



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL 116 OF 2007

JUMA CHACHA KIBWABA APPELLANT

VERSUS

REPUBLIC RESPONDENT

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

Court Kehancha Criminal Case No.505 of 2006 by J. R. NDURURI

Esq., RM)

JUDGMENT

The appellant was convicted by the Resident Magistrate, Kehancha of grievous harm contrary to **section 234** of the **Penal Code** and sentenced to serve 7 years in jail. The particulars of the charge were that on 24/3/06 at Kobobono village in Gwikonge sub location in Kuria District within Nyanza Province, he grievously injured **Benson Nyaikoba Maitara** by cutting him with a panga thereby inflicting him a fracture of the skull. He has appealed against the conviction and sentence.

The evidence called in support of the charge was that the complainant and the appellant were cousins. Prior to this case, the complainant had been convicted of chasing the appellant's mother with panga in a causing disturbance case and ordered to pay a fine. On 24/3/06 at about 3 p.m. complainant was at his shamba when appellant came with panga and asked if the complainant was going to pay his mother's money. Complainant asked what money as he owed none. Appellant claimed complainant was boasting because of money and cut him on the head with the panga and ran away. The complainant passed out and found himself at Kisii District Hospital 6 days later. He was admitted for a month. Medical evidence produced by clinical officer **Jared Mogesa Nyasede** of Kuria District Hospital revealed the complainant suffered a deep cut wound on the lateral side of the head involving the fracture of the skull. The complainant had as a result lost the motor power to the right upper limb. Injury amounted to grievous harm. **Samuel Chacha Mwitari** is complainant's brother and the appellant's cousin. He saw the complainant and appellant quarrelling near where he was harvesting maize. Appellant was demanding his mother's money. It was money she had spent in the case above. The complainant was saying he had paid fine and had not been meant to give her money in the case. Appellant had a panga. When the two were about 100 metres away, **Samwel** heard a scream. He saw the complainant fall down and appellant running away. He rushed to scene and found the complainant with a cut wound on the head and was bleeding profusely. **Daniel Mwitaria** is related to the two. He was outside his house when the appellant

passed with panga and was shortly followed by the complainant. He heard the two quarrelling over money. He entered the toilet and shortly heard screams. He came out and about 100 metres away saw the appellant running away. He went to the scene and found the complainant cut in the head. He was assisted by **Samwel** to take him to Kehancha District Hospital and then to Kisii District Hospital.

The appellant made unsworn defence and called one witness **Moses Gisiri Mwita**. **Moses** testified he knew nothing about the case. The appellant denied the charge and alleged he had been framed because of the case where complainant was convicted of causing disturbance in which his mother was the complainant. He appellant complained that all prosecution witnesses were complainant's brother.

The trial court considered all that evidence and found the prosecution had discharged its burden. The appellant was found guilty as charged. The duty of this court is to analyse and consider the entire evidence before the trial court and make its finding whether the appellant was properly convicted. In doing so, the court has to bear in mind it did not hear or see the witnesses who gave evidence in the trial court. However, before such consideration there is an issue raised by the appellant in his petition which was caused this court a lot of anxiety. The appellant was represented by **Mr. Okoth** up to the close of the prosecution case. Ruling of whether there was case to answer was reserved to 20/6/07. When the day came the appellant was present without his counsel. Ruling of case to answer was delivered. The appellant was not asked where his counsel was and whether he wished him to be present. The court proceeded and asked him to make his defence. The appellant did not have benefit of his counsel. He gave unsworn testimony and called a witness. In the Petition of Appeal he complains he was denied legal representation during the defence case.

The appellant was being represented by counsel during the trial. The appellant was entitled to be represented by an advocate of his choice under **section 77** of the **Constitution**. When his chosen advocate was not present, the trial court was under a duty to first ask him whether or not he could or was prepared to proceed with the case. In the case of **Okello v. Republic [1986] KLR 219** at page 223 it was stated as follows:

“A court ought not and must not hurry to conclude a case without due regard to the rights of an accused or without any due consideration as to what the ends of justice demand.”

Where the constitutional right of an appellant has been violated it does not matter the amount of evidence that was led against him (**Mwasia Mutua v. Republic Criminal Appeal No.120 of 2004 at Nairobi**). The trial is a nullity.

Accordingly, I will quash the conviction, set aside the sentence passed, and order the appellant to be immediately released unless he is otherwise lawfully held.

Dated, signed and delivered at Kisii this 14th day of July 2009

A. O. MUCHELULE

JUDGE

14/7/2009

Before A. O. Muchelule Judge.

Mongare c/c

Mr. Kemo for staste.

Applicant present.

Court: Judgment in open court.

A. O. MUCHELULE

JUDGE