



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 173 OF 2009

*(From Original Conviction and Sentence in Criminal Case No. 1525 of 2008 of the
Principal Magistrate's Court at Kwale: D.O. Ogembo – P.M.)*

1. JOHANA KALU Alias NZOLE KALU
2. MUGAZA KIMANYI APPELLANTS
3. NZOCHI NZUNJI MALONZI

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The three (3) Appellants namely **JOHANA KALU Alias NZOLE KALU** (hereinafter referred to as the 1st Appellant), **MUGAZA KIMANYI** (hereinafter referred to as the 2nd appellant) and **NZOCHI NZUNJI MALONZI** (hereinafter referred to as the 3rd Appellant), were jointly charged before the learned Principal Magistrate sitting at Kwale Law Courts with the offence of **ASSAULT CAUSING GREVIOUS BODILY HARM CONTRARY TO SECTION 234 OF THE PENAL CODE**. The particulars of the charge were that

“On the 6th day of December 2007 at around 11.00 p.m. at Mbuji Village in Mwerenji Location in Msambweni District in Coast Province, jointly unlawfully did grievous harm to NYANJE MWATUMBI”

The three appellants all pleaded ‘**not guilty**’ to the charge and their trial commenced on 5th December 2008. The prosecution led by **INSPECTOR GITONGA**, called a total of four (4) witnesses in support of their case. The brief facts as narrated by the complainant **NYANJE MWATUMBI** were that on the night of 5th December 2007 he and his wife **NZOCHI NZUNJI** (the 3rd Appellant herein), were asleep in their house in Mwerenji Location with the door securely locked. At 11.30 p.m. the complainant was suddenly and rudely woken up by people who held him down on his bed and began to slash him with a panga. The complainant could not fight back as he was being held down. The attackers inflicted upon him serious injuries but his wife was untouched. After the men left the complainant managed to crawl out of his house and into the nearby bushes. He lay there until the next day, when at 10.30 A.M. an uncle rescued him and took him to hospital. He was admitted at Coast General Hospital until 23rd February 2008 a period of about two months. The matter was reported to police who arrested the three appellants and charged them.

At the close of the prosecution case each appellant was ruled to have a case to answer and was placed on his defence. They each gave unsworn defences denying any involvement in the attack upon the complainant. On 28th September 2008 the learned trial magistrate delivered his judgement in which he convicted all three appellants and sentenced them to serve fifteen (15) years imprisonment each. Being dissatisfied with both their convictions and sentences the Appellants filed this consolidated appeal. **MR. ONSERIO**, learned State Counsel opposed the appeal and urged the court to uphold both the convictions and sentences of the lower court.

The injuries to the complainant are not in any doubt. He told the court that he was attacked by men

armed with pangas who proceeded to slash him severally fracturing his arm and shoulder joints. The complainant was unable to defend himself as the men held him down on his bed. **PW3 ALLAN TOMOIT CHEROP**, a clinical officer from Msambweni District Hospital confirmed these injuries by the P3 form which was produced in evidence **Pexb1**. He noted the cut wounds on the chest, mouth, arms and legs of the complainant and noted that the injuries were caused by sharp objects. He confirms that the injuries were assessed as grievous harm.

The next crucial question to be determined in this appeal is the identity of the attackers. The complainant himself was not able to identify any of the persons who attacked him. At page 3 line 17 he states

“They [the attackers] had flashed torches on my face and I could not see as he had put off the lamps”

The complainant further under cross-examination by the three appellants confirmed that he had not been able to identify any of them.

The 3rd appellant who was the complainant’s wife was arrested and charged because complainant suspected that she had been involved in the attack. This is because she was not injured and she did not call out for help. This on its own cannot be a cause for suspicion. If the attackers were only after the complainant, then they would not bother with his wife. It is also quite likely that witnessing such a savage attack on her husband, the 3rd Appellant feared to call out for help in case the attackers also turned on her. The complainant further states that it is only his wife who could have opened the door to let in the attackers because they were the only two people in the house and the door was not broken. However there is no evidence that the said door had been locked prior to the attack. At page 4 line 11 the complainant states

“It was a single room, we had only 1 small child. It was a wooden door. It was not broken. It had been closed (as opposed to locked) by her. I do not know how it had been opened”

If the door had been merely **shut** as opposed to **locked**, then the men could have simply opened the door and walked in. The fact that the door was not broken does not provide conclusive proof that the complainant’s wife was involved in the attack.

The 2nd Appellant was arrested and charged because it is alleged that the 3rd Appellant identified him as one of the attackers. It is curious how the 3rd Appellant would have been able to identify the 2nd Appellant, yet the complainant clearly told the court that at the time of the attack, the room was in darkness as the lamps had been turned off. In those circumstances how would his wife have been able to see and identify any person? Further the identification of 2nd Appellant by the 3rd Appellant amounts to evidence of a co-accused which cannot be deemed to be a reliable form of identification.

With respect to the 1st Appellant, **PW4 PC DAN MUSUKU**, tells the court that he arrested both the 1st and 2nd Appellants based on a statement given to him by the complainant in which the complainant identified them as his attackers. At page 12 line 13 **PW4** states that this is what complainant told him

“that accused 2 is the one who held his legs. That it was accused 2, his herder who had flashed torches as accused 1 cut him. Earlier accused 2 had warned him of a problem coming and at first wanted to tell him but changed his mind. Complainant mentioned all 3 accused”

Such a statement if made would no doubt implicate the appellants. However this evidence of **PW4** directly contradicts what the complainant himself told the court. As stated earlier the complainant testified that he was unable to identify any of his attackers. The complainant did mention having made a statement to police but he made no mention of having provided all these details to police. **PW4** made no attempt to produce the said statement as an exhibit to enable the court confirm that indeed this was what the complainant told police. This is a major contradiction which in my view casts doubt on the whole prosecution case. A police officer cannot come to court and claim to have recorded in a statement facts which the maker of said statement made no mention of (and infact directly contradicted) in his evidence.

On the whole based on the foregoing I find the prosecution case to have been based on mere suspicion, innuendo and conjecture which has no legal bearing and certainly does not meet the required standard of proof. The learned trial magistrate erred in failing to take into account these inconsistencies

and contradictions. The conviction of all three appellants was without any legal basis. I do hereby quash the same. The attendant 15 year sentences are also set aside. This appeal succeeds. All 3 appellants to be set at liberty forthwith unless they are otherwise lawfully held.

Dated and Delivered in Mombasa this 5th day of November 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-

All 3 appellants in person

Mr. Onserio for State

M. ODERO
JUDGE
5/11/2010