



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 108 OF 2011**

**BETWEEN**

**SIMON KARIUKI NJOKA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the original conviction and sentence in Embu Criminal Case 204 of 2011 by Hon. L.K. Mutai P.M. on 24<sup>th</sup> June, 2011)***

**JUDGMENT**

1. The appellant, Simon Kariuki Njoka, was charged with the offence of doing grievous harm contrary to **section 234** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the offence were that on the 28<sup>th</sup> day of January 2011 at Kiandongo village, Kianjokoma Sub-location in Embu municipality within the Embu County unlawfully did grievous harm to David Ngoroi. The learned Magistrate found the accused guilty and sentenced him to 10 years imprisonment. He appeals against the conviction and sentence.
2. The appellant raises several grounds of appeal. First, that the trial court erred in law and in fact when it convicted him on inconsistent and uncorroborated evidence. Further that the learned Magistrate failed to consider the fact that the moonlight used to identify the appellant was not sufficient for positive identification. The appellant also stated that the alleged weapon used to commit the offence was neither found on him nor was the blood stains found on the weapon examined to confirm that it was that of PW1. The appellant also claimed his constitutional rights were violated when he was kept in police custody for 4 days and no explanation was given during the trial for the prolonged pre-trial detention.
3. The State on the other hand opposes the appeal and supports the conviction on the ground that the evidence was clear that the appellant committed the offence.
4. It is the duty of the first appellate court to reconsider the evidence, evaluate it and draw its own independent conclusions in deciding whether the judgment of the trial court should be upheld. (See **Okeno v Republic [1972] EA 32**). In doing so, it must also take into account the fact that it neither heard nor saw the witnesses testify.
5. The prosecution's case was that on 28<sup>th</sup> January 2011 at about 4.30a.m, PW1 was sleeping inside the house when he heard commotion outside. He woke his wife up. The couple got out of the house towards the chicken shed where the appellant emerged, cutting PW1 on the right hand causing the *rungu* he was holding to fall down. PW1 was also cut on the left side of his head and as a result he fell down. He found

himself at Embu Provincial Hospital and was later referred to Thika Hospital for further treatment and was admitted for almost a month. PW1 further testified that there was plenty of moonlight and he was able to see his attacker very well as he stood very close to him. He even called the attacker by his name. PW1 reported the matter to Manyatta Police station.

6. PW2 is PW1's wife. She largely corroborated PW1's evidence stating that on the fateful night, she and her husband heard hens making noise as a result of which they got up and headed towards the chicken shed where the appellant emerged with a panga. She screamed shouting the attacker's name. After the attack on PW1, she testified that she ran towards the house as she screamed. Relatives and other members of the public responded. They later escorted PW1 to Kianjokoma Health Centre where they met the appellant and later to Embu Provincial Hospital. PW2 testified that she was able to see the appellant very well as she knew him well before the incident and that there was plenty of moonlight which enabled her see him.

7. PW3, PW1's brother and neighbor to the appellant testified that on the material day, at about 4.30am, he was sleeping when he heard PW2 screaming the appellant's name while stating that he had killed PW1. He rushed to the scene and found PW1 lying in a pool of blood. They took the complainant to Kianjokoma Health Centre and later to Embu Provincial Hospital. At Kianjokoma Health Centre, he saw the appellant. PW3 later returned to the scene and recovered a panga which had blood stains.

8. PW4, brother in law to PW2, testified that he heard PW2 screaming that the appellant had attacked his brother. He got out in a hurry and found his brother lying on the ground with serious injuries on the head but he did not see the appellant. PW1 was cut on the head with a sharp object.

9. PW5, Wicliiff Obanya Baraza, a Police officer at Kianjokoma police post testified that on the material day, he was at the police station when PW1 was escorted in. He had injuries on the head. He was also informed that PW1 had been attacked with a panga in his home. The appellant was around and was identified to him by PW2. He later visited the scene and was able to recover a panga at the scene which had blood stains.

10. Dr. Godfrey Njuki Njiru, PW6 was the doctor who examined PW1. He testified that upon examination, PW1 was suffering from dysarthria, and was stammering. He had a cut wound scar on the scalp left side about 6 centimeters long and had stitch marks on it. A CAT scan had been done on the head which showed a fracture of the parietal bone with brain contusion. He also had two cut wounds on the biceps and the left elbow. The probable type of weapon used was sharp. He assessed the degree of injury to be grievous harm.

11. The appellant gave sworn testimony. He stated that he was woken up on the material night and asked to go assist PW1. He even took PW1 to the hospital. They were advised to collect a P3 form from Kathangari Police where PW2 identified him to the police as the offender. He denied committing the offence as alleged.

12. DW2, Simon Gitonga, DW1's nephew testified that he was woken up by screams from the neighborhood. He met one Njagi when he learnt that the appellant had attacked the complainant. He rushed to PW1's home and heard PW2 say that somebody who looked like the accused had attacked her husband. He came with a bicycle and proceeded to take PW1 to the hospital. During cross-examination, DW2 stated that his home is about a kilometer from his, that when he passed by the accused he was there and that he didn't find the accused at the scene. Further that the accused followed PW1 to the hospital. He stated that he didn't witness the ordeal to know if the accused was involved or not.

13. DW3, the appellant's wife testified that on the material night, DW2 woke them up asking them to go assist PW1 who had been attacked. They proceeded to the Kianjokoma hospital and waited until he had been treated, and followed PW1 up to the police station where PW2 identified DW1 as the one who had injured PW1. DW3 testified that the appellant returned home at about 7.00 p.m. and that she knew that he never left the house on that date. She stated that she wasn't deeply asleep that night as she has a 3 year old child.

14. The evidence before this court no doubt reveals that grievous bodily harm was done on PW1. The evidence by both the prosecution and defence witnesses corroborated by the medical reports and the scars which were seen by the trial court all attest to this fact. The point of departure is whether it the appellant who caused the grievous harm.

15. The appellant contests the evidence of identification and recognition and it is the main point upon which this appeal turns. It is not in doubt that the attack took place in the early morning. PW1 and PW2 testified that they were able to identify the appellant through the moonlight. PW1 testified that he went up to the chicken shed where he was attacked. Neither of the witnesses testified as to the nature and intensity of the moonlight or the general lighting conditions in which they were able to identify and recognise the appellant whom they knew before. Although PW1 and PW2 also testified that they knew the appellant was the attacker, they did not indicate how they identified the appellant as the attacker. The witnesses did not testify as to the condition of the lighting in relation to the chicken shed where the attack took place and its lighting condition vis-à-vis the moonlight. In **Wamunga v Republic** [1989] KLR 424, the Court of Appeal held that, "*It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.*"

16. In such circumstances, it is difficult to sustain the conviction based on the evidence of identification and recognition where the intensity of the moonlight in the early morning was the only source of light particularly in relation to the chicken shed. The fact that PW2 screamed the appellant's name does not corroborate or buttress the fact that the appellant was identified and recognized. The screaming may have been based on the wrong premise that the appellant was the attacker. I therefore find that the circumstances of such identification were less than satisfactory to sustain a conviction. In view of the paucity of evidence of identification, it is unnecessary to deal with the other grounds of appeal.

17. I therefore allow the appeal and quash the conviction. The appellant shall be set free unless otherwise lawfully held.

**DATED and DELIVERED at EMBU this 16<sup>th</sup> December 2013.**

**D.S. MAJANJA**

**JUDGE**