REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 91 OF 2009

LESIIT J.

HENRY MBIRITHU NABEA.....APPELLENT

VERSUS

REPUBLIC.....REPONDENT

JUDGMENT

The Appellant HENRY MBIRITHU NABEA was convicted of assault contrary to section 251 of the Penal Code. He was sentenced to 15 months imprisonment.

The Appellant filed an Appeal through Kaberia Arimba & Co Advocates. The Petition of Appeal is dated 11th May, 2009.

Mr. Arimba did not argue the Appeal saying he had lost contact with the Appellant and secondly that the Application had been released through Presidential lenience. Counsel applied to withdraw from acting for the Appellant which Application was allowed.

I have considered the Appeal filed herein. I have subjected the evidence by both sides to a fresh analysis and evaluation bearing in mind the limitation was created due to lack of seeing and hearing the witness.

In the case of **OKENO V. REPUBLIC [1972] EA 32**. the role of a first appellate Court is given as follows:

"**An Appellant on first Appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 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, (See** Peters v. Sunday Post, [1958] EA 424.)"

The evidence on record was that of the Complainant, the Clinical Officer and Arresting Officer. The

learned trial magistrate believed the evidence of the prosecution witnesses.

The Appellant gave an unsworn statement. It was a bare denial. The learned trial magistrate subjected the evidence before him to a proper analysis and evaluation. He applied the correct test to the evidence of identification and found correctly that the incident took place in broad daylight and that Appellant and Complainant were neighbours and therefore, it was unlikely that the Complainant could have been mistaken in his identification of the Appellant. Besides it is clear that the Complainant had been cut on his left hand as a result of which he was admitted in hospital for one month. The learned trial magistrate correctly found the evidence sufficient to sustain a conviction.

The two grounds raised akin the Petition of Appeal are that the prosecution case was contradictory, that the P3 form was insufficient to form basis of a conviction and that the judgment was against weight of evidence. The first ground has no merit. The prosecution evidence had no contradictions.
The second ground does not come out clear. The complaint raised here is something to do with the Complainant as per charge sheet and the P3 form. I find that the name given as the Complainant both in the charge sheet and the P3 form was in fact the full names of the Complainant who testified in this case. Nothing turns on this point.

I find the Appeal has no merit on Appeal against conviction. The sentence imposed was lawful as charge calls for a maximum of three years upon conviction. The Appellant was sentenced to 15 months. That was a reasonable sentence.

I find no merit in this Appeal and do dismiss it accordingly.

DATED, SIGNED AND DELIVERED THIS 1ST DAY OF DECEMBER, 2011

J. LESIIT

JUDGE