



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPLICATION NO. 129 OF 2011

IBRAHIM HASSAN ISSACK APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 227 of 2011 in the Senior Resident Magistrate's Court at Wajir – L. Kassan (Ag.SRM) on 01/11/2010)

JUDGMENT

1. The appeal arises out of the conviction of the appellant in **Cr. Case No. 227 of 2010** in which he was convicted on two counts of grievous harm contrary to **Section 234** of the **Penal Code**. He was sentenced to serve 15 and 10 years imprisonment respectively in counts 1, and II. The sentences were ordered to run consecutively.
2. He has now come on appeal citing grounds in which he states that the evidence of visual identification was not supported by a prompt first report to the police, that the charges were not proved against him to the required standard, that his defence was not given due consideration, and that the learned trial magistrate failed to point out under which law the appellant was convicted.
3. In response, Miss Kuruga the learned state counsel submitted that **PW1** and **PW2** identified the appellant by the light of the torch which they shone in his face, while **PW4** identified him by the light in her house.
4. Miss Kuruga also contended that the appellant was identified by three witnesses while the P3 forms proved injury to the complainants, and that the matter was reported immediately to the police who testified that it took a while to arrest the appellant. She also submitted that the offence occurred on 3rd March 2010 and the appellant was arrested on 29th July 2010. His alibi defence did not therefore, cover the period during which the offence was committed. Lastly his witnesses failed to appear to testify even after they had been summoned by the court.
5. The single question for determination in this case is whether the appellant was positively identified at the scene where the complainants were assaulted and in the house where he was pursued from. In his submissions the appellant contended that the period during which he was under observation was not stated, while the evidence of the witnesses was not in harmony on the matter of the length of observation. Further that the agony in which they were and the mere light of a torch could not have enabled them to observe and identify their attacker properly.

6. This being the first appeal from a conviction by the magistrate's court, the appellant is entitled to have this appellate court's own consideration and views on the evidence as a whole, and its own decision thereon (see **Njoroge v Republic [1989] KLR pg 313**)
7. The case before me turns on the visual identification by the three main witnesses. A reference to the circumstances of identification requires me to deal with such matters as the length of time the witnesses had for seeing who was doing what was alleged, the position of the witnesses from the appellant, and the quality of light prevailing. (see **Mwaura v Republic [1987] KLR pg 645**)
8. The evidence of **PW1** of what transpired on 31st March 2010 at 3.00 a.m. from the time he was awakened by his mother's screams, to the time he was injured was as follows:

“I saw a man trying to run away from the house. The person was trying to get out. We followed him. We arrested him after 50 metres. I shone him with a torch (sic). It was white in colour. The light was bright. I shone the torch on him when we arrested him. I saw his face clearly. We did not know him. We asked him what he wanted. He did not respond. He asked if we were accused. He then jumped. He had a white shirt. He is in court. We talked to him between 1-2 minutes. He tried to run away. He removed a knife.”

Four months later on 23rd July 2010 **PW1** saw the appellant at the market.

The evidence of **PW2** on the other hand was as follows:

“We held him by the shoulder. PW1 shone his face and body for 5 minutes. The light was yellow. It was normal light. He said are you mad? Know you. We held him for around 20 minutes. We asked him reason of coming to our home. He did not reply. He jumped and stabbed my head and cut my left hand severally and chest. I did not see the knife. When we arrested him we did not see the knife. My brother held him and he was cut several times. My mother kept on calling for assistance. Accused then ran away. I and my brother were very weak. A man called Abdikadir came to assist us. We were taken to hospital.”

9. The prevailing circumstances under which the appellant was said to have been identified are worth noting. This offence occurred in the wee hours of the night. It was dark, and the exposure of the assailant to the witnesses was momentary. The torch light was shone upon him for a brief moment as they struggled. To complicate matters further, both complainants passed out as a result of the severe injuries. The appellant was not a person known to them prior to that day and they only had a brief encounter with him before he cut and stabbed each of them. It was not until four months later that **PW1** was said to have laid eyes on someone he thought to be their assailant and even then he did not cause him to be arrested on the spot. The arrest came two weeks thereafter.
10. The evidence of **PW4** was that although she usually left her lamp burning when she retired to bed because of the insecurity in the area, the intruder who gained entry into her house on the fateful night put it off. In her testimony she stated that:

“He came straight and put off a lump.”

In my view there was no time therefore, for the witness to observe the intruder properly, considering that the time was 3.00 a.m. and she had already slept when he came in.

11. After a careful analysis of the evidence in its entirety, I respectfully agree with the appellant that it was not cogent enough to sustain the conviction in any of the two counts. For the foregoing reasons the appeal succeeds. I therefore quash the conviction and set aside the sentences in each of the two counts. I order that the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and **DELIVERED** in open court this *13th* day of *June* **2013**.

L. A. ACHODE

JUDGE