



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MERU**

**Criminal Appeal 144B of 2006**

**REPUBLIC..... APPLICANT**

**VERSUS**

**JOHNSON MWITIA.....RESPONDENT**

**(From original conviction and sentence in Meru, C.M.CR.C.NO.4643/2003 by Hon. J. Omburah,  
Senior Resident Magistrate, Meru)**

**JUDGMENT**

This is an appeal by the state against the acquittal of the respondent who was facing a charge of causing grievous harm contrary to section 234 of the Penal Code.

By dint of section 348A of the Criminal Procedure Code, this court's jurisdiction in an appeal against acquittal is limited only to matters of law. The state has preferred this appeal on three grounds, namely:

- (1) that the learned trial magistrate erred in disbelieving the evidence of the complainant without any basis;
- (2) that the trial magistrate erred in allowing PW2 and PW3 to testify and failed to allow the prosecution to cross-examine them to test their credibility;
- (3) That there was a failure of justice when the trial magistrate ordered the prosecution to close its case.

The facts in this appeal are fairly straight forward and this being the first appeal, I am bound to re-evaluate the evidence in order to arrive at an independent decision, even though I am only confined to consideration of points of law.

The complainant alleged that as she was collecting firewood on her land the respondent, without any provocation attacked her, cutting her hand and slapping her with a panga. She fell down as she screamed for help.

PW2 George Karitho (George) and PW3, Duncan Muriithi (Duncan) responded and intervened.

George and Duncan in their testimony denied ever witnessing the attack on the complainant. They told the court that they were promised money to testify. The trial magistrate ordered for their arrest and for criminal charges to be preferred against them.

The complainant's daughter and son also testified of how they heard screams from both the complainant and the respondent's wife. Upon getting to the scene, they found the respondent beating the complainant.

A clinical officer, PW4, told the court that he examined the complainant and noted a deep cut wound on the left palm, a swollen left forearm, a fracture of the radius bone and tenderness and swelling. He concluded that the probable weapon used to inflict the injuries must have been sharp. He assessed the degree of injury as grievous harm.

After several adjournments to call the investigating officer, the prosecution was forced to close its case after the court refused to grant an adjournment.

Upon considering the evidence adduced, the learned trial magistrate found that it fell below the standard required for the respondent to make his defence. He dismissed the charges and acquitted the respondent. I have set out in the earlier paragraphs the grounds upon which this appeal is premised.

The first ground is clearly not on a matter of law. The second ground relates to failure of the learned trial magistrate to allow the prosecution to cross-examine PW2 and PW3. I understand this ground to mean that the two prosecution witnesses turned hostile and that the trial court ought to have allowed the prosecutor to cross-examine them. That, in my considered view, is a question of law.

A witness is hostile when he gives evidence adverse to the party who has called him. In such a case, section 163(1) of the Evidence Act permits the party calling the witness to cross-examine him.

It is clear from the language in section 163(1) aforesaid that it is only with the court's leave that the party calling the witness can impeach the credit of such a witness by cross-examination. The record is clear that the prosecution never applied for the cross-examination of PW2 and PW3.

That ground must, therefore fail.

The final ground is really to do with the exercise of judicial discretion. From 22<sup>nd</sup> July, 2005 to 21<sup>st</sup> May, 2006, nearly ten months, the prosecution was indulged by the trial magistrate to avail the single witness. The trial magistrate therefore declined to indulge the prosecution further and the prosecution closed its case on 26<sup>th</sup> May, 2006. The granting of an adjournment involves the exercise of discretion by the presiding judicial officer.

As was held in *Mugachia v Mwakibundu*, [1984] KLR 572 an appellate court will not normally interfere with the exercise of that discretion unless the judicial officer has acted on wrong principles or exercised his discretion injudiciously. Refusal to grant an adjournment for purposes of calling a solitary witness for over ten months was clearly a proper exercise of discretion.

I find no merit in this appeal and accordingly dismiss it.

Dated and signed at Nakuru this 23<sup>rd</sup> day of September, 2009.

**W. OUKO JUDGE**

Dated, signed and delivered at Meru this 20<sup>th</sup> day of November, 2009 by Hon. Justice Kasango