REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 90 of 2009

WILLIAM BIWOT……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(An Appeal from original conviction and sentence in Eldama Ravine R.M.CR.C.NO.491/2008 by Hon D. M. Machage, Resident Magistrate, dated 13th March, 2009)

JUDGMENT

The appellant was tried and upon conviction sentenced to seven years imprisonment for the offence of **grevious harm** contrary to **section 234** of the **Penal Code.**

According to the charge sheet, on 30th July, 2008 at Nerkwo village in Koibatek District, Rift Valley, the appellant unlawfully did grievous harm to Stephen Kiprop Serem, (the complainant). It was the complainant's evidence that on the evening in question at about 7.30p.m. he passed through the home of the appellant amid protestation by the appellant's wife who warned him that it was not a through fair.

After pleading with her she allowed him to proceed. About 100m away, he met a person who asked him where he was coming from. But before he could respond the man attacked him with a panga cutting him all over. He held the man and struggled briefly but lost strength and let him go. He was taken to the hospital and issued with a P3 form. The doctor assessed his injuries as grevious harm. The complainant maintained that it was the appellant who attacked him as he was able to identify his voice.

The appellant in his sworn statement raised the defence of *alibi* – that he was on safari when the complainant was attacked. The learned trial magistrate was convinced that the appellant was recognized by the complainant, and found him guilty, convicted him and passed the sentence of seven (7) years, as I have already stated. The appellant was aggrieved and has challenged both the conviction and sentence in this appeal. He is relying on the following summarized grounds:

i) that the prosecution failed to prove the case against the appellant.

ii) that the appellant's defence was not considered

iii) that the appellant's constitutional rights under **section 72(3)** of the **Constitution** was violated

Learned counsel for the respondent supported the finding and sentence by the trial magistrate arguing that there was sufficient evidence of voice identification; that the appellant's constitutional rights were not violated as his arrest was over the weekend and that if there was any delay he was only entitled to compensation and not acquittal; that the sentence was lenient.

I have considered these submissions and the only authority cited by counsel for the appellant to support the proposition that the appellant is entitled to an acquittal following his detention beyond the prescribed period – i.e. **Peter Waiguru Mbugu** Vs. **Republic** – H.C.Cr. Appeal No.295 of 2007.

The attack occurred at night, at 7.30p.m. There is evidence that it was dark; that indeed the person who attacked the complainant

was using a spotlight; that the attack took place shortly after the complainant had passed through the appellant's home attracting the latter's wife's furry. It is also conceded that the appellant and the complainant knew each other as they are neighbours.

These being the circumstances, the sole question in this appeal is whether the complainant was able to identify the appellant as the person who attacked him. The complainant's evidence is that of a single witness. As it related to identification, the complainant states as follows:

> **"I proceeded on, on reaching at the river, I heard the steps of a person running back (sic), it was about 100 meters away. I stopped and looked behind, only to see William. He was quite close. He spotted me with a spot light. Before I could talk he cut me on the left cheek.**
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> **I was confused but first he asked me where I was coming from. I held him by the color (sic). When he cut me on the elbow, inner part and at (sic) the buttocks , on the jaw and nose. I did not want to release him but I lost senses to my left hand but kept holding him when he bite (sic) me on the right thump (sic). I then released him……..I fell down. I heard him scream that he had killed."**

From this evidence, it is clear that the complainant engaged his attacker for sometime in a struggle. The attacker talked to the complainant. He asked him where he was coming from. The attacker also announced as he left the scene that he had killed. From the above (complainant's) testimony, the complainant appears to suggest that when he heard footsteps from behind him, he turned and saw the appellant (William) who was quite close. That the appellant had a spotlight. In other words, the prosecution is relying on the evidence of identification by appearance and voice recognition.

The law on recognition of persons known to the victim as opposed to identification of a stranger has been the subject of a long line of decided cases. Similarly, the law on a single witness is settled. With regard to the latter, it is trite learning that when the evidence before a court of law is mainly that of a single witness on identification, the court has to be extra careful before entering a conviction. The court in **Tipapek Kimiti alias Ole Lemurinka** Vs. **Republic**, Criminal Appeal No.2 of 2006 said further that:

> **"……the need for extra care is not reduced even when the evidence is that of recognition for there may be cases where even people who know each other very well may still make mistakes. In such circumstances, the court needs to see if there is other evidence to lend assurance as to guilt of the suspect before it, before it can enter a conviction."**

The court in stating the above relied on the celebrated case of **Abdalla bin Wendo & Another** Vs. **Republic** (1953) 20 EACA 166 where the law was stated thus:

> **"Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the probability of error."**

The attack was at night; the only identifying witness was the complainant; the only source of light was a torch held by the attacker and directed to the complainant; the complainant had shortly
before the attack passed through the home of the appellant; the appellant's wife complained; the attack was some 100m from the appellant's home; the appellant and the complainant are neighbours;
the attacker spoke to the complainant and then announced that he had killed; the attack was sudden.

In view of the foregoing conditions, can it be said that the prevailing circumstances at the time of the attack as well as at the scene of the incident were favourable for positive recognition of the appellant as the attacker? In my considered view, the conditions were not favourable. The only reason why the complainant suspected the appellant is because the latter's wife had attempted to stop him from passing through his homestead. That can only amount to mere suspicion. Secondly, there is no evidence that the complainant saw the appellant anytime before the attack – either as he passed through his homestead or earlier. Thirdly, there is no independent evidence to lend credence to the complainant's claim that he was attacked by the appellant.

With that finding, I see no need to consider the rest of the grounds raised in this appeal.

For the reasons stated, the appeal is allowed. The conviction quashed and sentence of seven (7) years set aside. The appellant shall be set free forthwith unless held for any other lawful reason.

Dated, Signed and Delivered at Nakuru this

19th May, 2010.

W. OUKO
JUDGE