



**PAUL MWIKA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(An appeal against the judgment of the learned trial Magistrate Hon. G. Oyugi R.M. Tigania*

*in Criminal Case No. 2195 of 2003)*

**JUDGMENT**

After his trial in the court below, the appellant was found guilty, convicted and sentenced to two years imprisonment for the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. He was aggrieved and preferred this appeal in which ten (10) grounds were raised.

The grounds were argued together. The collective effect of those grounds are that the evidence adduced in support of the charge was insufficient to form a basis for a conviction; that the defence was not given due attention; and that the sentence was excessive.

The appeal was opposed and counsel for the respondent submitted that the prosecution established the case against the appellant beyond any reasonable doubt.

As the first appellate court, before I consider these arguments I am bound and must re-evaluate the evidence on record in order to arrive at an independent conclusion bearing in mind that I have not had the benefit of the trial court where the witnesses were seen and heard. The prosecution evidence was led by the complainant, PW1 Joshua Mutabari of how the appellant approached him while purchasing tea leaves at a shop and demanded to know why he was competing with him in the tea business. He insulted the complainant and threatened to cut him with a panga with which he was armed. To avoid being attacked the complainant moved towards the market with the appellant in pursuit. He cut the complainant with the panga on the left hand. The second blow missed the complainant's neck and only scratched it. People, including Stanley Kabengi (PWII) and Alfred Mutea, I presume PWIII responded.

Both Stanley and Alfred confirmed the attack on the complainant by the appellant. The complainant was taken to the hospital after reporting the incident to the police. He was treated by PWIV Wilson Namu, a clinical officer at Meru Hospital, who noted the injuries and assessed them as "harm".

In his unsworn defence the appellant maintained that it is the complainant and Stanley who attacked him. That the complainant cut him on the head and he fell. That as the complainant was preparing to cut him again he (the complainant) slipped and fell on the panga. That Stanley who was also armed with a panga aimed to cut the appellant but missed and instead cut the complainant.

The appellant went to the nearby AP camp and made a report. He was referred to Tigania Police Station where he recorded a statement before seeking treatment at the hospital. He was issued with a P3 form. When he was returning the form he met with the complainant who was also returning his form and both of them were locked up in the cells. The appellant's P3 form was taken away from him. He was detained while the complainant was released. The appellant was then charged with assault. He called two witnesses, Francis Koronya and Jacinta Mwakiuri. Both maintained that it is the appellant who was attacked with a panga by the complainant. That the injuries sustained by the complainant were inflicted by mistake when Stanley missed the appellant and cut the complainant instead.

I have considered the foregoing evidence. There cannot be any dispute that the complainant sustained a deep cut wound as found by the clinical officer, on the left forearm and bruises on the left side of the neck.

The main issues are whether the injuries were inflicted by the appellant and whether the appellant was also attacked. On this question, the learned trial magistrate who saw the witnesses including the appellant found as a fact that the appellant had no visible physical injury, scratch, scar or mark on his head. With respect, I have no basis to discount that finding which was based on observation made by the learned trial magistrate.

I have on my part looked at the appellant's evidence and without shifting the burden find no support for his claim that he was assaulted. It was convenient that only his P3 form was taken away. He did not say anything about treatment notes, if any. The learned trial magistrate gave sufficient consideration to the appellant's defence and dismissed it.

The prosecution evidence presented by the complainant and his witnesses was consistent and truthful. Stanley and Alfred were present and they witnessed the attack. The existence of bad blood between them and the appellant has been alleged.

The appellant armed himself, approached the complainant, who was going about his business peacefully, insulted him and when the complainant began to leave he chased him and cut him. The appellant was the aggressor. I find no reason to interfere with the finding of the learned trial magistrate.

The sentence of two years instead of the prescribed five years and in view of the injuries suffered by the complainant cannot be by those standards be described as excessive.

For these reasons, the appeal is dismissed.

Dated and delivered at Meru this 24<sup>th</sup> day of March 2009.

**W. OUKO**

**JUDGE**