



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

**OF KISII**

**Criminal Appeal 169 of 2005**

**CHARLES TORAH NYAMATO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(From original conviction and sentence of the Senior Resident Magistrate's Court at Nyamira,  
Criminal Case No.545 of 2005 by L. KOMINGOI, SRM)**

**JUDGMENT**

The appellant was charged with the offence of **Grievous harm** contrary to **Section 234** of the **Penal Code**. The particulars of the offence were that on the 12<sup>th</sup> day of June 2004 at Morako sub-location in Nyamira district the appellant unlawfully did grievous harm to **Bosire Nyanduri Nyamato**.

After a full trial, the appellant was convicted and sentenced to seven years' imprisonment. He was aggrieved by the said conviction and sentence preferred an appeal to this court. In his grounds of appeal he faulted the learned trial magistrate for convicting him without sufficient evidence and for failing to give due consideration to his defence. He also stated that the sentence that was handed down was harsh and excessive. Mr. Momanyi appeared for the appellant and argued all the grounds of appeal together.

The facts of the case briefly stated were that on the material day, **PW1, Bosire Nyanduri Nyamato**, was at his home when he was informed that the appellant, who is also his nephew, had assaulted his aunt. PW1 went out to enquire about the incident. He met the appellant outside his house. The appellant was holding a split wood. When PW1 asked the appellant why he had assaulted his aunt, the appellant abused him and also hit PW1 on his left hand.

PW1 reported the matter at Nyamira Police Station where he was issued with a P.3 form. PW1 went to a hospital for treatment.

**Stella Kemunto Nyanduri, PW2**, a daughter of PW1 and **Esther Kwamboka, PW3**, the appellant's aunt who was also assaulted by the appellant, corroborated the evidence of the complainant in every material aspect.

**Jeremiah Ogendi, PW4**, and **Police Constable Seth Legek, PW5**, testified as to how the appellant was arrested.

**Tom Sabore Oncharo, PW6**, was a Clinical Officer at Nyamira District Hospital. He attended PW1 at the hospital following the said assault. PW6 produced the P3 form which he had filled.

In his defence, the appellant denied having assaulted PW1. He alleged that on the material day he met PW1 who had a spear in his hands. PW1 stopped him but the appellant did not stop. The complainant then jumped over a fence and fell down but did not get hurt. The appellant decided to go and report to their clan elder and to the area Assistant Chief. Thereafter he was arrested and taken to Nyamira Police Station.

This being the first appellate court, it is mandated to examine the evidence that was adduced before the trial court, re-evaluate and re-assess the same and reach its own independent decision whether it should uphold the conviction. The court must, however, warn itself that it did not see the witnesses as they testified and must therefore make due allowance for that, see **NJOROGE VS REPUBLIC** [1978) KLR 19. I have carefully perused the entire record of appeal. I have also considered the submissions that were made by Mr. Momanyi, learned counsel for the appellant and Mr. Kemo, learned Principal State Counsel. PW3 testified that she was assaulted by the appellant and PW2 witnessed that incident.

PW2 ran and told her father, PW1, who in turn decided to move out of his house and find out what had happened. PW1 met the appellant and when he asked him why he had assaulted PW3, the appellant abused and assaulted him.

I agree with Mr. Kemo that there was overwhelming evidence against the appellant. Mr. Momanyi's submission that the complainant contradicted himself by stating in his statement that the appellant used a walking stick whereas in court he testified that he used a split piece of wood is of no consequence. The statement was not self-recorded and it is common knowledge that mistakes in language interpretation often occur in such circumstances.

The appellant's Counsel submitted that the language of the court was not clear. There was a possibility that the appellant did not follow the proceedings, he added. My finding is that the language of the court was stated as Ekegusii when PW1 and PW2 testified. PW3, PW4 and PW5 testified in Kiswahili. Only PW6 testified in English. It is not clear whether there was any interpretation. In any event, the record does not show that there was any objection raised by the appellant.

The learned trial magistrate considered the appellant's defence and rightly dismissed the same as lacking in truth. The appellant did not call as witnesses their clan elder and the area Assistant Chief whom he alleged to have reported to immediately after his encounter with the complainant.

Having carefully re-evaluated the evidence on record, I am satisfied that the appellant was properly convicted and consequently, I dismiss his appeal against conviction.

As regards sentence, Mr. Momanyi submitted that the prosecutor's address to the trial court immediately after conviction must have caused prejudice against the appellant. The prosecutor told the court that the complainant sustained permanent disability and he could do nothing with his hand.

He pleaded with the court to pass a stift sentence. The trial magistrate concurred with the prosecutor and sentenced the appellant to seven years' imprisonment.

In **SHIANI VS REPUBLIC** [1972] E.A 557 the court held as follows:

***"It is not the function of a prosecutor, as this court has more than once said, to tell the court his views. He is required simply to put the facts before the court. The court must decide how it views the case."***

The appellant was a first offender and it is most likely that the sentence that was passed against him was influenced by the aforesaid sentiments by the prosecutor. In the circumstances, I allow the appeal against sentence and reduce the same to the period already served. In essence, the appellant is now set at liberty

unless otherwise lawfully held.

**DATED, SIGNED and DELIVERED at Kisii this 4<sup>th</sup> day of April, 2008.**

**D. MUSINGA**

**JUDGE.**

**In the presence of: Mr. Kemo**

**Senior Principal State Counsel for the Republic**

**Mr. Momanyi for the Appellant.**

**D. MUSINGA**

**JUDGE**