

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 243 of 2007

GICHUNGO THIONGOAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 25 of 2005 of

the Principal Magistrate's Court at Kikuyu by M. W. Murage – Principal

Magistrate)

JUDGEMENT

The appellant was charged with grievous harm contrary to section 234 of the Penal Code. That on 28th day of August 2004 at Gikambura village in Kiambu District within Central Province unlawfully did grievous harm to Harrison Kariuki Njuhi. After full trial the appellant was convicted and sentenced to serve 14 years imprisonment. He has now appealed against conviction and sentence on the grounds that he was not properly identified by the complainant and that his conviction is based on insufficient evidence.

The evidence of PW1 Harrison Kariuki is that on the material day at about 7.20 p.m. while going home he met the appellant standing on the road and armed with a panga. He says the appellant followed him and cut him several times on the neck and hands inflicting him serious injuries. He lost consciousness and was admitted at Kikuyu hospital for 28 days. It is the evidence of PW1 that the appellant was a person well known to him for a period of over 15 years and that the area was well lit to enable him to recognize the appellant as the attacker.

PW2 Dr. G. K. Mwaura examined the complainant and confirmed that he had suffered serious injuries caused by a sharp object.

PW3 on his part stated that on 27th December 2004 he received information that the complainant had been assaulted by a person known to him. He proceeded to the house of the appellant, arrested him and charged him with assault causing grievous harm. The appellant in his defence denied attacking the complainant and stated that the charges were fabricated against him.

I have considered the evidence tendered by the prosecution in support of the charges that were preferred against the appellant. I also considered the defence mounted by the appellant against the charges that were brought against him. I appreciate that it is the duty of the prosecution to prove its case beyond reasonable doubts. I also appreciate that the appellant has no responsibility to prove his innocence. However, it is the duty of this court to evaluate the evidence on record in order to satisfy itself whether the evidence on record can sustain a proper conviction. It is the evidence of PW1 that the appellant was a person well known to him for a period of over 15 years and that they used to play football together during that time. It is also the evidence of PW1 that the area was well lit and that there was no possibility of mistake or error in recognizing the appellant as his attacker. The evidence against the appellant is that of recognition which is more reliable than identification of a stranger. However, where a witness is

purported to recognize someone whom he knows the court is required that there can be mistakes in recognition of close relatives and friends. It is for that reason that the court is required to exercise caution in convicting an accused person on the strength of the single evidence of recognition. In this case the appellant and the complainant were persons known to each other thereby removing the possibility of mistake or error on recognition of the appellant. I am therefore satisfied that the appellant was properly convicted on sufficient evidence of recognition given by PW1 and that there is no possibility or error from the recognition of the appellant by PW1. In that regard I am of the opinion that the appellant was properly convicted and that the prosecution proved its case beyond reasonable doubt. The appeal against conviction is therefore dismissed.

On sentence the appellant was given 14 years imprisonment from 25th July 2005 and in view of the injuries and the circumstances I think the sentence is rather harsh therefore, I reduce the sentence to 10 years imprisonment with effect from 27th July 2005.

Dated, signed and delivered at Nairobi this 10th day of September 2009.

M. WARSAME

JUDGE