

REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 27 of 2012

CALPHAS OCHIENG NYASUNA APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with the offence of maim contrary to **Section 234** of the **Penal Code**. The particulars of the offence were that the appellant on the 11th of December 2010 at Lurambi market, Sichilayi sub-location, Shieywe Location in Central Kakamega District within Western Province , unlawfully did maim to **KENNEDY OCHIENG OWINO**. He was convicted and sentenced to serve four years imprisonment. His grounds of appeal are that- the prosecution evidence is at variance with the charge, provisions of Section 200 of the Criminal Procedure Code was not complied with by the sentencing magistrate and that the prosecution evidence is contradictory.

Mr. Kiveu, counsel for the appellant filed written submissions and contends that the investigating officer visited the scene on the 25th of December 2010 yet the offence had occurred on the 13th of December 2010. The identification of the appellant was not done through an identification parade and the weapon used was not produced. Mr. Orinda, state counsel conceded the appeal and submitted that the conviction was not safe as both the appellant and the complainant were attacked. The injury on the charge sheet reads maim but the evidence relates to an injury of harm. The fight occurred at a bar and how the complainant was attacked is unclear.

The record of the trial court show that **PW1, KENNEDY OCHIENG OWINO** was the complainant. His evidence was that on the 11th of December 2010 at about 5.30 p.m. he was attacked by the appellant and another person as he was coming from Lurambi. There was a third person whom he did not know. He was treated and issued with a P3 form. The appellant was his neighbor and that he gave the description of the appellant's home to the police. He was aware that the appellant complained that he was assaulted by the complainant (PW1). Fredrick Wanyama Wekesa was PW2 and testified that he saw three men on the 11th of December 2010 assaulting PW1. He went to separate them and each one of them went their way. He did not know the appellant before that day.

PW3, was **DR. JEREMIAH KIMUTAI** who produced the P3 form of the complainant. The injuries were categorized as harm. **PW4 PC ERICK MUTUMA** was based at the Kakamega police station and got the report on 25th December 2010 at about 10 p.m. He issued the complainant with a P3 form and the degree of injury was described as harm. His further evidence was that when the complainant reported the matter at the police station he did not give the appellant's name.

The appellant was put on his defence and his sworn testimony stated that on the 11th of December 2010 he went to buy food from a shop and on his way back he was assaulted by two people who robbed him of his mobile phone. He did not identify those who robbed him. He reported the matter at the Lurambi AP Camp and later at the Kakamega police station. He was issued with a P3 form which he produced in court. One of his friends later informed him the names of his attackers and he was given a warrant of arrest to go and arrest the complainant. He produced the warrant of arrest as his exhibit. He went with AP officers to the complainant's home but he was not there. Later a warrant of arrest was issued against him and he was arrested on 18th of December 2010.

From the prosecution evidence it is not clear whether it was the appellant who assaulted the complainant PW1. There is no evidence that the complainant knew the appellant and led police to his arrest. The appellant was also assaulted and was issued with a P3 form which described his injuries as harm. The P3 form for PW1 described his injuries as maim. It is evident from the record that there was confusion as to who assaulted the complainant. The appellant is called **CALPHAS OCHIENG** and he was issued with a warrant of arrested dated 17th December 2010 to have one **OCHIENG** arrested for robbery. The prosecution evidence does not establish what happened to that warrant and whether it was the same **KENNEDY OCHIENG**, PW1 who was to be arrested. I do agree with the sentiments of the state counsel that the conviction is not safe. I do find that the prosecution did not prove its case beyond reasonable doubt. No proper investigations were conducted. It is not clear whether both the appellant and the complainant fought or whether they were attacked by different people. The prosecution evidence raises doubt as to whether it was the appellant who assaulted the complainant. The appeal is merited and the same is allowed.

The conviction and sentence of the trial court is hereby set aside. The appellant shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 31st day of July 2012

SAID J. CHITEMBWE
J U D G E