



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

**Criminal Appeal 66 of 2006**

**CLEOPHAS NYONGESA WANDABWA.....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

Cleophas Nyongesa Wandabwa hereinafter referred to as the appellant was charged before the Webuye Resident Magistrate's Court with assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars are as in the charge sheet. He denied the charge. He was tried and found guilty and convicted following a full trial. He was placed on probation for a period of one year. Being dissatisfied with the said conviction and sentence, he filed this appeal through Kraido & Co. Advocates. He cited 6 grounds of appeal but at the hearing of the appeal, counsel dropped ground 6 and argued out the 5 other grounds together. These 5 grounds are as hereunder.

1. *The learned Trial Magistrate erred in law and fact when he convicted the appellant on the basis of evidence which was contradictory thereby pointing to a conclusion that it was entirely contrived (sic).*
2. *The learned Trial Magistrate erred in law and fact when he convicted and failed to hold that the evidence of the complainant and that of the Clinical Officer – PW3 contradicted each other and therefore could not sustain the charge.*
3. *The learned Trial Magistrate erred in law and fact when he failed to hold that the injuries sustained by the complainant were due to a fall due to drunkenness.*
4. *The learned trial Magistrate erred in law and fact when he failed to hold that the evidence of PW2 was merely contrived and false and therefore did not corroborate the evidence of the complainant.*
5. *the learned trial magistrate erred in law when he failed to give the appellant the benefit of the doubt in view of the glaring discrepancies and contradictions in the evidence of the prosecution witnesses.*

Learned counsel expounded these grounds in his oral submission in court. Learned counsel for the state opposes the appeal. He urged the court to dismiss the appeal, uphold the conviction and even enhance the sentence, saying the sentence of one year probation was too lenient in the circumstances. I will consider these grounds and submissions along with the evidence adduced before the trial court. The case before the trial court was that the complainant was walking home from his uncle's funeral on the night in question. As he was about to enter his compound, he met the appellant who was his neighbour outside his gate. The appellant is said to have been armed with a stick and a sword. The complainant greeted him but instead of answering him, he clicked his tongue. He is then said to have asked the complainant whether he was the one who had caused him to beat his wife. He then hit the complainant with the stick on his right eye. He also hit him 3 times on his back. The complainant fell down and the appellant continued to beat him. He screamed for help and PW2 heard the screams and rushed outside to see what was happening. PW2 told the court that he found the appellant actually beating the complainant. He (PW2) asked the appellant why he was beating the complainant but once again he is said to have clicked his mouth. He left the complainant at the scene injured and unconscious. PW2 went and called the complaint's brothers who took him to his house and later to hospital, where he was admitted for 4 days.

According to PW2, the complainant had injuries on his eye, left and right rib areas and on the right shoulders. The matter was later reported to the police station. A P3 form was issued to the complainant. It was duly completed by the Doctor and later produced as evidence by PW3. According to the P3 form, the complainant had a blunt injury on the right eye, the right side of the head, chest and right arm. The degree of injury was assessed as harm. The appellant was subsequently arrested and charged with the offence now before the court.

In his defence, the appellant testified on oath and called his wife as his witness. They said that on the date and time the complainant alleges to have been assaulted, they were asleep in their house. According to the appellant, he learnt the following day that the complainant had been beaten. He went to see him in his house and confirmed that he was in pain. He said he knew nothing about the assault. The learned Trial Magistrate considered this evidence and arrived at the finding that the charge against the appellant had been proved beyond reasonable doubt. On my part, I have considered this evidence afresh. My finding first and foremost is that there is no doubt that the complainant was indeed assaulted on the night in question and he sustained injuries. He was injured on his right eye. An injury which all witnesses appear to have seen. He said he was injured basically on his right side and back. PW2 also saw the injury on the right eye and on his back.

On cross examination, the complainant said that his right side of the ribs was also aching following the beating. Learned counsel for the appellant has emphasized the fact that there were discrepancies in the nature of the injuries as described by the complainant in his evidence and the P3 form. I have considered all this evidence. My considered view is that the differences are very minor and inconsequential. For example when the P3 says that the complainant had an injury on the right side of the head, definitely the right eye, which was swollen is on the right side of the head and so this was not inconsistent with PW1's evidence.

In any event, there is no dispute at all that the complainant sustained the injuries for which he was admitted in hospital for four days. The learned Trial magistrate did not therefore err in fact in resolving the said contradictions in favour of the complainant. On the issue that the complainant was not a truthful person because he said he was married while others said he wasn't. I would say that this was neither here nor there. Indeed, the complainant's marital status had absolutely nothing to do with the matter and it was actually an intrusion into his private life which was not necessary in the circumstances. If his evidence was not corroborated, then may be the learned Trial Magistrate would have been called upon to treat it with caution. In this case however, we have the evidence of PW2 who said he found the appellant actually in the act of beating the complainant. Even the appellant in his sworn testimony stated that his relationship with the complainant was "*very cordial*" and that he had no grudge with him at all. The night was well lit and there was no possibility of the complainant and PW2 who knew the appellant very well before mistaking him for anybody else. There was therefore no reason whatsoever for the complainant to fabricate the case against the appellant herein. My finding is that the learned Trial Magistrate did not err at all either in law or in fact in arriving at his verdict. The conviction was based on the evidence before him and the law applicable. I cannot fault the said judgment. Accordingly, I find this appeal devoid of merit and dismiss the same. On the issue of the sentence, I am satisfied that the same was justified by the mitigation which was offered by the appellant and also following the recommendation by the probation officer. I do not therefore see any need to enhance the same. I will not therefore interfere with the said sentence. I uphold the same. This appeal is hereby dismissed.

W. KARANJA

JUDGE

DELIVERED, Signed and Dated at Bungoma this 15<sup>th</sup> day of May, 2007 in the presence of:- Mr. Makali for Mr. Kassim for the appellant.

Mr. Onderi for the state.