REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

NYERI

CRIMINAL APPEAL CASE 272 OF 2004

(*Appeal against the original Conviction and Sentence in Criminal Case Number 44 of 2004 in the Resident Magistrate's Court at Othaya by T. K. Kimutai – R.M.)*

PETER MUNENE KANYONI……..…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

J U D G M E N T

Peter Munene Kanyoni hereinafter referred to as the appellant was charged before the Resident Magistrate's Court at Othaya of one count of Grievous Harm Contrary to Section 234 of the Penal Code and 2 counts of Assault causing Actual Bodily Harm Contrary to Section 251 of the Penal Code.

During the trial in the lower court a total of 6 witnesses testified in proof of the prosecution case. Briefly their evidence was as follows: -

On the 21st December 2005 Lawrence Maina Mwangi (1st complainant) and George Muturi (2nd complainant) were going to look for tea pickers at around 8.00 p.m. when they were attacked. The 1st complainant was hit on the left side of his face, his left lower jaw snapped in two and He also lost 5 teeth. The 2nd complainant was cut on the left side of the nose and 3 of his right hand fingers.

Both complainants swore that they saw and recognised one of the assailants whom they identified as the appellant who is a cousin to 1st complainant and brother to 2nd complainant. Both complainants ran to the house of Joseph Kihara (P.W.3) where they sought refuge.

They reported the assault to Cpl. Anthony Njogu who issued them with P3 forms. The 1st complainant was examined by Dr. Muchiri George (P.W.5) a dental surgeon who assessed his degree of injury as grievous harm whilst the 2nd complainant was examined by Peter Karanja (P.W.4) a Clinical Officer who assessed his degree of injury as harm. The appellant was subsequently arrested and charged.

In his defence the appellant gave sworn evidence and called one witness. His evidence was that on the material day, one Njamba who is his nephew assaulted his daughter Agatha Wangui Muchiri (D.W.2) He

then ran away. The appellant reported the incident to the police and then took his daughter to the hospital.

At around 8.00 p.m. as the appellant was coming from Hospital He realized that the two complainants were following him behind with a torch. He told his daughter to run away. A struggle then ensued between him and the complainants but the appellant managed to escape. The Appellant swore that He never assaulted any of the complainants. He maintained that He never came into any physical contact with them. The defence witness Agatha Wangui Muchiri also reiterated what was stated by the appellant.

The trial magistrate found the appellant guilty of the charge of grievious harm Contrary to ***Section 234*** of Penal Code and one count of Assault causing actual bodily harm Contrary to ***Section 251*** of the Penal Code. He acquitted the appellant of the second count of assault as no evidence was adduced in respect of the same, the complainant in that charge not having been called to testify.

In a petition of appeal filed through Gathara Mahinda and Company Advocates, 8 grounds of appeal were raised. Mr. Mburu who argued the appeal submitted that the evidence adduced against the appellant was not sufficient to support the charge as the evidence regarding the identification of the appellant as the person who attacked the complainant was not sufficient the circumstances not having been favourable for a positive identification, and that the 1st complainant was not sure of who hit him and his assertions that it was the appellant were just a mere afterthought.

Mr. Mburu also submitted that there was material contradiction in the prosecution evidence as well as unexplained gaps. For instance the length of time from the time of report to the time of arrest which was 38 days was not explained. Medical evidence tendered was insufficient. Finally it was submitted that the trial magistrate did not give due consideration to the defence of the Appellant but that He shifted the burden of proof onto the appellant.

I have reconsidered and evaluated the evidence which was adduced before the lower court. Both the two complainants maintained that the appellant was one of those who attacked them. 1st complainant claimed He saw the Appellant holding a panga and a torch, and that He actually saw the appellant attack the 2nd complainant and He talked to the appellant asking him why He had cut the 2nd complainant and the appellant responded with a command to others to hit the 1st complainant with tear gas and it was at that stage that 1st complainant was also hit.

The 2nd complainant also maintained that He saw and recognised the appellant as the person who cut him on the left side of his nose and right hand fingers. It is evident that the incident occurred at 8.00 p.m. when it was already dark. The complainant however maintained that there was torch light. 1st complainant explained that the Appellant moved very close to him and He was therefore able to recognise him. Both complainants knew the appellant very well as the appellant was a brother to 2nd complainant and a cousin to 1st complainant. The possibility of a mistaken identification was therefore minimal. Moreover, in his defence the Appellant did not deny having had a confrontation with the two complainants on the same date and time as alleged by the complainant. What was actually in dispute is what transpired when the two complainants and the appellant had a confrontation.

According to the appellant “a struggle ensued but I got away” but in cross-examination the appellant contradicts himself when He claimed that He escaped from the complainants and that they did not have any physical contact. The version given by the appellant cannot however be true. Both complainants sought refuge at the house of Joseph Kihara (P.W.3) who had also heard the commotion outside. Both were injured and this was consistent with the evidence of the complainants that they were the ones who were attacked. The trial magistrate who saw and assessed the demeanour of the witnesses believed the version of the complainants and rejected that of the appellant and I have no reason to differ with him.

As regards the failure of the complainants to identify the appellant to P.W.3 the person who had attacked them, would not attach much significance to this failure as it is evident that the complainants were at this time both in pain and more concerned with escaping and P.W.3 assisted them by showing them an

alternative escape route. There was therefore no time for details.

It is true that there were certain inconsistencies regarding the recovery of the teeth and whether both complainants went back to the scene after the incident. This was however not such a crucial inconsistency noting that it relates to events after the alleged assault. I am satisfied that there was sufficient evidence to sustain the appellant's convictions on both counts 1 and 2.

As regards the sentence, given the mitigating factors put forward by the appellant, the sentence of 18 months imprisonment imposed in respect of count 1 was rather excessive. I would therefore reduce the same to a fine of Kshs.60,000/= in default to serve 12 months imprisonment.

The upshot of the above is that I dismiss the appeal against both convictions but allow the appeal against sentence to the extent of setting aside the sentence of 18 months imprisonment in respect of the 1st count of causing Grievious harm and substituting thereof a fine of Kshs.60,000/- in default to serve 12 months imprisonment.

Orders accordingly.

Dated, signed and delivered this 1st day of February 2007.

H. M. OKWENGU

JUDGE

1/2/07