REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 96 OF 2010.

INNOCENT MBAABU :: APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

(An appeal from the original conviction and sentence of Hon. S. J. Saenyi – RM in Criminal case No. 713 of 2009 delivered on 16th August, 2010.)

J U D G M E N T.

1. The appellant was charged with the offence of causing grievous harm contrary to the provisions of section 234 of the Penal Code. The particulars of the charge stated that on the 5th day of July, 2009 at Green Leaf Motel in Turkana Central District within Rift Valley Province, the appellant unlawfully caused grievous harm to **Gabriel Enkule**. The appellant was tried, found guilty and upon his conviction, he was sentenced to a fine of Ksh. 100,000/= and in default 1 year imprisonment. Being aggrieved by the conviction and sentence the appellant appealed and raised the following grounds in his petition of appeal:-

(1) The learned Resident Magistrate erred in law and fact in relying on evidence of identification that was not stated as there was no identification parade or knowledge of the lighting at that hour of the night.

(2) The learned Resident Magistrate shifted the burden of proof to the accused contrary to the law.

(3) The learned Resident magistrate misdirected himself as to hearsay evidence.

(4) The learned Resident magistrate failed to avail the benefit of the doubt to the accused person.

(5) The learned trial Magistrate relied on evidence that did not prove the guilty of an accused beyond reasonable doubt and lowered the bar of the onerous task of proof and evidence that should be watertight in a criminal case.

(6) The learned resident magistrate erred in law and in fact in finding that the appellant committed the offence alleged when evidence before him shows that someone else could have committed the offence.

(7) The learned resident magistrate misdirected himself whilst knowing that the prosecution case was not fairly prosecuted in that they excluded exculpatory evidence to mislead the court and not achieve the ends of justice.

(8) The learned resident magistrate erred in considering extraneous matters.

(9) The judgment and conviction are against the weight of evidence.

(*10*) *The learned resident magistrate erred in law in that he convicted the appellant against his constitutional rights not to be placed in custody beyond the necessary period*.

2. In further arguments to support the above grounds **Mr. Menusi,** learned counsel for the appellant submitted that the issue of

identification was critical. The attack took place at about 1 a.m. outside a bar, and none of the witnesses gave evidence on the source of the lighting on the scene. No identification parade was mounted to identify the appellant, thus the conviction was not borne out of the evidence. The evidence of PW2, PW6 and PW7 referred to another AP who was a suspect, there was also another lady called Azzina who recorded a statement and named another suspect by the name Mwangi but the prosecution conveniently failed to call this witness. Lastly the statement of defence by the appellant and his witness were credible and if the trial magistrate took it into consideration he would have arrived at a different opinion by acquitting the appellant.

3. This appeal was opposed by the state; M/**s. Bartoo,** the learned State Counsel, submitted that, the conviction was safe, because an identification parade was not necessary since the complainant and other witnesses were able to identify the appellant by recognition. The incident was reported to the police immediately and the knife which was used in the attack was produced as exhibit. The trial magistrate properly rejected the defence which did not dent the prosecutions' strong case. The appellant should have raised the issue of constitutional rights before the trial court. It is the trial court which was in a position to make an enquiry from the police regarding the appellant's arrest and detention in custody.

4. This being a first appeal, this court is mandated to re-evaluate and reconsider the evidence before the trial court and arrive at its own independent determination on whether to allow the appeal or not. In so doing, the court should always bear in mind that it never saw or heard the witnesses as they testified and give due consideration for that. The evidence before the trial court was given by 7 prosecution witnesses. Very briefly, **Gabriel Ekalalel Lokalimoi PW1** who was also the complainant testified that on 5th July, 2009 at about 2.00 a.m. he was leaving Green Leaf Bar where they were enjoying themselves with **Stephen Gole Lowoton, PW2** and **Ekai Lokwam, PW3**. On the entrance of the bar, PW1 saw the appellant whom he identified as Innocent Mbaabu pushing PW3. PW1 grabbed Ekai and pushed him back towards the door of the bar.

5. That is when the appellant demanded to know the identity of the complainant. The complainant asked the appellant why he pretended not to know him whereas the complainant knew the appellant well. The appellant started insulting the complainant calling him a fool, a fight ensued but the two were separated by PW3, PW4 and other people, PW1 started walking home. The appellant suddenly stabbed the complainant with a knife at the back. The complainant was able to turn and he grabbed and pinned the appellant to the ground. Suddenly the complainant realized the knife he was stabbed with, was still lodged in his back. The appellant was blocked by people who were in the bar but he managed to ran and he jumped over the fence and disappeared. The complainant was escorted to his home by PW2 and PW4; he was taken to hospital the same night and was referred the next day to Moi Teaching and Referral Hospital in Eldoret where he was admitted for 10 days.

6. The knife that was lodged on his back was removed in the hospital and was handed over to the investigating officer who produced it as an exhibit. The injuries sustained by the complainant were confirmed by **Dr. Gilchrist Lokoel PW5**, the District Medical Officer of Health in charge of Turkana. He produced the medical report on behalf of **Dr**. **Amayo Bonventure** who could not attend court without unreasonable delay. It is Dr. Amayo who attended to the complainant on 5th July, 2009. The complainant was stabbed on the back left side of the chest and the knife was lodged in the body after one hour of the incident. The injury was classified as grievous harm which caused massive clot of the blood in the chest. The P3 form was produced pursuant to the provisions of section 33 as read with section 77 of the Evidence Act**.**

7. The other set of evidence was by PW2 who testified that on 5th July, 2009, he was with PW1 in Green Leaf Bar at about 2.00 a.m. they were drinking beer and dancing but PW1 said he wanted to go home. That is when PW2 escorted him up to the door of the disco. PW2 was called after 5 minutes and he told that PW1 was stabbed with a knife. He saw somebody being chased in the disco. He heard it was Mbaabu. He suddenly saw Mbaabu enter the disco, Mbaabu fell down, rose up and jumped over the fence across the disco. Suddenly, PW1 also came inside and it is PW2 who escorted him to his home with a *boda boda* motor cycle **with PW4.**

8. PW3 also testified that he was also at Green Leaf Bar on 5th July, 2009 when he met the appellant outside the gate. The appellant called him and demanded to be told where he came from. That is when PW1 came and grabbed him and returned him to the bar. The appellant ordered PW3 and PW1 to stop and demanded to know the identity of PW1. The appellant hit PW1 with a kick and PW1 reiterated. They both fell down and they were separated. As PW1 was leaving, the appellant came from behind and stabbed PW1 with a knife from the back. PW1 was able to turn he grabbed the appellant and pinned him down on the ground. PW1 had already been stabbed on the back and the appellant ran away through the disco. PW3 said he knew the appellant as a police officer by the name Mbaabu.

9. This incident was also witnessed by **Emuria Lurion, PW4**, who testified that he was stationed outside the Green Leaf Bar as a **boda boda** cyclist where he was waiting for customers. He first of all saw PW3 walking out of Green Leaf Bar and PW3 met with appellant at the gate and he saw the two engaged in a conversation. While they were talking, they were joined by PW1. All over a sudden PW4 saw a fight ensue, he went to separate PW1 who was fighting with the appellant. PW1 started to walk away from the scene, and PW4 saw the appellant stab PW1 with a knife. PW1 wrestled the appellant to the ground but the appellant managed to rise up, ran and jumped over the fence. PW4 assisted PW1 to his home by carrying him on his motorcycle.

10. This matter was investigated by **PC Osana Kehana PW6** who at first travelled to record a statement from PW1 at Moi Teaching and Referral Hospital but PW1 refused to co-operate and the hospital advised him not to disturb PW1. During cross examination PW6 also testified that on the material day a woman had reported that she had witnessed an incident at Green Leaf

Bar where **APC Mwangi** had stabbed somebody. The lady's name was **Azzin Asikuku**. That statement was produced as defence MFI. However the prosecution did not call this witness.

11. Chief **Inspector Erastus Muturi PW7**, who was the OCS Lodwar Police station also testified that an assault case was recorded at the police station on 5th July, 2009 but before he could carry out investigations members of public led by Deputy Mayor of Lodwar Municipal council came to the police station complaining of an incident where a local teacher was assaulted by a police officer. He had sustained serious injuries for which he was airlifted to Moi Teaching and Referral Hospital in Eldoret.This was followed by rioting in the town as the people were complaining of police brutality within Lodwar. PW7 carried out some inquiries and established that the appellant and APC Simon Mwangi who was attached to the DC's office Lodwar were at the Green Leaf Bar when the incident occurred. He remanded the two and after PW1 was discharged from hospital, he recorded a statement and the appellant was charged with the offence.

12. The appellant was put on his defence; he gave unsworn evidence and denied having committed the offence. He claimed that he left the Green Leaf Bar before midnight and went home and slept until the following day when he was woken up by Cpl. Muchende who informed him that there were allegations that he had stabbed somebody at the Green Leaf Bar. The appellant was summoned by the OCS where he found two ladies one by the name Azzin Asikuku. The two ladies said they did not know the appellant but they gave the name of APC Mwangi as the one who stabbed the complainant.

13. Cpl Suma Mwangobia also gave evidence as DW2; he told the court that he recorded a statement from a lady called **Azzin Asikuku** on 5th July, 2009 at 11.00 a.m. She recorded how PW1 picked a quarrel with APC Mwangi and it is APC Mwangi who stabbed PW1. The learned trial magistrate considered the above evidence and he was satisfied that the prosecution proved their case beyond reasonable doubt. The evidence against the appellant was overwhelming and watertight regarding the identification which was by way of recognition by witnesses. The court disregarded the fact that a witness by the name Azzin Asikuku was not called as a witness and believed the evidence of PW7 who stated that he considered statement by the said Azzin Asikuku unreliable.

14. I have re-evaluated the evidence before the trial court; I find the appellant was identified by no less than four witnesses who said they were at the scene when the appellant was stabbed. That was PW1, PW2, PW3 and PW4. They all testified that they knew the appellant as a local police officer; that was identification by recognition which is more reliable than identification of a stranger. Since the witnesses said they knew the appellant, it was not necessary to conduct an identification parade. (See the case of **Githinji vs. Republic [1970] E.A. 231,** a High Court decision comprising **of Mwendwa C.J**. (as he then was) and **Simpson J.** (as he then was)

"Once a witness knows who the suspect is, an identification parade is valueless."

15. As regards the submissions that there were inconsistencies in the prosecution's evidence, I find no material variance in the evidence of the prosecution's witnesses. The other issue was regarding the appellant's constitutional rights to a fair trial when he contends he was remanded in police custody for 10 days which is against the letter and spirit of the constitution. I find the trial court also considered this aspect and found it was raised at the close of the case when it ought to have been raised at the first instance so that the court could have investigated and sought an explanation from the investigating officer. Similarly, like the trial court, I am of the view that raising the issue at this late stage, denies the court an opportunity to enquire as to whether there was a delay. Moreover justice is a double edged sword that cuts across the rights of the appellant as well as the victim. Failure by the police to observe the time limits has nothing to do with the criminal culpability of the assailant who can always seek damages against the police for unlawful detention.

16. After evaluating the entire evidence, I am in concurrent finding with the learned trial magistrate that this case was proved to the required standards. The defence by the appellant and his witness did not dent the prosecution's case. PW7 gave reasons why he did not consider the woman called Azzin a credible witness and that in my view was not fatal to the prosecution's case. Indeed the learned trial Magistrate observed that the defence was free to call the witness in defence if the appellant so wished. That was not shifting the burden but a mere observation.

17. Finally on the issue of sentence, I find a fine of Ksh. 100,000/= and in default of 1 year imprisonment very lenient considering the offence attracts life imprisonment. The appellant is lucky the court or the State did not address the issue of enhancement of the sentence because an enhancement would be called for in this case. Accordingly, I find no merit in this appeal. It is hereby dismissed. The conviction and sentence are hereby upheld.

Judgment read and signed this 26th day of May, 2011.

MARTHA KOOME.
JUDGE.