**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**Criminal Appeal 186B of 2008**

**ENOCK OKEMWA ONDARI …….. APPELLANT**

**VERSUS**

**REPUBLIC ……..…….. RESPONDENT**

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

**Keroka Criminal Case No.426 of 2008 by**

**J. Were Esq., SRM)**

**JUDGMENT**

The appellant was convicted by the Senior Resident Magistrate, Keroka, of attempted robbery with violence contrary to section 297(2) of the Penal Code and sentenced to death. The particulars of the charge were that on 25/5/08 at Manga/Raitigo sub location in Borabu District within Nyanza Province he jointly with others not before court and while armed with dangerous weapons namely; a knife and panga, attempted to rob Justus Okeyo Bosire of unspecified sum of money and at the time of such attempted robbery injured the said Justus Okeyo Bosire. The appellant was aggrieved by the sentence and conviction and preferred this appeal.

The evidence upon which the appellant was convicted was that on 25/5/08 at about 7.30 p.m. the complainant was from his mother's house with food going to his house. Outside there he met two people whom he greeted and asked if he knew them. They responded they were visitors. He went into his house, put on the lamp and welcomed them in. The complainant knew one of them, the appellant. He knew the appellant to be from the same place as his wife, about 20 km away. The appellant came in but the other person remained outside. The complainant and the appellant began to talk. The appellant asked if he was a smoker. The complainant asked him to wait. He was going to the bedroom for a match box when appellant stabbed the complainant on the chin and forehead. The complainant punched him until he fell on the table. The person outside came with panga. appellant stood up and stabbed him on right chin. The complainant punched him again and he fell. The lamp went off. The other attacker wanted to cut complainant but the latter used the appellant as a shield and he ended up cutting him (the appellant) on the head. The complainant ran out of the house screaming. He found neighbours outside. The attackers ran out of the house and disappeared into darkness. He fell unconscious. He was taken to Kaplong Mission Hospital where he woke up from unconsciousness. Medical report contained in a P3 confirmed the fact

of injury. Josephat Osoro Bosire is complainant's brother. He met with the attackers running away but did not identify or recognize them.

The appellant's defence, given not on oath, was that he knew nothing about the incident. Regarding the injury he had on the head, which prosecution was saying was inflicted by the complainant in the attack, he told the trial court he was beaten on his way from drinking illicit brew on 30/5/08.

The trial court considered the evidence and found the prosecution had established the guilty of the appellant beyond doubt. The appellant complains that he was convicted on insufficient evidence and the defence evidence was not considered. Mr. Mutai conceded that the evidence did not disclose an offence under section 297(2) of the Penal Code. In his view, the trial court ought to have entered a conviction under section 251 of the Penal Code of assault causing actual bodily harm.

It is clear from the evidence of the complainant that the attackers did not in any way indicate they wanted to steal any property from him or the house. It may have been suspected that was their intention, but there was no proof of that. All that happened, according to him, was the assault. The P3 form that was produced showed the extent of the injury suffered to be harm. If anything, police ought to have preferred the charge of assault causing actual bodily harm under section 251 of the Penal Code.

The question, however, is whether the appellant was positively identified to be the complainant's attacker. The complainant testified he knew the appellant and that was not denied by the defence. But, did the complainant recognize the appellant?

The evidence was that the complainant was coming from his mother's house when he found the two people outside. There was no evidence there was any form of light out here. When he went to the house, and before he invited them in, he lit a lamp. The appellant came in and they began to talk, before the fight, as it were, began. The struggle took sometime. The appellant made unsworn defence denying he was at the scene or in the attack. The trial court considered the evidence as a whole and accepted the complainant's version. The complainant testified that in the struggle the appellant was cut by his companion on the head. When the appellant was arrested he had a scar on the head. The complainant testified it was from cut inflicted by his companion. The appellant stated that he sustained it from a beating he received elsewhere. The scar on the head of the appellant confirmed to the trial court that he was the complainant's attacker. Police did not seek to have the appellant examined to see if the injury was from a sharp object. It would appear that at the time of the plea the appellant had a fresh wound on the head. The plea was taken about 8 days after the incident. The trial court noted as follows:

"The accused in his evidence was also not able to explain,

the fresh wound on his head at the time of his plea on

3/6/08."

That was a misdirection. It was for the prosecution to prove beyond doubt the wound the appellant had was inflicted in the attack. The appellant did not have any explaining to make. In any case, he stated he was beaten elsewhere.

More important, the complainant was a single identifying witness at night. In the case of RORIA v. REPUBLIC [1967] E.A 583, 584 the then Court of Appeal had this to say about identification:

"*Subject to certain well-known exceptions it is trite law*

*that a fact may be proved by the testimony of a single*

*witness but this rule does not lessen the need*

*for testifying 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. I such circumstances*

*what is needed is other evidence, whether it be*

*circumstantial or direct pointing to quilt, 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 possibility of error."*

The trial court did not caution itself about the need of testing, with the greatest care, the evidence of the complainant regarding identification, or the need for corroboration. It is accepted the court was dealing with recognition. Nonetheless, there was need for caution.

Secondly, the complainant's testimony was that he became unconscious and recovered at Kaplong Mission Hospital. When he was discharged he returned home. Police visited him. Later on he learnt police had arrested the appellant. He was not led to say he gave the name of the appellant to Police as his assailant. His brothers, Josephat Osoro Bosire and Richard Omwenga Bosire came to the scene immediately. None of them said the complainant told him who the attacker was. When P.C. Isaak Chesire went to the scene following the report, the complainant was in hospital. They did not meet at that point. The police officer continues:

"*His brothers had taken him to hospital. The next day*

*they came and wrote statements. The victim was released*

*after 1 day. We continued to search for the assailants and*

*we arrested one Enock on 31/5/08. The P.C.Musebe and*

*Njeru were informed and they went and arrested the*

*accused and he was brought to the station."*

Chesire was not the arresting officer and did not say the complainant told him that the appellant was his attacker. The officers who arrested the appellant did not testify. Did they know the appellant? Did the complainant give them the name of the attacker?

In short, the court finds that the prosecution evidence was not sufficient to demonstrate beyond doubt that the appellant was the complainant's attacker. The trial court fell into error when it found the charge had been proved. This finding is the same for attempted robbery with violence contrary to section 297(2) of the Penal Code as it is for assault causing actual bodily harm contrary to section 251 of the Penal Code.

The result is that the appeal is allowed. The conviction is quashed and the sentence set aside. The appellant shall be released forthwith from custody unless he is otherwise lawfully detained.

Dated, signed and delivered at Kisii this 23rd day of July, 2009.

**D. K. MUSINGA** **A. O. MUCHELULE**

**JUDGE** **JUDGE**

23/7/2009

Before D. Musinga J.

Mobisa cc.

Mutai for state

Applicant in person present

Court: Judgment delivered in open court on 23rd July, 2009

**D. MUSINGA.**

**JUDGE**