



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

Criminal Appeal 118 of 2006

PETER NYAGA RUIGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was represented by an Advocate at the hearing of this Appeal.

The charge was grievous harm contrary to Section 234 of the Penal Code. At the end of trial the Appellant was convicted and sentenced to 10 years imprisonment.

The grounds of appeal were framed by advocate numbering 6. The counsel argued all the grounds together urging court that the Trial Magistrate erred in shifting the burden of proof upon the Appellant and that the Trial Magistrate failed to direct his mind that crucial evidence was not called by prosecution and that it was in the dark and other persons did attack the appellant and the complainant and that the Trial Magistrate erred in dismissing the Appellant's defence as a sham and an attempt to circumvent justice and the case had not been proved beyond reasonable doubt and that the Trial Magistrate took into account extraneous matters in sentencing the appellant. The evidence of the complainant shows that the Appellant firstly appeared before her at her place of work where he hit her and (Lucy who was around) with a panga. Then the complainant was travelling home and the vehicle in which she intended to take the Appellant hit the driver with the panga. She took another vehicle of Mr. Mwanzia. On reaching at her parents home at about 7.30 p.m. she saw the appellant at the gate. Appellant held her and pushed her down. He cut her on left side of the head. He cut her elbow and on left side of the ear and the left arm leaving a stump left on the left arm without a wrist. The left hand from the wrist fell down and dropped to the ground. The appellant was held by one Gatimu. She was taken to hospital where she was admitted until 13/11/2004. In her cross-examination she denied a suggestion by defence counsel that she was cut by her father who thought he was cutting the appellant.

The evidence of PW4 P.C Anthony is the one who received the report of the incident and he directed that the appellant and accused be taken to hospital. When he went to visit them after 2 days he found that the appellant already been discharged and complainant was still in a coma. She was discharged on 13/11/2004.

On 21/1/2005 he arrested the appellant and charged him with this office. The complainant had cut wounds and on her left hand it had been amputated at the wrist. What is to be noted is that the appellant in his sworn evidence placed himself at the gate of the complaint's family home at the material time. He said he wanted to speak to the complainant, his wife, as to why she had left his home carrying everything. His visit was not friendly. He said incident occurred at the gate where he was attacked by

complainant's uncle Gatimu. Therefore he was able to see his attackers and recognize them. It follows that the others were able to see him. It is said it was at night but there was some moonlight according to PW2. These are persons who knew one another. There does not appear to have any difficulty in identifying each other. The Appellant defence was considered and it was considered to be sham. The Appellant hid although he had no obligation to disclose that he had earlier visited the complainant at place of work/business and had attacked her. He hid the fact he had a panga although he admits that the complainant was cut "trying to save me" yet he did not disclose who cut her. He admits he was at the scene. There is overwhelming evidence that he is the one who attacked the complainant.

On the issue of the speech made by Trial Magistrate after conviction it was necessary for him to address his mind on the gravity of the offence before deciding on the sentence. It is obvious the Trial Magistrate was struck by the severe injuries inflicted on the young complainant and the effect a deformed arm would have on her life. Then there is complaint that the Trial Magistrate in his Judgment was of the view that the case was "hinged" on the evidence of the defence. It is true that in Criminal Cases the burden of proof always lies on the prosecution and not on the accused. The accused could choose to keep silent, to offer no evidence and it is the duty of the Trial Magistrate to decide the case. In this case the appellant chose to make a sworn statement in his defence. The Trial Magistrate could not ignore what the accused said particularly as it was on oath.

Upon considering the evidence of the prosecution and the defence of the appellant, it is clear that the Appellant placed himself at the scene at the material time. He could see and know the people at the scene and he admitted seeing the complainant was out "trying to save me". It is to be noted that the appellant was not found with any life threatening injuries. Therefore saying that people wanted to kill him cannot be true. There are some people who were named as being present at the scene who were not called to testify. That may be so but it is for prosecution who decide which witnesses to call or not to call. The record shows that the evidence available was overwhelmingly against the Appellant. It cannot be known why the Appellant was not given P3 form. But the police was dealing with the complaint made by the PW1. The Appellant did not make any complaint. It appears he was discharged from the hospital the second day and the card he exhibited was for out patient clinic.

I have perused the authority relied upon by *Mr. Njagi Okethi Okakele & others vs Republic 1965 EA 555*. On the burden of proof, it was held that it was the duty of the Trial Judge to look at evidence as a whole. In that case the court of Appeal also held that in every criminal trial a conviction can only be based on the weight of the actual evidence adduced.

Upon considering the authority and the evidence in this case it is my finding that the conviction was based on the weight of evidence offered in court. I have evaluated the evidence offered by prosecution and the defence and I am convinced that the scale tilts against the Appellant.

Regarding sentence the court awarded 10 years imprisonment after considering the seriousness of the offence. The maximum sentence is imprisonment for life. Considering the seriousness of injuries inflicted the complainant sentence of 10 years is neither harsh nor excessive. The upshot is that I find the offence proven beyond reasonable doubt and I do not interfere with the conviction or sentence.

The appeal is dismissed.

Dated this 19th February, 2008.

J. N. KHAMINWA

JUDGE

19/2/2008

Khaminwa – Judge

Njue – Clerk

Mr. Njagi for Appellant

Appellant present

Mr. Omwega for State.

Read in open court._

J. N. KHAMINWA

JUDGE