be proved beyond all reasonable doubt. In this case the facts did not come out fully. To my mind both PW1 and the appellant fought and sustained injuries. The appellant was not allowed by the court to tender all evidence in support of his defence. The trial court, by allowing Dr. Sultana to testify despite valid objections by the appellant and without addressing the reasons why Dr. Mwangi was not served with court summons, denied the appellant a chance to advance his defence which to me seems a valid one. It is my finding and I so hold that the appellant did not get a fair hearing. His grounds of appeal are valid. The defence evidence creates valuable doubts in my mind and I do believe that PW1 and the appellant fought. The cause of that fight could have been due to PW1 allowing his cattle to graze on the appellant’s crops or it could be because of some other reason not disclosed. The investigations were not carried out to find out what caused this fight and who between PW1 and the appellant was to blame for it and therefore which one of them or if it is both of them to be charged with the relevant offence.

19. In conclusion therefore, I agree with the appellant in his grounds of appeal. I hereby allow this appeal, quash the conviction and set aside the sentence. I hereby order immediate release from custody of the appellant unless he is being held for any other lawful cause. It is so ordered.

**Stella N. Mutuku**

**Judge**

**Dated, signed and delivered this 11<sup>th</sup> day of February 2013.**