REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCRA NO. 70 OF 2008

(From: Original Criminal Case No. 2034 of 2034 of 2007 Maua; J.N.Nyaga PM)

LESIIT J.

JUMA KAINGA IKAMATI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant faced one count of grievous harm contrary to S. 234 of Penal Code. He was conceited of the offence and sentenced to ten years imprisonment. Being aggrieved by the conviction and sentence, he filed this appeal.

The appellant was represented by counsel, Mr. Kiambi. He relied on the grounds of appeal in the amended petition of appeal dated 28th March 2011. I have noted those grounds and will be considering them in this appeal.

The appeal is strongly opposed by the State. Mr. Kimathi learned State Counsel represented the State in this appeal.

The facts of the case are that the complainant was walking home from home on 1st January 2007. He met the appellant who was well known to him, at Nkinyanga Market. It was 4pm. The appellant demanded money from the complainant claiming that he must have some since he worked for a very rich man. When the complainant told the appellant he had no money, the appellant pushed him prompting the complainant to start running. The appellant soon caught up with the complainant to start running. The appellant soon caught up with him, knocked him down and bit off the tip of the complainant's nose. The appellant spat the piece on the ground and continued hitting the complainant with blows. PW2 who was in a nearby

kiosk, together with members of public not called as witness held the appellant. The appellant was later taken over by Police Officers in a police vehicle that was driving away from Maua Prison. The appellant was on 3rd January, 2007 taken to Maua Prison. In the meantime the complainant proceeded to Maua Police Station where he was issued with a P3 form. He was treated in 2 hospitals in Maua. On 8th January 2007 his P3 form was filled by a Clinical Officer PW3.

The appellant denied the charge against him in his defence and said that the complainant had a grudge because of a long standing land dispute between complainant's father and appellant's father. He called two witnesses. DW2 told the court that the appellant found him in a place called Luanda on 31st December 2006 and that he remained there until 3rd January 2007. DW2 told court that the appellant left Luanda on 3oth December 2006 in company of DW2 later she changed and said that the appellant left for Luanda on 30th July, 2006 and only returned on 3rd January 2007.
I have carefully considered this appeal, the grounds of appeal, submissions by both counsel, and have subjected entire evidence adduced before the trial magistrate to fresh analysis and evaluation.

This is the first appellate court and as the duty was stated in the case **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Criminal Appeal No.272 of 2005** as follows:-

"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trail court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well known case of Okeno vs. Republic [1972] EA 32 will suffice. In this case, the predecessor of this court stated:-

"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975]EA 57]. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidenced to support the lower court's findings and conclusions; it must make its own findings and draw its won conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for ht fact that the trial court has had the advantage of hearing and seeing the witnesses."

Mr. Kiambi for the appellant urged that the evidence against the appellant is only that of the complainant since PW2, who purported to have witnessed the incident, was present. That the complainant's evidence was clear. He w as alone and that it is later that people came to the scene.
Mr. Kimathi for the State urged that the complainant's evidence, PW1, was that he was assaulted by the appellant in broad day light. Counsel urged that PW2 was among those who witnessed the incident and testified to the effect. Counsel further testified that PW2 had no reason to facilitate the case against the appellant.

I perused the judgement of the learned trial magistrate. He made specific findings of fact drawn from the evidence adduced by the witnesses. The learned trial magistrate found.

"There is no doubt that the appellant bit off the complainant's nose. The appellant was a person well known to the complainant and Peter M'Itobi, PW2 came from the same village. The incident occurred in broad day light. The two witnesses saw the appellant clearly and there was no possibility of mistaken identity. PW2 did not have any reason of lying against the appellant."

I musts indicate here that the evidence against the appellant is by the complainant himself and by PW2. The complainant's evidence was he met the appellant whom he knew very well. The appellant does not deny the two know each other. The complainant said there was an exchange of words before the appellant attacked him in a bid to get money from him.

It is trite that a fact can be proved by the evidence of a single witness. However, the evidence against the appellant was by two people. I am satisfied from the evidence of PW2 that he too was present at the scene when incident occurred. He was everything. There was no basis upon which to find that either the complainant of PW2 may have lied against the appellant. I find the learned trial magistrate came to the correct conclusion after a through evaluation and analysis of the evidence.

The appellant did not as counsel submitted put forward an alibi. However, his witnesses testified that the appellant was in Luanda at the alleged date of office. One of the defence witnesses, DW3, contradicted the evidence of DW2. DW2 had stated that the appellant and that appellant found him in Luanda on 30th December 2006. DW3 contradicted him and said that the appellant and DW2 passed by her place on their way to Luanda on 30th December 2006. Later she changed her story and said that it was on 31st July, 2006 when the appellant and DW2 went to Luanda.

I agree with the learned trial magistrate finding that the reason for contradiction was because the story was not true. I agree with the learned trial magistrate that the alibi defence raised by the appellant did not shake the prosecution case.

There was evidence that the appellant was arrested on the same day of the incident. The arresting officer, said to be Administration Police were not called as witnesses. However we have the evidence of PW4 that he received the appellant at Maua Police Station from Administration Police officer's on 3rd January, 2007. PW1 and 2's evidence was AP's arrested the appellant on 1st January 2007 and that they put him in police vehicle and took him to Tigania Police Station. It could have been good to receive evidence from the AP's who arrested the appellant. failure to call the m is however not fatal to the prosecution case as there is sufficient evidence to show that the appellant was arrested by police officers on 1st January and taken to Tigania Police Station and on 3rd January and taken to Maua Police Station on 3rd January was transferred to Maua Police Station. Nothing turns on this point.

Mr. Kiambi had submitted that the complainant and PW2 were brothers. There was no evidence to that effect. PW2 was asked about his relationship with both the complainant and the appellant. He evidence was that he appellant came from his village and that the complainant was from a different village.

Regarding the sentence the appellant in his amended petition urged that it was manifestly excessive. Mr. Kimathi for the state urged that the sentence was neither excessive nor illegal. S. 234 of Penal Code provides the sentence of life imprisonment for the offence of grievous harm. In this case, DW3 a clinical officer produced the P3 form on behalf of a colleague who filed it at Nyambene District Hospital on 8th January 2007. The findings of the Clinical Officer were that the complainant's nose at the tip had been bitten off by a human bite. The degree of injury was assessed as grievous harm.

I considered the circumstances of the offence and find them serious. It is apparent that the appellant attempted to rob the complainant and the force he used was intended to intimidate and therefore compel the complainant to part with his property. The sentence for attempted robbery is 7 years imprisonment. I am aware the charge preferred against the appellant was grievous harm and the police were perfectly correct to decide which offence to prefer as there was sufficient evidence to support both offences.

Taking all factors into account, including the fact the appellant was a first offender; I will allow the appeal against the sentence by reducing it to a period of 7 years.

In the result the appellant appeal against conviction is without merit and is dismissed.

The appellant's appeal against sentence is allowed. The sentence of 10 years in prison is set aside. In substitution thereof I reduce the sentence to 7 years imprisonment. The appellant will now serve 7 years imprisonment from the date of sentence in the lower court.

Dated. Signed and Delivered at Meru this 26th day of May, 2011.

LESIIT, J.

JUDGE.