



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA
Criminal Appeal 56 of 2009

BENJAMIN MAYABI MUYODI.....APPELLANT
-VERSUS-
REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant was charged and convicted for the offence of grievous bodily harm contrary to section 234 of the Penal Code. He was sentenced to serve four (4) years imprisonment. He has now appealed against the conviction and sentence of the Busia Principal Magistrate.

The grounds in his petition of appeal is that the light which assisted the complainant to see him was unreliable. He asked the court for the Occurrence Book to be produced during the hearing but his prayer was ignored. For this reason the appellant argues that it is not possible to establish whether or when the complainant made a report to the police. There was no independent witness who testified in this case although PW1 said that he was rescued by neighbors.

The State through Mr. Onderi Senior Principal State Counsel opposed the appeal on grounds that the appellant was identified by his victim. He was also identified by PW3, Pw1's daughter as the two fought. PW3 inflicted an injury on the face of the appellant.

PW1 said he was attacked in his house around 2.00 a.m. on 06/05/06 while he was sleeping. He heard the voice of the appellant whom referred to as Ochieng and whom he has known for many years. His wife PW2 woke up and flashed a torch. Pw1 saw and confirmed it was the appellant who had already hit him with a hard object on the head. PW1 pushed appellant onto a seat in the one-roomed house. The appellant used a panga to cut PW1 on the hand using a panga. The appellant said he was attacking PW1 because he had caused his father to be arrested by police.

PW2 the wife of PW1 heard the appellant call out her husband. She took a torch and flashed it and saw the accused cutting PW1 with a panga.

PW4 the daughter of PW1 was sleeping in a separate house when she heard her mother (PW2) call for help. She had a torch and a stick. She flashed the torch at the entrance of her parent's house. She identified the accused who was armed with a panga and was pulling PW2. PW4 hit the accused with a stick. He ran away.

The accused in defence said there is a land dispute between his family and that of PW1 who is his uncle. He denies he committed the offence. He was arrested on 14/05/06.

The magistrate found the evidence of PW1 and PW2 very well corroborated by that of PW4 their daughter. He noted that PW4 tried to rescue her mother from the grip of the appellant. She had a torch and flashed it to see the accused whom she knew before the incident. The court found that the appellant was positively identified by each of the three witnesses.

The appellant said it is doubtful that PW1 made a report at the police station. This was confirmed by PW5 who received the report from PW2 at Bumala Police post on 06/05/06 around 2.20 p.m. PW2 said she was able to identify two suspects. He arrested the appellant and his accomplice on 17/05/06. the delay in arrest was not explained by PW5. In cross-examination, the appellant did not ask any questions regarding this issue.

The defence of the accused is that there is a land dispute between him and his uncle PW1. The nature of the dispute was not explained. Neither was it dealt with during cross-examination.

The appellant raised the issue of independent witnesses or neighbours who rescued PW1 having not been called to testify. The prosecution are at liberty to call any relevant witnesses but cannot be compelled to call certain witnesses. After all none of PW1's neighbours witnessed the incident. Those who came, did so after the incident. There was no failure of justice caused by this omission.

PW1 was assisted by the light from the torch of his wife (PW1) to see the appellant. The two witnesses were in the same room and proximity was conducive to identification. PW2 said she flashed the torch when she heard a stranger inside their room calling her husband "mzee". She was able to identify the appellant and his accomplice. She saw the appellant cut her husband with a panga. PW3 came a short while later and saw the appellant pulling PW2. She also had a torch which she flashed at the appellant and identified him. PW1 and PW2 identified the appellant both by his voice and later by his physical appearance. The defence of the appellant was a mere denial and did not shake the prosecution's overwhelming evidence. PW3 the clinical officer corroborated the evidence of PW1 on injuries inflicted on him.

I find that the prosecution proved the case against the appellant beyond reasonable doubt. The appellant was rightly convicted in count 1. He was sentenced to four (4) years imprisonment. Section 234 provides for a maximum sentence of life imprisonment. The sentence imposed is neither harsh nor excessive. I therefore uphold both the conviction and sentence. The appeal is not successful and is dismissed.

F.N. MUCHEMI

J U D G E

Judgement dated and delivered on the 3rd day of March 2010 in the presence of the Appellant and the state counsel.