



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL CASE NO. 184 OF 2009**

**JOHN MICHUBU ..... APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(An appeal against the judgment of S. Mwendwa SRM in Senior Principal Magistrate's Court at Maua in Criminal Case No. 400 of 2009 delivered on 31<sup>st</sup> July 2009)***

**JUDGMENT**

The appellant is charged before the Principal Magistrate Court Maua with offence of grievous harm contrary to section 234 of the Penal Code. He was convicted by that court as charged and was sentenced to 7 years imprisonment. He now appeals against that conviction and sentence. This is the first appellate court. The principles that should guide this court in considering this appeal were set out in the case **Okeno vs. Republic** [1972] E.A. 32 where it was stated as follows:-

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. R., [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs. R. [1957] E.A 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”***

PW2 Stephen Ntirimi a brother of the appellant stated in evidence that on the 9<sup>th</sup> February 2008 at 6pm as he walked towards Kathelwa he heard the appellant behind him saying that he would kill him. The appellant was carrying a walking stick which had a metal rod at the end. The appellant hit him with the side of the walking stick with the metal. He hit him on the right side of his head. PW2 lost consciousness and was taken to hospital. He was admitted in that hospital for 7 days. PW2 stated that the appellant was claiming to *miraa* trees planted by their father on the part of the land now owned by PW2. PW3 was a witness of the appellant's attack of PW2. He was in the *miraa* farm when he heard the appellant quarreling on the road which is near his farm. He saw the appellant hit PW2 with a walking stick which had a metal rod at the end. According to him, PW2 was unarmed. On being attacked by the appellant, PW2 fell down. PW3 noted that the appellant wanted to hit PW2 again and proceeded to chase him away

by throwing stones at him. The appellant run away. It was PW3 with another person who took PW2 in his unconscious state to Laare Police Station. PW2 was eventually referred to Maua Methodist Hospital. Although PW3 stated that they reported the matter at Laare Police Station on 9<sup>th</sup> February 2008, when the incident occurred, PW4 a police officer stated that the report of the attack of PW2 by the appellant was made on 11<sup>th</sup> February 2008 at the police station. That report was made by the wife of PW2. This officer visited and found PW2 admitted to hospital and later issued PW2 with a P3 form. At first when he visited PW2 at the hospital he found him not to be in a stable state of health. In his defence the appellant stated that he and his brother PW2 had had many cases between them relating to their sharing of the family land. That PW2 on 5<sup>th</sup> February 2008 demolished his house. That PW2 and his wife had in the past beaten him. He said that the present case was a frame up. DW2 was the mother of both the appellant and PW2. She narrated the conflicts between the appellant and PW2 relating to the sharing of the family land. She referred to the action of PW2 of demolishing of the appellant's house. She ended her statement by saying:-

***“Stephen (PW2) and my other son joined forces and they framed accused in cases (sic).”***

On ground one and two of the petition of appeal, the appellant submitted that the learned trial magistrate erred to have received evidence of PW1 who was not the maker of the P3 form he produced. PW1 did indeed state that he was not the maker of the P3 form. No leave was sought from the court for PW1 to produce the P3 form on behalf of the maker. The appellant was also not requested to indicate if he objected to Pw1 producing that P3 form. Section 33 of the Evidence Act Cap 80 provides that:-

***“Statements, written or oral of admissible facts made by persons who are dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expenses which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following case.....”***

The cases where such evidence is admissible is as in paragraph (b) of that section that is, statements made in the course of business. The prosecution should have laid before court the grounds upon which he sought to have the P3 form produced by one who had not made it. The provisions of section 77 of Cap 80 could also have been invoked by the prosecutor in respect of the production of the P3 form. That section provides:-

***“In criminal proceedings, any document purporting to be report under the hand of a government analyst, medical practitioner or of any ballistic expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or thing submitted to him for examination or analysis may be used in evidence.”***

Again for the prosecutor to benefit from the provisions of that section, he ought to have obtained the leave of the court. The court before affording that leave to the prosecutor should have inquired if the appellant objected. A case in point is **Sibo Makovo vs. Republic** Criminal Appeal No. 39 of 1996 where the Court of Appeal stated thus:-

***“The P3 form was filled in by the Medical Officer, Naivasha District, was produced by PW3. The record does not show that the contents of the P3 form were explained to the appellant. Nor does the record show that the maker of the report (P3 form) was not available to give the requisite evidence. No foundation was laid so as to produce the P3 form by a person other than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in section 33 of the Evidence Act (Cap 80, Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in courts is to taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called.”***

In respect of the P3 form in a case where a person is facing a charge to which the P3 form is absolutely relevant should have led the trial court to have required the maker to produce it, or a proper basis should have been made before court for someone else to produce it. In my view, that failure was fatal to the

prosecution's case particularly since the appellant was unrepresented and cannot have been expected to know his rights to insist on the maker attending court. Having not been produced by its maker the P3 form produced in this case remains hearsay and was inadmissible. See the case of **Rajab Said Abdallah vs. Republic** Criminal Appeal No. 86 of 1997 where the Court of appeal stated thus:-

***“It was indeed wrong for Sgt. Mwangangi to produce the P3 from which he did not make unless the doctor who authored it had become incapable of giving evidence. It follows therefore that the P3 form produced by Sgt. Mwangangi was inadmissible in evidence. That being so, opinion evidence contained in the said form was hearsay, and was inadmissible in evidence on that ground. In the circumstances there was no evidence before the trial court on which it could properly hold that the injury sustained by the complainant was caused by a knife.”***

What is more disturbing in this case is that the appellant was first charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. After he pleaded not guilty, the P3 form was produced by a person who was not its maker. Immediately thereafter, the charge was substituted to the more serious charge of causing grievous harm. The learned trial magistrate failed to follow the provisions of section 214 (1) of the Criminal Procedure Code. That section provides:-

“214 (1) Provided that:-

- (i) where a charge is so altered, the court shall thereupon call upon the accused to plead to the altered charge.***
- (ii) where a charge is altered under this sub-section the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross examined by the accused or his advocate, and, in the last – mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.”***

The trial court on the substitution of the charge being allowed quite rightly called the appellant to plead to the new charge. The appellant pleaded not guilty. Under the provisions of subsection (ii) of the section above however, the trial magistrate should have informed the appellant that he had a right to recall the previous witness who had testified before the substitution of the charge. That witness would then have given evidence on the substituted charge and would have further been cross examined by the appellant. The court of Appeal in the case **Harrison Mirungu Njuguna vs. Republic** Criminal Appeal No. 90 of 2004 commented on sub section (2) of section 214 of the Criminal Procedure Code as follows:-

***“The right to hear the witnesses give evidence afresh on the amended charge or to cross examine the witnesses further is a basic right going to the root of a fair trial and clearly it was the duty of the trial court to show in his record that he had informed the appellant of that right and to record further what the appellant said in answer to the information. All that the magistrate recorded the appellant as saying was, ‘I have understood.’ Even if that statement was intended to mean the appellant had understood that he had a right to have the witnesses recalled to testify afresh or for further cross-examination, the statement does not show the position taken by the appellant on that issue.”***

This appeal will succeed on ground 2 of the appellant's petition. It is clear from the defence evidence that the appellant and his brother PW2 had previous misunderstanding involving their sharing of the family land. That misunderstanding had even led to the appellant being previously charged with assaulting PW2's wife. The defence offered by the appellant and DW2 should not have been ignored by the trial court. DW2 the mother of both the appellant and the complainant stated in her evidence that the complainant in this case in conjunction with his other brothers had fabricated previous cases against the appellant. With that evidence in mind, I find that the prosecution failed to prove a case beyond reasonable doubt against the appellant. There is doubt whether this was yet another fabricated case against the appellant. The upshot of this judgment is that I find that the appellant appeal does succeed both on conviction and sentence. The conviction of the lower court is hereby quashed and the sentence is hereby set aside. I order the appellant to be set free unless he is otherwise lawfully held.

*Dated, signed and delivered at Meru this 19<sup>th</sup> day of May 2011.*

**MARY KASANGO**  
**JUDGE**