



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE 186 OF 2006

MERCY KAJUJU.....1ST APPELLANT
CHARITY THINGU.....2ND APPELLANT
PAUL M'BICHORO.....3RD APPELLANT
TIMOTHY KIRIMI.....4TH APPELLANT
BERNARD KITHURE M'RICHORO.....5TH APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An Appeal from the Judgment and Conviction and sentence of learned Senior Resident Magistrate G. Oyugi dated 7.12.2006 in Tigania S.R.M. criminal Case No. 1201 of 2003)

Criminal law and Criminal procedure

v It is a cardinal principle of the constitution and the criminal law process, that a person charged with a criminal offence shall be informed as soon as reasonably practicable in a language he understands and in detail of the nature of the offence with which he is charged (ss.77 (1) (b) of the Constitution)

v Violation of that principle vitiates the entire trial.

v What is planted or permanently fixed to the land becomes part of the land.

J U D G M E N T

The appellants were charged before the Tigania Senior Resident Magistrate's Court in Criminal Case No. 1201 of 2003 and the 1st, 2nd, 4th, and 5th appellants were each sentenced to twenty (20 years) imprisonment, the 3rd appellant was on account of his age sentenced to ten (10) years imprisonment.

All the five appellants appealed against their conviction and sentence and since the appeals arose from

the same judgment, they were by order of court made on 23rd October 2006, consolidated under proceedings in file **H.C. Criminal Appeal No. 186 of 2006**. The grounds of appeal set out in the supplemental Petition of Appeal dated 18th September 2008 are identical and are as follows:-

- 1. that the trial magistrate erred in law and fact by failing to comply with mandatory provisions of section 77 of the law of the Constitution and thus conducting a flawed trial ab initio.**
- 2. that the learned trial magistrate erred in law and fact by convicting and sentencing the appellants wherein the charges were not proved beyond reasonable doubt, and**
- 3. that without prejudice to the foregoing the sentence was excessive regard being had to the offence committed by the appellant.**

On those grounds each of the appellants prayed that the conviction and sentence be set aside and that each of them be set at liberty.

The Appellants were charged with the offence of causing grievous harm contrary to section 234 of the Penal Code, (Cap 63 Laws of Kenya). The particulars were that on 6th day of March 2002 at Kiandiu Sub location in Meru North District within Eastern Province, jointly unlawfully did grievous harm to Peter Gitonga Nchebere.

The prosecution called seven (7) witnesses. The five (5) appellants persons gave unsworn statements, and called no witnesses. At the end of the prosecution and defence's unsworn statements the learned trial magistrate found all the five appellants guilty and sentenced them to respectively twenty (20) years except for the 3rd accused who was sentenced to ten (10) years as noted above.

In order to understand the submissions of counsel for the appellants and learned Senior State Counsel for the Republic, it is necessary to set out briefly the history of this case.

On 9th July 2003, the Appellants No1. Mercy Kajuju No 2. (Charity Thigaigu Ntorichoro) were charged with causing grievous harm against the complainant and pleaded not guilty.

On 10th January 2005 (not 10.10.2005) as recorded at p.3 of the proceedings the prosecution had a new consolidated charge sheet, which included the 3rd and 4th appellants respectively. All four pleaded not guilty to the charge.

On 16th June 2005 the prosecution applied for the consolidation of Criminal Case No. 493 of 2005 the **Republic Vs. Timothy Kirimi Lichoro**. The application for consolidation was not dealt with until the 26th August 2005, when it was granted and Tigania **SRM Criminal Case No. 493 of 2005** was withdrawn. The consolidated charge was read out and explained to the appellants persons in the Kimeru language which they all understood and answered in Kimeru and denied the charge.

All the appellants in their respective Petitions of Appeal pleaded that the trial magistrate erred in law and fact by failing to comply with the mandatory provisions of Section 77 of the Constitution and thus rendering the conduct of the prosecution flawed **ab initio**. Indeed this was the basis upon which Mr. Muteti learned Senior State Counsel informed the court that the State was conceding the entire appeal and would be asking for a re-trial of the 4th and 5th appellants only that being no evidence against the 1st -3rd Appellants.

The **second** ground of Petition of Appeal was that the learned trial magistrate erred in law and fact by convicting and sentencing the appellants whereas the charges were not proved beyond reasonable doubt.

The **third** ground was the sentence of twenty years (20) was harsh having regard to the circumstances of the commission of the offence, and prayed that the appeal be allowed.

Commencing with the first ground of the Petition of Appeal, Section 77 of the Constitution is a wide provision. It comprises of fifteen (15) sub sections with their own sub paragraphs except for subsection (15) thereof which is a definition provision in respect of the phrase “**criminal offence**” as meaning a criminal offence under the laws of Kenya, the rest of the subsections deal with the specific protection of an accused person’s right under the constitution.

For example section 77(1) requires that if a person is charged with a criminal offence then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

For a plea of contravention of Section 77 of the Constitution to succeed the affected person or as in this case, the appellant needs to specify which protection or right in relation to him has been contravened or violated by the court or prosecution. The plea cannot be at large.

In his submission to the court Mr. Mwanzia learned counsel for the appellants stated that he relied upon the first appellant’s Supporting Affidavit sworn on 18th September 2008 (in support of the application for grant of bail pending appeal), wherein that appellant avers in paragraph 4(a) thereof as follows:-

4. that I am advised by my counsel on record which advice I verily belied to be true that my appeal has merit because of the following issues-

(a) that the trial was conducted in a language which I did not understand which is a serious omission in law and contrary to the constitution of Kenya.

In this appeal the provision alleged to have been contravened by the court is section 77 (2) (b) of the constitution, which requires that, every person who is charged with a criminal offence shall be informed as soon as reasonably practicable in a language that he understands and in detail, of the nature of the offence with which he is charged.

It is indeed a serious omission, and the contravention of the law of the Constitution of Kenya (s.77 (2) (b) thereof if the court were to conduct proceedings in a language which the accused person does not understand. If that happened such proceedings would indeed to use a hackneyed work “**be flawed**” and void **ab initio**, and the conviction arising there from would be liable to be quashed and an appellant set free.

Under Sections 197 and 198 of the Criminal Procedure Code, (Cap 75 Laws of Kenya) the language of the court is English (in the High Court and the Court of Appeal) and English and/or Kiswahili in the subordinate or lower court. This means that the court record (or the court archive) commencing with the charge or information is in English and the proceedings including the evidence of witnesses and the accused, or their unsworn statements would be received in either English or Kiswahili, and in either case shall be transcribed or translated into a language which an accused person understands, or as the case may be his advocate, and the court transcription remains in English.

The Appellants contend the trial was conducted in a language which they did not understand. Elaborating this point while conceding the appeal Mr. Muteti learned State Counsel Submitted that at p5 of the Proceedings where the matter was consolidated and a new charge read to the accused, (the appellants) the problem of language clearly appears that the consolidated charge sheet was read in Kimeru, that there was no indication the proceedings were conducted in Kimeru language or whether this was merely an omission, that there should have been an indication that the charge was translated to Kimeru language. For those reasons counsel submitted that he would not wish to see the re trial of the 1st, 2nd, and 3rd appellants, or in other words the conviction of these appellants be quashed and the sentences set aside and they be set at liberty.

To emphasize his submission Mr. Muteti learned Senior State Counsel referred to the evidence of Sgt. Wangila contained at p.14 of the lower courts record, which he submitted being an initial report, is the best evidence of the persons who committed the offence.

In this case counsel submitted a report was made against the 4th and 5th Appellants on 6.10.2002, at 10.00 a.m. that is about the time when the offence was committed and the events were fresh. Indeed at p.2. of the proceedings under cross examination, P.W.1 admits that he recorded his statement in the year 2003. His witnesses P.W.2, P.W.3 also recorded their statements in 2003.

Further at pp 8-9 of the proceedings it is revealed that P.W.2 recorded his statement on 24.06.2003, that is a period of well over 7 months after the events, then implicates appellants 1-3 as being involved. At p9, P.W.3 says she recorded her statement on 21.06.2003 and incriminated all the five appellants. Counsel posed a rhetorical question, why wait for 8 months, and concluded that it smacks of malice ill-will on the part of PW.3 and of the other witnesses. Bad blood is shown at p.7 where the 3rd appellant is referred to as “**a witch**”. In summary learned State Counsel stated that the evidence of the Prosecution witnesses in particular P.W.1 – P.W.5 is incredible, and the conviction of the 1st – 3rd appellants should not stand. On the other hand counsel submitted there is sufficient evidence for a retrial against the 4th and 5th appellants, that witnesses will not be hard to find that since the offence is bailable, they will not be prejudiced and the injuries caused upon P.W.1, by 4th and 5th Appellants should not go unpunished. Finally counsel submitted, the sentences were discriminatory for the same offence, 20 years for some and 10 years for another on account of age.

For all those reasons learned Senior State Counsel urged that there be a re-trial of the 4th & 5th Appellants, and that the appeals of 1st 2nd and 3rd appellants be allowed.

In a rejoinder Mr. Mwanzia learned counsel for the appellants submitted that a retrial of the 4th and 5th appellants without evidence would be highly prejudicial against these appellants and prayed that all the appeals should succeed.

ANALYSIS OF SUBMISSIONS, THE EVIDENCE OF THE LAW

There are three issues revealed by this appeal namely **firstly** whether the appellants trial rights as guaranteed under s.77 (2)(b) of the Constitution were contravened in the conduct of the trial herein. **Secondly** whether there was sufficient evidence to convict all the five appellants, and **thirdly** whether the sentences meted against the appellants were harsh and discriminatory. I will take each of these issues in the paragraphs following.

1. OF WHETHER THE APPELLANTS RIGHTS GUARANTEED UNDER S. 77 (2) (b) WERE CONTRAVENED.

Although this issue has been raised in an incompetent manner by way of an appeal, I will deal with it on the basis of the record of the lower court. I say the issue has been raised in an incompetent manner because there is a whole structure established under section 84(6) of the Constitution for the Enforcement of Fundamental Rights (s.70 to 83 inclusive of the constitution). I refer to the Constitution of Kenya (Supervisory Jurisdiction and Enforcement of Fundamental Rights and Freedoms of the Individual High Court Practice and Procedure Rules, 2006. The point is that both the substance and procedural law of the constitution should be observed. The substance and procedure stand side by side all equally important and enforceable. This ground of the petition of appeal would therefore fall as being incompetent.

As observed however I will still deal with it on the basis of the record of the lower court to determine whether the conduct of the proceedings was “**flawed**” as claimed by both counsel. While I concede that there was minor omission in the lower court by failure to state clearly that the consolidated charge was read in English and translated into Kimeru language which the appellants understood. The common law principle is that the law does not concern itself with trivialities (de minimis non curat lex) I think it would lead to illogical and an absurd conclusion to suggest that charge was read in Kimeru, and is not clear whether the proceedings were conducted in Kimeru language. These are further reasons why such conclusion would not stand in the face of logic.

Firstly, the prosecution called seven (7) witnesses. P.W.1, P.W.IV (inclusive) and P.W.VI were

cross-examined Mr. Kirima learned counsel who represented all the appellants in the lower court. P.W. II Sgt John Wangila was called as a witness at the instance of said counsel for the appellants. In the absence of said counsel P.W. V (P.C. Henry Mwirigi from Tigania Police Station) was cross examined by all the five (5) appellants respectively. In my view persons who were represented by able counsel such as Mr. Kirima cannot on appeal turn round and say that their trial rights guaranteed under the constitution were contravened as they did not understand the language of the proceedings. It cannot be said that their able counsel did not understand the proceedings!

Secondly and perhaps more fundamental, is the courts record when the plea was first taken and in the subsequent charges consolidating the cases against the first two appellants and the 3rd and 4th appellants and later the 5th appellant. I note at p. 4 of the trial proceedings, the learned trial magistrate wrote the new consolidated charge read out (in English?) and explained in Kimeru to the accused persons (4) and they responded as follows in Kimeru-

“Accused 1 Not true

Accused 2 Not true

Accused 3 Not true

Accused 4 Not true.

Court: pleas of not guilty entered”

A similar Procedure was followed on 26th August 2005, when the Tigania S.R.M. Criminal Case No. 493/2005 was consolidated in Tigania Criminal Case 1201 of 2003. Their words appear at p5 of the record-.

“Prosecutor: I wish to consolidate the matter with case No. 493/2005. I have a consolidated charge sheet and then the words the Consolidated charge sheet read out and explained in Kimeru to the accused persons and they answer in Kimeru:-

Accused 1 – Not true

Accused 2 – Not true

Accused 3 – Not true

Accused 4 – Not true

Accused 5 – Not true

COURT: Plea of not guilty entered on all accused persons. Accused persons released on earlier bond terms. Case No. 493 of 2005 withdrawn.

Kirima for accused persons I suggest 16.11.2005.

Court:

“Matter now for hearing on 16.11.2005. Mention dispensed with.”

I do not think that there is any doubt the appellants understood the charge before them. They even had counsel representing them they could not plead as they did without prior consultation and advice from their counsel.

In my view, a breach or a contravention of a fundamental right or freedom of an individual guaranteed under the constitution must be proved by evidence. A mere averment in a petition of appeal is not adequate, nor is such an averment proof without a clear demonstration that indeed the right or freedom was contravened.

In this case as demonstrated above, I am satisfied that the trial court did observe and comply with the requirements of Section 77 (2) (b) of the constitution. The consolidated charge was read over in English, and explained in detail to the appellants in Kimeru a language the appellants understood, the charge or accusation facing them. Ground one (1) of the Petition of Appeal must on those grounds fail and I so find and hold.

OF WHETHER THERE WAS SUFFICIENT EVIDENCE TO CONVICT ALL THE FIVE APPELLANTS.

It was the contention of Mr. Mwanzia learned counsel for the appellants that from the evidence of P.W.VII, Sgt John Wangila who produced the OB number 2, entry made on 6.10.2002, at 10.30 a.m. and only referred to Bernard Kithure and Timothy Kirimi respectively (the 4th & 5th Appellants) and indeed the submission of Mr. Muteti learned Senior State Counsel, that indeed that the first report to the police was the best evidence, of the persons involved in the fight, as it was fresh in the memory of the person who made the report, and is to say Peter Nchebere alias Peter Gitonga that the inclusion of the 1st –3rd appellants was out of malice, and ill-will as P.W.1 even called the father of the 4th Appellant **a witch** who had caused him to be sacked from the armed forces.

Whereas, a first report to the Police is often the first line for investigation, it cannot be regarded as the best or conclusive evidence of the involvement of the persons reported in the commission of a crime. That information has to be followed up by investigation and recording of statements from possible witnesses or persons who witnessed the crime being committed. That report cannot exclude the prosecution of others who may have been involved in the commission of the crime. That is the reason why a charge/information may be amended from time to time or charges consolidated to include other persons or accomplices in the crime who identity was revealed well after the initial report. I cannot say or subscribe to the view that inclusion of such other suspects in the charge later is either malice or ill-will. So what is the evidence against the appellants?

I will commence with the unsworn statement of all the accused persons. Although it is an accused person's right to remain silent, or not to give a statement, or evidence on oath, but whenever an accused persons elects to make an unsworn statement he gains one major advantage over the prosecution, his statement cannot be tested as to its veracity or truthfulness by way of cross examination whose purpose directed-

- (1) to test the credibility of the witness;
- (2) to the facts to which he has deposed in-chief including the cross examiners version thereof, and
- (3) the facts to which the witness has not deposed but to which the cross-examiner thinks he is able to depose,
- (4) failure to cross examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.

In addition the estimation of the value of evidence in ordinary cases, the testimony of a witness who swears positively to a fact may receive credit in preference to one who testifies to the negative. For instance evidence as to what has not been seen would not carry the same weight as evidence as to what has been seen. Little weight will consequently be given to an unsworn statement. That is the disadvantage in an accused person electing to make an unsworn statement. A few cases will illustrate the point.

In **AMBER MAY VS THE REPUBLIC** [1999] K.L.R. 38, the High Court held that unsworn statement has no probative value notwithstanding the provisions Section 211(1) of the Criminal Procedure Code. On Appeal against that decision and reported as **MAY VS THE REPUBLIC [1981] KLR. 129**, the court of Appeal inter alia held-

1. That unsworn statement is not, strictly speaking evidence and the rules of evidence, cannot be applied to unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential is persuasive rather than evidential. For it to have value it must be supported by evidence recorded in the case.

2. No adverse inference can be drawn against the appellant for electing to make an unsworn statement as she was exercising her right conferred by Section 211 (1) of the Criminal Procedure Code (Cap 75, Laws of Kenya)

That case involved a second appeal to the Court of Appeal against a conviction for offences under the Prevention of Cruelty to Criminals Act (Cap 360, Laws of Kenya). The facts were undisputed. The appellant who had traveled overseas and during her absence her animals were grossly neglected, hence the charges. The appellant's defence was that she had left the animals in the care of another and her employees. This she said in an unsworn statement. Both the trial court and the High Court (on first appeal) found her guilty. Her appeal to the Court Appeal on the ground that the judge erred in considering her evidence as hearsay and in not giving weight to her unsworn statement was dismissed on the grounds stated above.

What probative value if any will a court give to the unsworn statements of the appellants? Let us look at each of the unsworn statements of the five appellants.

The 1st Appellant, Mercy Kajuju in her unsworn defence **"I am Mercy Kajuju. I am a farmer. I am framed up in this case."**

There is in my view no probative value which can be attached to this statement. Is it because she is **"a farmer"** that she has been framed up in this case? The basis of the framing is not laid down.

The 2nd Appellant Charity Thigaigu sounds a little more credible. She was washing clothes at a public tap when she saw a group of people going to her house. She followed the people and saw Peter Nchebere with no clothes with Kithuru (4th appellant) when people were trying to help Peter threw a spear which Kithure ducked, caught up with Kithure and a fight ensued **"people came and separated Peter and Kithure"**.

The 3rd Appellant stated that the matter is a frame-up against him. He was not even present when the incident took place. His is a plea of an alibi.

The 4th Appellant, Bernard Kithure in his unsworn statement stated that it was P.W.1 who went to his home armed with a spear to inquire why he Bernard Kithure had pruned trees which did not belong to them. There was an exchange of bitter words between him and P.W.1 who allegedly called his father (3rd Appellant) a witch who had caused P.W.1 to be sacked from the armed forces. Engaged P.W.1 took off his shirt and cap and started chasing him with a spear attracting the attention of the 1st Appellant before P.W.1 pinned him (4th Appellant) down and **"the people who responded started hitting Peter on the back trying to get him off me. Peter was forced away to his home. Then I went to Miathene Police Post and found Peter there. He had been cut on the left hand. The Police refused to give me a note to hospital saying I had not suffered any injuries. This is a frame up."**

The 5th Appellant's statement was not dissimilar. He was away attending a circumcision ceremony when he heard noise from his home and ran back and found Peter (P.W.1) chasing Kithure (4th Appellant) armed with a spear and a panga, P.W.1 hurled the spear at the 4th Appellant who ducked it but fell when

P.W.1 set upon him with blows (not a panga until the people came to his rescue. The 5th Appellant avers in his unsworn statement.

“The people who responded beat Peter so much and led him. Later on we reported the matter to Miathene Police Post. We found Peter there having been cut on the left hand.

COMMENT

None of the Appellants called any witness despite their statements that **“the people who responded started hitting Peter on the back trying to get him off me.”** By 4th Appellant people responded got off Peter from 4th accused person and beat Peter so much and led him away (5th Appellant) which people were these if not the 1st, 2nd and 3rd Appellants. What was the fear in naming them so many who responded, or even one of them?

A circumcision ceremony is a great social occasion and is attended by those being circumcised many people responsible and elderly people. Is it possible that none of such people would leave the ceremony and come and inquire even or for curiosity’s sake as to the cause of wailing in the immediate neighbourhood? The prosecution called five (5) independent witnesses apart from P.W.VI (Dr Isaac Macharia) and P.W. VII Sgt John Wangila. If there had been such an important ceremony in the neighbourhood it is highly doubtful that none of them would have had no knowledge and therefore fail to mention or refer to it in their testimony.

The women folk are very gregarious persons and if indeed the 2nd Appellant was washing clothes at a public tap, would there be no other persons at such a place to testify as to their washing clothes together on that date or when there the incident occurred? How come it is only the 2nd Appellant Charity Thingiu who saw P.W.1 with a spear? While the 4th Appellant (Bernard Kithure) and 5th appellant (Timothy Kirimi) saw P.W.1 the complainant with a spear and panga. How come P.W.1 did not cut any of the appellants and in particular, Bernard Kithure (the 4th Appellant) when he fell down and was pinned down by the complainant P.W.1?

The answer to these questions are a foundation for the proposition that the unsworn statements by the appellants are but a well rehearsed pack of incredible stories to hide behind the clear evidence of the prosecution that although the primary culprits for the vicious attack on the complainant, P.W.1, were Bernard Kithure and Timothy Kirimi (the 4th and 5th Appellants respectively) there is no doubt in my mind that all the appellants actively participated in the vicious attack and causing grievous harm upon the complainant, P.W.1. Here is the prosecution evidence.

According to the evidence of P.W.1 Peter Gitonga (S/O Norman Nchebere) 3rd Appellant, Paul Lichoro, is the father of the 1st, 2nd, 4th and 5th Appellants. The Appellants had a long running dispute with the family of Norman Nchebere, which was resolved in favour of the Appellants who there by gained land and some 17 trees which were demarcated to the 3rd Appellant. We all know the old Roman common law principle that which is planted on the land, becomes part of the land (and **platather, solo solo caedit**) so land includes everything permanently fixed to and growing on it crops or trees.

In this case, the dispute over the land and indeed everything else growing on it had been determined. The land and trees were over and on the appellants’ land and beyond the complainant’s land. It does not and did not matter that his father Norman Nchebere had planted the 17 or more trees. Once the boundary was demarcated neither Norman Nchebere nor his son Peter Gitonga had taken steps to appeal against the decision of the Adjudication Officer who demarcated the land Norman Nchebere and his sons had lost and the decision was therefore final. We are reminded of another roman and common law principle **volenti non fit injuria** (volition has no remedy – the principle that a person who knowingly and voluntarily risks danger cannot recover for any resulting injury).

Norman Nchebere and his family may have planted the trees grevillia or wattle according to the

evidence of P.W I and P.W. II in order to lay a basis for claiming the land but having lost the land they lost also the trees, unless of course the family of Paul Lichoro (3rd Appellant) allowed them to cut and remove the trees, which as is evidenced by the events surrounding this case, the latter did not allow, and were prepared to defend, even to kill.

I touch on the question of land, or disputes over it not to justify the vicious attack upon the complainant P.W.1, but rather to show the origin of that attack. Was it justified and were all the appellants responsible for that unlawful enterprise, or is it merely the 4th and 5th Appellants who were responsible? I have said all the appellants were responsible. This is why I say and hold so.

P.W.1 Peter Gitonga (S/O Norman Nchebere) was in the company of Stephen Nchebere (P.W.2) who had earlier gone to P.W.1's home to seek payment for some services rendered by him to P.W.1. Having missed P.W.1 and was on his home when he met with P.W.1 they heard some noise of trees being cut in a nearby shamba, which he claimed were planted by his father. In his testimony. **"I then found the 4th and 5th accused persons pruning branches of the already cut down trees. I asked them why they had cut down the trees but they did not respond. When I was about to reach where the 5th accused person was he ran away. Kithure (the 4th accused person) then hit me with a stick on the face. He then wanted to hit me with a panga and then held his hand with the panga and asked him why he wanted to cut me then he said he would kill me"**.

P.W.1 continued in his testimony **"I still held him when I turned and saw the 1st, 2nd accused persons and the 5th accused person armed with a panga and a rungu. On reaching where I was the 1st accused hit me on the left cheek with a panga.** The 3rd Accused person came and held my left hand (Not **"Head"**) as humans have only one head and there cannot be a left head and the 4th accused cut me on the left hand (the scars seen by the court) and then he (3rd accused)attempted to cut my neck, I blocked and I got cut on the elbow. It is the 3rd accused person who cut me on the left hand on both spots.

P.W.1 continued in his testimony he heard the 3rd accused's wife (from afar) that that he should be **killed completely.** The 4th accused cut me again on the upper side of the arm the scar seen. The 5th accused then cut me on the armpit. The 1st accused person cut me on the chest and the stomach. The 2nd accused cut me on the chest and stomach, the right side of the neck region. I fell down and the 3rd, 4th and 5th accused persons cut me on the head. They went on beating me senseless. **They were telling each other that I should be killed.....tried to stand up but could not manage. I was really bleeding. The 3rd accused's wife with her children** who were trying out aloud wondering why they were killing me.

In conclusion of his evidence the complainant, P.W.1 stated his situation was hopeless he could neither walk nor sit on a bicycle until some lorry came a long, which took him first to Miathene Police Post bleeding. The police referred him to Miathene Sub-District Hospital for treatment and later because of his serious injuries to Meru General Hospital where he was admitted for 6 days while undergoing treatment.

When cross-examined by Mr. Kirima learned counsel for the accused, P.W.1 testified that he went where the 4th and 5th appellants were, he did not assault them. He had nothing in the form of a panga. The accused persons hit him on the head at three spots. The 3rd, 4th, and 5th accused persons hit me on the head. The 4th accused cut him on the neck, and he saw him since he took away his (P.W.1's shirt)

P.W.II Stephen Nchebere is the one who had gone to Peter Gitoga (P.W.1) to get his wages for services rendered. He knew both the accused persons and the complainant. He accompanied P.W.1 to where they heard a noise of a tree being cut. He confirmed the evidence of P.W.1 that when asked why they were cutting down the trees Kithure 4th Appellant responded that they would beat up P.W.1, got a stick, threw it at P.W.1's face and sensing danger P.W.1 got hold of the 4th appellant's hand which had a

panga. It is then that the 3rd appellant came with a panga and cut P.W.1 on the left hand in two places, Kirimi (5th Appellant) then cut P.W.1 on the upper side of the left hand on the armpit of the same hand.

P.W.II testified that then the 1st and 2nd accused came with pangas. Kajuju 1st accused cut P.W.1 on the left side of the shoulder bone and the stomach. The 2nd accused cut P.W.1 on the right side of the stomach and right shoulder bone. P.W.1 fell down and they proceeded to cut and beat P.W.1. I ran away fearing for my life.

In cross examination by Mr. Kirima learned counsel for the accused P.W.II testified that P.W.1 had held Kithure's hands to avoid being cut he did not see P.W.1 having a panga and did not snatch a panga from Kithure. He denied having been called to come and tell lies to court. He was emphatic that **“all the accused persons were present there at the scene. Kirimi 5th accused person ran to their home and came back. Lichoro the 3rd accused person is the one who was first to arrive, the 3rd accused person cut P.W.1 on the left hand Kiome cut P.W.1 armpit.** P.W.1 could not run away since he had been cut. He denied that P.W.1 was fighting anybody. He further testified in cross-examination that it was only Thimba 3rd accused's wife, and Nkatha who responded to the scene that he P.W.1 told her (Nkatha) what had transpired.

P.W.III was Nkatha Miriani Nchebere, P.W.1 was her brother. She also knows the appellants. She confirms that she was briefed or informed by P.W.II of what had transpired, that P.W.1 was being cut by the 3rd Appellant M'Lichoro and his two sons and daughters, that is Kithure Kirimi Charity and Kajuju who were with the 3rd accused person were cutting P.W.1. Concerned about her brother, she and P.W.4 went to the scene and met the accused. They had nothing and did not find P.W.1 at the scene. He had been taken away, Kajuju was saying **“today he has seen”**. She followed her brother P.W.1 to Miathene Police Post and found **“P.W.1 was really cut”**. He had no shirt and she arranged to him taken to Meru General Hospital. He identified the trouser her brother was said to have been wearing. He had lost his shirt in the assault.

In cross examination by Mr. Kirima learned counsel for the accused, P.W. III denied any suggestion that she had come to help her brother (P.W.1). She had come to testify as to the events of the day her brother was assaulted and confirmed that there is a land dispute between the appellant's family and their family. She recorded her statement late because P.W.1 was still under treatment.

P.W.IV was **Martha Kanini**. She was 10 years old in the year 2002 when the events in this case took place. She was 15 years of age when she testified. She was then in standard 5 at Imathele Primary School. She was subjected to a **voire dire** and found to be of sufficient intelligence to appreciate the import of an oath and was sworn.

P.W.1V confirmed that P.W.II had gone to the home of P.W.1 to look for his wages for work done for P.W.1 but missed him. On his way home, P.W.II had met P.W.1 and they returned to P.W.1's home then **“we”** heard a tree being cut. P.W.1 and P.W.II went to where the tree was being cut, a distance of about 50 meters away from where she was standing she could see the persons cutting down the trees.

It was the 4th and 5th accused persons who were cutting down trees using a panga, when asked why they were cutting down the trees Kithure said they will kill P.W.1 and threw a stick at P.W.1's face and did as if to cut P.W.1 but P.W.1 held Kirimi's hand, that the 5th accused person then ran along and the 3rd accused person who was the first person to respond hit P.W.1's left hand, then P.W.1's left hand then P.W.1 let go Kithure. Kithure cut P.W.1 on the part of the left hand....came and cut on the left armpit. Charity then came and cut P.W.1 on the left side of the stomach. 1st accused person cut P.W.1 on the back and right side of the stomach. P.W. 1 fell down. The 3rd, 4th and 5th accused then cut P.W.1 on the back of the head. I thought P.W.1 had been killed. P.W.II ran away on sensing danger. I also run away crying out for help. She pointed out the trouser P.W.1 was wearing on the material day.

On cross examination by Mr. Kirima learned counsel for the accused P.W.IV confirmed her testimony

in chief that P.W.II was present when P.W.1 was being cut and P.W.II run away when P.W.1 fell down that she saw the 4th & 5th Appellants cutting the trees and confirmed the trees 3rd accused's shamba; that there was no time P.W.1 had a panga nor did he snatch a panga from Kithure, 3rd appellant wanted to cut P.W.1 on the neck but P.W.1 blocked it by his hand and that the 3rd, 4th and 5th accused persons cut P.W.1 on the head Charity cut P.W.1 and Kajuju also cut P.W.1.

P.W.V was **No. 46082 P.C. Henry Mwirigi**, he was attached to Miathene Police Post. He recalled that on 6.10.2002, while at the station, P.W.1 the complainant was brought to the Station. He had been cut on the head, hand left hand. The injuries were visible and he was bleeding profusely. The complainant said that he was assaulted by the persons in the dock, the Appellants. The complainant had a blood stained trouser which he kept as an exhibit. He testified that complainant was referred to Miathene Sub-district hospital for treatment but was transferred to Meru General Hospital where he was admitted for treatment. He did not recover the assault weapon.

All the appellants cross examined P.W.V and in answer to cross examination by the 2nd accused (Charity Kigaigu Ntorichoro 2nd Appellant) P.W.V testified as follows:

“The complainant said he was cut by you people. I went through the witnesses statement and found all of you to have cut the complainant”.

And when cross examined by 4th Accused/appellant P.W.V said:

“The complainant had no shirt when he came to the police post. The shirt was said to have been taken by you.....”

The last prosecution evidence I wish to refer to is that of P.W.VI, Dr Isaac Mwangi Macharia. He produced P3 Form prepared by Mr. Namu one of his clinical officers who could not be called except at great expense, and delay as he was away on study course at Kenyatta National Hospital. This was his evidence.

“He had 3 deep cuts on the scalp on his back of the head. He had two deep cuts on the left shoulder involved nerves the cuts were deep. The left forearm had multiple cut wounds. The left had a deep cut with the fracture of the same. An X-Ray showed compound fracture of the radius and ulna bones of the left hand. The patient had been examined on 6.10.2002 and was discharged on 18.10.2002. At the time of examination the injuries were a few hours old and they were caused by a sharp object, patient had received tetanus injection plaster had also been applied and patient was placed on physiotherapy. The assessment of injuries was grievous harm.”

In cross examination by Mr Kirima learned counsel for the accused Dr. Macharia testified inter alia that it is not necessary that the person who treated the patient is the one to fill in the P3 form. The degree of damage to the body organs is what is used to assess whether the injuries are grievous harm or maim. There is no measurement of cuts indicated in the P3 Form. Measurements could not be taken of the injuries suffered by the complainant once they were multiple and that there was also a blood stained trouser and shirt.

The evidence of P.W.VI, Dr. Isaac Mwangi Macharia clearly corroborates that of the complainant (P.W.1) regarding the injuries he suffered in the hands of the appellants. It also corroborates the evidence of Martha Kanini (P.W.V) who was a kid of 10 years when the events occurred. She was now 15 years of age and remembered clearly the events of 6th October 2002. There appeared no guile in the testimony even upon cross examination by Mr. Kirima learned counsel for the accused (now appellant).

CONCLUSION

In the earlier passages of this long judgment I discussed in some detail, and disposed off the contention by the appellants that their fundamental rights under Section 77 (2) of the Constitution (to have proceedings

explained to an accused person in a language which he readily understands) and found and held that no such right of the appellants had been violated. I also touched upon the procedure for bringing such allegations as laid down in Section 84 (6) of the Constitution that is to say the Constitution of Kenya (Supervisory Jurisdiction and Enforcement of Fundamental Rights and Freedom of Individual) High Court Practice and Procedure Rules 2006 (LN No. 6 of 2006) and proffered the view that raising such issues by way of an ordinary appeal is incompetent and renders the appeal liable to be summarily struck out.

I also discussed at some length the nature and value of unsworn statement, and on authorities held that unsworn statements have no probative or evidential value unsworn statements are not in evidential sense, facts which either go prove or disprove a point alleged by one party and disputed by another. Facts in issue must be proved and unsworn statements are inappropriate subject of evidence.

I have said before, and say so again, that in England from where we derive much of our law the system of unsworn statements was abolished by the Criminal Justice Act 1982 s.72(1) & 2 which reads:-

72 (1) subject to subsections (2) and (3) below in any criminal proceedings the accused shall not be entitled to make a statement without being sworn, and accordingly to give evidence, he shall do so (subject to sections 55 and 56 of the Youth Justice and Criminal Evidence Act 1999) on oath and be liable to cross examination; but this section shall not affect the right of the accused if not represented by counsel or a solicitor, to address the court or jury otherwise than on oath on any matter which, if he were so represented, counsel or solicitor could address the court or jury on his behalf.

(2) nothing in subsection (1) above shall prevent the accused making a statement without being sworn

(a) if it is one he is required by law to make personally; or

(b) if he makes it by way of mitigation before the court passes sentence upon him,

There are of course constitutional issues to overcome for instance Section 77 of the Constitution on fundamental rights and compulsion to give evidence. There is need to study these provisions and ss.211 and 306 of the Criminal Procedure Code, for the better enforcement of the law in relation to the criminal justice system and eliminate these unsworn statements as they add no value to the system and if any they confuse the accused who are mostly ignorant of their effect, and thereby obfuscate the system all together.

Lastly I reviewed in some detail the unsworn statement of the appellants, as well as the entire prosecution evidence. I cannot see the basis on the facts for the submission by Mr. Muteti learned Senior State Counsel that the appeals for 1st, 2nd and 3rd Appellants be upheld or that there be a retrial of the 4th and 5th appellants. There was in my view adequate evidence and the prosecution proved its case beyond reasonable doubt to convict the appellants as the trial court did. The only question left is whether the sentences imposed on the appellants were harsh and excessive, and discriminatory.

The appellants were charged with the offence of doing or causing grievous harm to P.W.1 contrary to section 234 of the Penal Code which reads.

“234 Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.”

In this case, the 1st, 2nd, 4th and 5th Appellants were sentenced to twenty (20) years imprisonment. The 3rd Appellant was sentenced to ten (10) years imprisonment allegedly on the ground of his age although there was no evidence of his age, and even if there was, those sentences are indeed discriminatory as both counsel for the Appellant and the state observed.

The Appellants were first offenders and the prosecution submitted that they should be treated as first offenders. The 1st and 2nd Appellants had nothing in mitigation. The 3rd appellant pleaded that he is an old man, but like the 4th and 5th Appellants, pleaded that “**the complainant is the one who has been disturbing us**”. In other words, the 3-5th Appellants were pleading an element of provocation by the complainant by his challenge against the 4th or 5th Appellants from felling trees on apparently disputed land.

While it is conceded that land is an emotive issue throughout the length and breadth of the land mass of Kenya, there are however, many established avenues for ventilating such disputes. There are clan elders, the chiefs, the Land Disputes Tribunals, and the three tiers of courts, subordinate, the High Court and the Court of Appeal. When and where any one, like the Appellants in this case, over-look all those avenues and take the law into their own hands, however genuine their cause and case or grievance, they breach the law and any one who breaches the law is liable to suffer appropriate punishment as by law provided after being subjected to due process.

For all those reasons I uphold the conviction of the appellants. However in view of my discussion regarding the rights to land and that what is planted and is permanently fixed to the land becomes part of the land, the trees or tree in issue having been cut on the land demarcated or adjudicated in favour of the 3rd Appellants the father of the 1st, 2nd, 4th and 5th Appellants the personal and frontal or direct confrontation by the complainant was no doubt very irritating to the appellants, but as I have stated, they should and no one should unless in self defence, or defence of property take the law into his or her own hands.

Section 354 (2) (a) (iii) of the Criminal Procedure Code empowers the Court to alter the finding maintaining the sentence or, with or without altering the finding reduce or increase the sentence.

So taking into account that element of direct and frontal provocation by the complainant, I would set aside the sentence of ten (10) years imposed upon the 3rd Appellant, and the twenty (20) years imposed upon the 1st, 2nd, 4th and 5th Appellants and exercise of the discretion conferred upon the court by the section 354(3) (a) (ii) aforesaid of the Criminal Procedure Code sentence each of the appellants to seven (7) years imprisonment from the date of their detention.

The Appellants shall in terms of s. 361 of the Criminal Procedure Code have the right of appeal within 14 days of the date hereof.

There shall be orders accordingly.

Dated. delivered and signed at Meru this 14th day of July 2009

M. J. ANYARA EMUKULE

JUDGE

