



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISII

Criminal Appeal 197 of 2007

NICHOLAS OUCHO MOGAKA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence in the Senior Resident Magistrate's Court at Keroka

in Criminal Case No.679 of 2006 by HON. G. H. ODUOR ESQ., S.R.M)

JUDGMENT

The appellants were charged with assault causing actual bodily harm contrary to **section 251** of the **Penal Code**. The particulars of the offence were that on the 7th day of October, 2006 at Rigena sub-location Nyamira District the appellants jointly with others not before court unlawfully assaulted **Dennis Gwaro Motanya** thereby occasioning him actual bodily harm. The appellants were convicted and sentenced to a fine of Kshs.20,000/= in default six months' imprisonment.

The appellants were aggrieved by the said conviction and sentence and preferred an appeal to this court. In their joint petition of appeal they stated that the learned trial magistrate erred in law and fact in convicting them without sufficient evidence. They further alleged that the evidence that was adduced by the prosecution witnesses was contradictory.

The prosecution evidence briefly stated was that the appellants are all uncles of **Dennis Gwaro Motanya, PW1**. On 7th October, 2006, at about 7 p.m. the complainant was talking to a girl known as Alexina. They were standing next to the appellants' houses. The appellants appeared and started throwing stones at PW1. The first appellant held PW1 and asked him who else he was with apart from Alexina. He told them that he was with another friend known as Robert Onyari.

The appellants started assaulting PW1 using a panga.

They alleged that PW1 and his friend were trying to break into their houses, but PW1 and Alexina denied that. There was moonlight and PW1 was able to recognize the appellants properly since they were his relatives. PW1 was treated at Keumbu Hospital.

Jackson Morauni, PW3, a Clinical Officer, testified about the injuries that were occasioned to PW1.

Richard Omwenga Ondieki, PW2, testified that on the material day at about 7.30 p.m. he heard people screaming and saying "**thief, thief**". When PW2 went out of his house he found PW1 being beaten by the

appellants herein. The appellants had pangas, clubs and sticks. When he asked the appellants why they were beating PW1 they replied that he was a thief. They were outside the house of a woman known as Moraa. They called a girl who was in the house and she said that the complainant was her lover. PW2 added that there was no evidence that the complainant had stolen anything.

A report was made to the police and Sgt Rafael Mutiso of Keroka Police station testified as to how the appellants were arrested. The complainant had identified his assailants by their names to the police.

In his defence, the first appellant testified that on the material day at about 9.00 p.m. he heard screams and when he went out he heard some people saying that there was a thief near a certain river. As he walked towards the river he found a person surrounded by many people. He realized that the person who was surrounded was PW1. He denied that he ever assaulted the complainant. The other appellants gave more or less the same defence. The appellants called Alexina Ariga, DW1 as a witness. This is the girl who was alleged to have been with the complainant at the time of his assault. She testified that on the material day at about 9.30 p.m. she was asleep at her aunt's house. She heard a knock on the door. Someone was calling her aunt known as Moraa.

DW1 tried to wake up her aunt but she did not respond. She saw many people standing outside the house and she was asked to come out. When she walked out she was asked if she knew Dennis. She denied any knowledge of the said person. She also said that she did not know a person by the name Robert. She added that she did not see the appellants assaulting the complainant.

The learned trial magistrate considered the appellant's defence against the defence that was adduced by the prosecution that she was at scene

Having carefully considered all evidence on the record I believe the appellant's conviction was well merited.

The complainant knew the appellants very well as they were his close relatives and the complainant had no reason to frame him up. He saw the appellants and talked to them. Their defence as well as that of DW1 and one other defence witness Daniel Anyona Mogeni was not credible.

There was sufficient evidence that at the time when the complainant was assaulted by the appellants he was talking to DW1. Whether the complainant was a friend of DW1 or not is not important for purposes of this appeal. The evidence of PW1 was well corroborated by PW2. In the circumstances I dismiss the appeal against both conviction and sentence.

DATED, SIGNED and DELIVERED at KISII this 31st Day of March, 2009.

D. K. MUSINGA.

JUDGE.

Delivered in the open court in the presence of:

1. Mr. Omariba for the Appellant.
2. Mr. Mutai for the State.