



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Appeal 82 of 2009

ZEBEDI OMBAYO LUTTA APPELLANT
V E R S U S
REPUBLIC RESPONDENT

J U D G E M E N T

The appellant was charged with the offence of causing grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that on the 25th day of May 2008 at Mulukanji Trading Centre, Luunza Sub-location, Lunza location in Butere District within Western Province, the appellant unlawfully did grievous harm to Mary Athieno Ayoti. The appellant was found guilty and sentenced to serve 4 years imprisonment.

The appellant filed this appeal. He filed seven grounds of appeal and nine supplementary grounds. These grounds are quite similar and can be summarized as follows:-

1. *That the appellant pleaded not guilty.*
2. *Prosecution case was not proved beyond reasonable doubt.*
3. *Appellant's constitutional rights were violated as he was arraigned in court after the expiry of 24 hours.*
4. *His Alibi defence was rejected.*
5. *Witnesses were from one family members and there was no independent witness.*
6. *No exhibits were produced.*

During the hearing of the appeal, the appellant relied on his grounds of appeal and added that the first report to the police station by PW2 did not indicate his name.

Mr. Karuri, learned State Counsel, opposed the appeal. Counsel submitted that PW1 & PW2 identified the appellant at close range and there was electricity from security light. Pw1 informed the investigating officers that she knew her attackers.

The prosecution called five witnesses to prove its case. PW1, Mary Atieno Ayoti was the complainant. Her testimony is that on 25th May she was asleep with her husband, PW2, when at about 12.00 a.m. they heard something outside. The two were sleeping inside their kiosk. They opened and saw two people and managed to identify the appellant but did not know the other one. The appellant had an axe. The two people attacked PW1 who sustained serious injuries and PW3, Oliver Mahaso, a clinical officer, produced medical evidence to corroborate PW1's evidence.

PW2, David Ayoti Wabubi is PW1's husband and they were together. He saw two people who followed them to the Kiosk. They

tried to pull his out and cut her with a panga. He identified the appellant who is their neighbour.

PW1, P.C. John Nyasiro was at the Butere Police Station on 25th May, 2008 when PW2 went to report about the assault of his wife on the night of 24th and 25th May, 2008. He visited PW1 at the St. Mary's hospital and PW1 informed him that she identified the appellant.

PW5, Samson Tondi Wendaya is the assistant chief, Lunza sub-location. He testified that he was phoned by PW2 on the night of 24th May, 2008 at 3.00 a.m. and he arrested the appellant on 25th May, 2008 at 6.00 a.m.

The appellant was put on his defence and he denied committing the offence. He informed the court that he was arrested on 26th May, 2008. He called PW2, Violet Ombayo who is his wife as a witness. DW2 testified that on the day the incident allegedly occurred the two were asleep in their home. Further, that PW2 told them that he didn't identify anyone and after two days it was alleged that her husband was involved.

The main issue for consideration is whether the appellant was positively identified. PW1 stated that they used a torch to identify the appellant. This was a small torch and that initially they saw them using lights from electricity and from mobile phones. PW1 and 2 went to their kiosk and closed the lower part of the door but the attackers were pulling her from the upper part while her husband was pulling her inside.

PW2's testimony on identification is that he identified the appellant when he was pulling his wife. There was light nearby and they saw two people who followed them to the kiosk. People came and helped him to take his wife to hospital. He named them as George Ogoti, Mary Nekesa and Fredrick Lubale.

From the prosecution evidence, I am not satisfied that the appellant was positively identified. From the evidence of PW1 and 2, it is clear that the electricity light was not near their kiosk. It appears that they saw two people when they went out and they were chased back into their kiosk. Before they could close the door which had two parts these people caught up with them and started pulling out PW1 through the upper part of the door. PW2 could not talk of identifying the appellant using a torch and mobile phones if there was electricity light. The identification by PW1 and PW2 raises some doubts.

PW2 testified that neighbours came to assist them. He did not give them the appellant's name as he was afraid they could harm him through mob justice. He went to the police station on 26th May, 2006. PW4, the police officer who received the report did not state that PW2 gave him the appellant's name. He was informed by PW1 that she identified her attackers when he visited her at the hospital. The date of the visit was not given.

The incident occurred on the night of 24th and 25th May, 2008. The appellant's evidence is that he was arrested on 26th May, 2008 as indicated on the charge sheet. This is confirmed by the information on the charge sheet. PW5, the area sub-chief's evidence is that he arrested the appellant the following day in the morning. His evidence is that he arrested the appellant at the river. He was called by PW2 at night. From the evidence on record, the appellant was arrested on 26th May, 2008. This was one day later. He is a neighbour and PW2 could have informed the other neighbours who came to help him that it is the appellant who attacked them and the neighbours could have checked the appellant at his house.

I do find that the appellant was not accorded the benefit of doubt. DW2's evidence confirms that the appellant was not arrested the following morning of 25th May, 2008. PW2 went to the police station on 26th May 2008. And if the appellant was arrested on 25th then already a report would have been made by PW5 who arrested the appellant.

In the end this appeal is merited and the same is allowed. The appellant shall be set at liberty unless otherwise lawfully held.

SAID J. CHITEMBWE

J U D G E

Delivered, dated and counter signed at Kakamega this 10th day of March, 2010

J U D G E