



GABRIEL MUNANGA IMALI.....APPELLANT

VERSUS

REPUBLIC.....ACCUSED

(Appeal against both conviction and sentence of the Chief Magistrate's Court at Kakamega in Criminal Case No.518 of 2008 [P. N. ARERI ESQ., RM])

JUDGEMENT

The Appellant was charged and convicted of the offence of causing grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that:-

“on the 27th August, 2005 at Bukhonyi village, Shiswa Sub-location in Kakamega Central District within Western Province, the accused jointly with another not before court did grievous harm to Mr. Elkana Aluvisia.”

The Appellant was sentenced to serve ten (10) years imprisonment.

The appellant filed this appeal with the following grounds:-

- 1. The Learned trial Magistrate erred in law in convicting the Appellant on a defective charge whose particulars are not clear.***
- 2. The learned trial Magistrate erred in convicting the Appellant on uncorroborated evidence and which evidence was full of contradictions.***
- 3. The learned trial Magistrate erred in law in convicting and sentencing the appellant relying on extraneous evidence.***
- 4. The conviction and sentence was against the weight of evidence adduced.***
- 5. The trial Magistrate erred in law and fact by not giving the appellant time to prepare for his defence.***

Mr. Getanda, Counsel for the appellant submitted that the appellant was convicted on a defective charge whose particulars were not clearly stated. Counsel further contended that the prosecutions evidence was full of contradictions especially the evidence of PW1, PW2 and PW3. While PW1 testified that he was assaulted while walking along the road towards the homestead, PW2 and PW3's testimony was that the complainant was assaulted by the appellant within PW1's homestead. Counsel further submitted that the sentence was excessive taking into account the Appellant's age and that the evidence of the Investigating Officer's was different from the other evidence and hence the conviction is not safe.

Mr. Karuri, learned State Counsel, opposed the appeal and submitted that the charge was not defective

and it clearly discloses the offence. Counsel submitted that the prosecution evidence was credible and there were no contradictions. The complainant was assaulted by the appellant and his two sons while armed with clubs and a panga. The complainant was admitted for one month. Counsel contended that the sentence is lawful. The appellant was allowed to mitigate but he had nothing to say. His defence was mere denial. The appellant's age is immaterial.

The prosecution's case was that PW1 who was the complainant on 27th August, 2005 at around 10.00 a.m. he was heading home from Kakamega Town when he was assaulted by three people as he was about to reach his home. The three people were the appellant, Geoffrey Shimenga and Muyali who had a panga and clubs. PW1 heard the appellant saying "Ndiyo huyu" and the appellant cut him with a panga on the left wrist. The complainant lost consciousness and regained consciousness at Kakamega Provincial Hospital where he was admitted for one month. The complainant testified that prior to the assault, the appellant had chased a certain woman who ran to his home and he prevented the appellant from cutting the woman.

PW2, JOHN ITABULWO LITALI on the material day saw three people assaulting the complainant (PW1). One of the assailants had a panga while others had clubs. He knew the appellant. Similarly, PW3, CELINE SHISIALI ZACHARIAH on the 27th August, 2005 at about 10.00 a.m. while in her mother's house heard noise outside saying "kill him". She saw the appellant and his two sons assaulting the complainant. The appellant had a panga and had cut the complainant on the head twice and his two sons hit him with clubs on the knees. She screamed and people came. John Litali, PW2 was the first to arrive at the scene after PW3 screamed.

PW4, FRANCIS WASIKE, a Clinical Officer at Kakamega Provincial Hospital attended the complainant four hours after the assault. The complainant had a fracture of the skull, cut wound on the forehead, cut near the wrist and the hand was not functional and cut wounds on the right knee with ruptured tendons. The complainant was admitted for one month.

PW5, Police Constable Richard Ekuwom on the 10th April 2008 was at the Kakanega Police Station on duty when the Assistant Chief, Muranda Sub-location, Mr. Aseka, brought the appellant and told him the appellant had committed a crime in 2005 and went into hiding. He re-arrested the appellant and caused him to be charged with the offence.

The appellant in his defence testified that he is a farmer and has never fought with anybody. None of the witnesses testified as to the place the appellant was seen fighting, no weapon was produced in court and that he was arrested alone.

The charge gives the offence as grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence as per the charge sheet read as follows.

"Gabriel Munanga Imali, on the 27th day of August, 2005 at Bukhonyi village, Shiswa Sub-location, in Kakamega Central District, within Western Province, jointly with another not before court, did grievous harm to Mr. ELIKANA ALUBISIA."

Learned counsel for the appellant contended that the charge was defective and the particulars were not clear. He did not point out the defects or the unclear particulars. From the charge and the particulars as stated above, I do not find that there was any defect on the charge or its particulars. Ground one of the Appeal is misplaced.

On the 2nd, 3rd and 4th grounds, the prosecution's evidence, is consistent. I do not find any contradictions. PW2 and PW3 witnessed the incident. They knew the appellant and they saw him in the company of his two sons assaulting the complainant. The two witnesses saw the appellant with a panga and it's the appellant who cut the complainant while his sons used clubs to hit the complainant. The injuries stated in the P3 form were consistent with the testimony of the complainant and that of PW2 and PW3.

I do find that the prosecution evidence was not contradictory and was sufficient to convict the appellant. The trial magistrate in the judgement did not refer to any extraneous evidence.

The appellant was not represented before the trial court. On 26/2/2009 PW4 and PW5 testified and the prosecution closed its case. The trial magistrate stood over the matter to 23/3/2009 for Ruling. On 23/3/2009 the ruling was delivered whereby the trial magistrate held that the appellant had a case to answer. The appellant proceeded and gave his evidence. He stated that he was not going to call any witness.

The appellant contends that he was not given time to prepare his defence. There is no requirement that upon finding that the accused has a case to answer then the trial court should adjourn the matter to another date for defence hearing. The appellant did not seek adjournment. He was not going to call any witness. He proceeded to give his testimony and I do not find anything wrong with the trial process. The Appellant's ground of Appeal that he was not given time to prepare his defence must also fail.

Counsel for the appellant contended that the sentence was excessive in the circumstances taking into account his age. The appellant gives his age as 62 years. The charge allows life imprisonment as the maximum sentence. The injuries sustained by the complainant are quite serious. The record shows that the accused had nothing to say in mitigation. However, taking into account the appellant's age, I will reduce the sentence from 10 years to five (5) years.

In the end, the appeal lacks merit and the same is disallowed. The appellant shall serve five (5) years imprisonment with effect from 12th May, 2009.

Delivered, dated and signed at Kakamega this 21st day of October, 2009.

SAID J. CHITEMBWE

J U D G E