NO.338

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEALS NO. 103 AND 104 OF 2010 CONSOLIDATED

SHEM ONGORO SERETI.....1ST APPELLANT

ELIJAH BARAKE SERETI.....2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

(From original convictions and sentence by Principal Magistrate's court at Keroka criminal case no. 1096 of 2008)

These two appeals were consolidated for ease of hearing and as they arose from the same trial in the subordinate court. The two appellants were charged before the Senior Resident Magistrate's court at Keroka with the offence of grevious harm contrary to section 234 of the Penal Code. It was alleged that on 22nd February, 2002 at Kenyenya village in Nyamira District within Nyanza province, they jointly and unlawfully did grevious harm to **Jemima Nyamoita.** The appellants denied the charges and they were subsequently tried. Following their trial, they were convicted and sentenced to six (6) years imprisonment each. They were aggrieved by the conviction and sentence. Through **Messrs Momany Aunga & Co. Advocates** they lodged the instant appeal. Nine grounds of appeal were preferred to wit:-

"1. The learned trial magistrate erred in law and in fact in holding that there was sufficient evidence to prove the charge of grevious harm contrary to section 234 of the Penal Code when the prosecution had not discharged its onus of proof as required by law.

2. The learned trial magistrate erred in law and fact in convicting the appellant on a piece of evidence which was full of contradictions .

3. The learned trial magistrate was wrong in relying on the P# form in arriving (sic) his conclusion which P3 form was not authentic in law.

4. The learned trial magistrate did not properly consider the entire evidence on record in his judgment.

5. The learned trial magistrate was wrong in law in shifting the burden of proof to the appellant.

6. The learned trial magistrate did not appreciate the appellant's defence in his judgment.

7. The learned trial magistrate erred in law and infact in not properly considering the first report made to the police by the family of the complainant especially PW2 who was allegedly present when the incident took place.

8. The learned trial magistrate did not appreciate the fact that the appellant was framed in the case because of the long-standing land dispute between the complainant and the family of the appellant.

9. The judgment of the learned trial magistrate was against the weight of the evidence on record…."

The prosecution case was that on 22nd February, 2002 at about 9.a.m while going to her shamba, the complainant met **Mzee Stephen Sereti** cutting her gum trees. He was in the company of 1st appellant, with **Ongoro Sereti, Milka Sereti, Barake Sereti** 2nd appellant and **Marita Sereti .** Whereas the 2nd appellant was on top cutting the trees, the 1st appellant was trimming the branches and giving to the others. When she got near she demanded to know why they were cutting her trees. The trio instead abused her by telling her that she was as stupid as her body. She turned to leave so that she could report the incident to a village elder. She immediately noticed the appellants behind her with pangas. As the 2nd appellant raised the panga to attack her she raised her hand in defence and she was cut twice. Infact the entire hand was chopped off in the process and it fell to the ground .As she screamed the 1st appellant hit her on the head. She fell down and her son, **Evans Ongoro Aberi** (PW2) ran to her rescue. But he was similarly chased away by the trio. In the meantime the complainant had lost consciousness. The father of the appellant, **Mzee Sereti Ongoro** asked them if the complainant was dead and they answered in the positive. He then told them to lick her blood and run away. The complainant regained consciousness whilst in hospital. The father of the appellants, was subsequently arrested. The two appellants in the meantime disappeared from the neighbourhood and only returned after the post election violence. They were then arrested and charged with the offence. The complainant knew the appellants very well as they come from the same area. The trees that the appellants were cutting were hers and her husband's as the piece of land on which they were belonged to her husband. She was about 5 metres from where the appellants were cutting her trees. She stated that she was married in the same home as the mother of the appellants. She however denied that she had a land dispute with the appellants' family. She had previously sued the appellant's father for harvesting her finger millet. She denied stating that she was assaulted by the appellant's father

PW2 **Evans Ongoro Aberi,** the complainant's son testified that on 22nd February, 2002 at about 9 a.m he was on his way to pick tea with his mother the complainant she was walking a head of him and as he tethered a cow, he heard the sound of trees being cut near their tea farm. He heard his mother ask whey

the trees were being cut without their permission. PW1 asked him to go and call the village elder and as she did so, the 2nd appellant approached her and cut her twice with a panga on her hand which was chopped off completely. As he ran to rescue his mother, he heard the appellant's father say ***"there is another and we should also kill him".*** 1st appellant cut PW1 on the head while the 2nd appellant and his father chased him away. He screamed and people rushed to the scene. They went to where PW1 was, took her and the chopped off hand to Nyamira District hospital. They also reported to Nyamira police station and the police duly visited the appellants' home. However by then the appellants had ran away. PW1 was treated at Nyamira district hospital for 3 days, Tenwek hospital for 4 days and then transferred to Kenyatta National Hospital. Later the appellants' father was arrested and charged for the offence but was acquitted. The appellants were arrested later. He testified in cross examination that he was the first to report the incident at Nyamira police station vide **OB 26/22/2/02**. He stated in the report that the family of **Sereti** had assaulted his mother and gave the names of the 5 as they were all present at the time of the assault. He stated that he informed the police that it's the 2nd appellant who had cut off PW1's hand. The appellants were later arrested in 2008. He wrote another statement after their arrest. The appellants had left after the assault and were only arrested on their return. He denied that there was a land dispute with the appellants family but admitted of numerous disputes between his father and the appellants' father. He denied that the assailants were unknown.

PW3 **Victor Nyambati,** a clinical officer at Nyamira District hospital testified and produced the P3 form on behalf of **Mr. Aluoch** who was then out of the country. He stated that PW1 was admitted to their facility on 22nd February, 2002 after an assault, later they referred her to Tenwek hospital on 24th February, 2002 and thereafter Kenyatta National hospital for further treatment. She had a scar, deep cut running from the left cheek to the left ear and temporal region. She had also suffered loss of hearing in the left ear. Her left upper limb was also fully amputated 1/3 distally but had healed at the time of examination. The weapons used were sharp. The injury was assessed as grevious harm .

PW4 Corporal **Edward Dero** testified that on 17th May, 2008 at about 4 a.m he was instructed by Inspector Jane to go with other officers and arrest the suspects. Guided by the son to PW1 they proceeded and arrested the appellants and took them to Nyamira police station. They arrested the appellants from their respective houses. They had come back home after the post election violence.

In their defence the appellants in their unsworn statements stated that they were not involved in the alleged offence as they had been working in Nairobi since 1998 . This was as far as the 2nd appellant was concerned . As for the 1st appellant he had been working in Nairobi since 2006. They only returned home in 2007. They were later arrested on 18th may, 2008. They denied any knowledge of the crime.

Their father Stephen **Sereti Aberi** testified though that the appellants were his sons. PW1 didn't know who had assaulted her as he together with his wife, daughter and daughter in-law had previously been arrested in relation to the same assault. Later the others were released and he was charged with the same offence. He was acquitted of the charge in **Nyamira Criminal case no. 174 of 2002**. It was his evidence that the appellants were away in Sotik at the time of the alleged assault and only returned in 2007. They were at home till their arrest on 17th may, 2008. He admitted that PW1's hand was cut off but he didn't know who did it. He stated that PW1 is his step sister. He denied that the appellants ever worked in Nairobi. He confirmed though that there was a land dispute between himself and PW1.

At the hearing of the appeal, **Mr. Momanyi**, learned counsel for the appellants submitted that there was no evidence linking the appellants to the charge. The 1st report to the police made by PW2 was to the effect that the family of **Sereti** had assaulted the complainant. He was not specific. In the earlier criminal case involving the appellants' father, the complainant had testified that it was the 2nd appellant who was chasing her and not both appellants as in this case. In this same case, a clinical officer by the name of **Evans Nyakundi** had testified that he was the one who filled the P3 form. Yet in the instant case it was being alleged that it was infact filled by **Dr. Oluoch**. The appellants advanced a defence of an alibi. However, the same was not properly considered. The prosecution did not prove common intention between the two appellants.

The appeal was opposed. **Mr. Gitonga,** learned State counsel submitted that the complainant knew the appellants very well as they were neighbours. The contradictions alluded to with respect to the P3 form was not fatal because it is expert evidence which need not necessarily affect the outcome of the trial. On alibi defence counsel submitted that the appellants' assertion that they were away in Nairobi at the alleged time of commission of the offence was contradicted by the evidence of their own father who testified that they had never been to or worked in Nairobi. Common intention need not be proved. It can be inferred from the actions or acts of the appellant.

As a first appellate court, it is my duty to subject the evidence tendered in the trial to afresh and exhaustive re-appraisal so that I can reach my own independent opinion as to whether or not the judgment of subordinate court can be upheld. See **Okeno .v. Republic (1973) E.A.** 123.

It is common ground that the complainant was grieviously assaulted leading to the chopping off, of her hand. The appellants' father concedes that much. Then of course there is the evidence of the complainant herself, her son and the clinical officer. Whereas the complainant is certain that it was the appellants who inflicted the injuries, the appellants and their witnesses are categorical that they had nothing to do with the complainant's injuries.

The offence according to the evidence on record was committed at about 9.a.m . It was in the morning. That being the case the offence was committed in broad daylight. The appellants and the complainant knew each other very well. They appear to be related family wise although all is not well between the two families. The issue of mistaken identity does not therefore arise. The complainant picked on the appellants as the ones who assaulted her because she saw them as they attacked her. Her son too saw them. This cannot be a case of mistaken identity therefore. The case too cannot be one of a frame up. I do not think that the complainant would go out of her way to chop off her hand merely to frame up the appellants. It would appear the dispute that precipitated the attack was about gum trees and whether they belonged to the complainant or the appellants. The dispute escalated into wanton violence.

Soon after the commission of the offence, the appellants went underground. According to them they were working in Mulolongo in Nairobi. However, according to their father, they were working at Sotik and had never been to Naitobi. It has been held that where a suspect goes underground soon after the commission of an offence, that is good evidence of the suspects culpability. It is the kind of evidence upon which a court can convict. In the circumstances, I have no doubt at all that the appellants disappeared from the scene having committed the heinous crime to avoid arrest and subsequent arraignment in court. Their story that they had relocated to Nairobi for work is just a makeup story. Their own father categorically stated that the appellants had never been to Nairobi. It is quite apparent to me that either the appellants or

their father was not being candid with the court.

The appellants of course advanced an alibi defence. The law is that when an accused raises an abibi as an answer to a charge against him, he assumes no burden of proof and the burden of proving his guilt remains on the prosecution throughout. Even if the alibi is raised for the first time in an unsworn statement at his trial, the prosecution ought to test the alibi wherever possible although different considerations may arise as regards checking and testing it and it is sufficient for the trial court to weigh the alibi against the evidence of the prosecution. See **Republic –vs- Kirima & Another (2005)KLR 658.** and **Kiarie .v. Republic (1984) KLR 739**. In my view the alibi defence juxtaposed against overwhelming prosecution evidence on record is completely displaced. First and foremost, they were recognized by the complainant as they attacked her in broad daylight; secondly, they disappeared from the neighoburhood soon after the complainant was assaulted and were on the run for close to six years until they resurfaced following post election violence. Thirdly, their own father who should no better, disabused the appellants' claim that they were in Nairobi. I am in the circumstances unable to agree with the appellants' submissions that the trial court shifted the burden of proof to them on their defence of alibi.

With regard to P3 form, there are some contradictions as to who filled and signed it. Whereas a clinical officer by the name of **Evans Nyakundi** testified in the earlier criminal case involving the appellants' father at Nyamira that he filled the P3 form, in the instant case the clinical officer who produced it, **Victor Nyambati** testified that it was infact filled by **Dr. Oluoch** who had since relocated to USA for further studies. I have looked at the said P3 form and it is quite clear that it was filled by the medical officer of Health, Nyamira District hospital. The contradiction to my mind is minor and does not go to the root of the prosecution case. What is of importance and it is conceded is that the complainant was attacked and her hand chopped off.

Finally, I have no doubt at all that common intention by the appellants to prosecute the crime against the complainant was proved. As correctly submitted by **Mr. Gitonga,** common intention can be inferred from the actions or acts of the accused. In this case, the appellants jointly attacked the complainant. Whereas the 2nd appellant chopped off her hand with the panga, the 1st appellant hacked him on the head and she fell down. How can these actions of the appellants not pass for common intention?.

The end result of these appeal is that they are unmerited. They are dismissed in their entirety. However, I was minded to enhance the sentence imposed on the appellants which I found linient in view of the grave injuries they unleashed on the complainant. I have nonetheless refrained myself from doing so since I had not warned the appellants of that possibility and the state did not ask for it as well.

Judgment dated, **signed** and **delivered** at Kisii this 17th January, 2011.

ASIKE-MAKHANDIA

JUDGE