



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

**Criminal Appeal 16 of 2007**

**REPUBLIC ..... APPELLANT**

**VERSUS**

**NAHASHON MURUNGI M'ITAYA ..... RESPONDENT**

***(An appeal from the judgment of Mr. J. Nyaga, Principal Magistrate in Maua Cr.Case No.2688 of 2005 delivered on 26.1.2007)***

**JUDGMENT**

This is an appeal by the State challenging the acquittal of the respondent by the Principal Magistrate Court at Maua. The respondent was charged in that court with assault causing grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence are that on the 24<sup>th</sup> June, 2005 at Nguyuyu location in Meru North District the respondent unlawfully did grievous harm to Jane Njeri Kaberia.

After a full trial the court below found that the case against the respondent has not been proved beyond any reasonable doubt and acquitted him under Section 215 of the Criminal Procedure Code. The state was not satisfied with that decision and proceeded to prefer this appeal, citing the grounds, namely:-

1. that the acquittal was against the weight of evidence
2. that the trial magistrate drew conclusion regarding darkness, which was not supported by evidence
3. that he erred in finding that the prevailing circumstances were not favourable for positive identification
4. that the trial magistrate erred in failing to find that this was a case of recognition as opposed to identification.

Before considering these grounds and this appeal I am bound to re-evaluate the evidence on record in order to arrive at my own independent conclusion bearing in mind as I do this my disadvantaged position not having heard or seen the witness.

The victim of this attack who shall call Jane testified that on 24<sup>th</sup> June, 2005 at 7.00 p.m as she walked to her home from the shop she found the respondent standing near his house.

He held her hand and began to drag her towards his house. She screamed. The respondent then cut her

on the face and hand before fleeing. Jane's screams attracted among other people, Daniel Murungi(PW2) and Daniel Kiburi(PW3).

According to PW2 on getting to the scene he found Jane bleeding from the cut wounds. She told him that she had been cut by the respondent, who was not at the scene. PW2 explained that he left Jane with PW3 as he (PW2) went to get transport to take Jane to the hospital.

As he ran through the respondent's shamba he saw him running towards the road holding a panga. Jane also told PW3 that she had been attacked by the respondent.

Jane was examined by Paul Thiange(PW4) who assessed the deep cut wounds on the left side of the head and on the right hand as Maim. He produced the P3 form. A report of the attack was made to the police and the respondent arrested and charged with the present offence. In his sworn defence the respondent stated that on the night in question between 8 and 9pm he was attacked while guarding miraa by a group of six (6) people, who were stealing miraa. As the six advanced towards him he ran away. He admitted that he was armed but maintained he did not have a panga and that he did not attack Jane.

I have considered these arguments. There is no dispute that Jane was attacked on the evening in question. She suffered deep cuts on the head and hand, which were classified as maim. What has to be decided is whether it is the respondent who inflicted these cuts.

Jane testified that she saw and recognized the respondent. She described how he was dressed. She had even seen him as she went to the shop. The respondent grabbed her hand and began to drag her towards his house. The respondent on the other hand was categorical that he did not have a panga. Instead he explained that it was him who had been attacked.

It is cardinal requirement of the law that the court must test with greatest care the evidence of a single witness respecting the identification of a suspect especially where the conditions favouring a correct identification are shown to be difficult.

In such a case the court must look for some other independent evidence to corroborate that of a single witness. See Abdalla Bin Wendo V R, 20 EACA 166.

That duty to subject such evidence to critical scrutiny applies even in cases of recognition as opposed to identification. See R V Turnbull (1976) 3 ALL ER 519.

Although it was about 7.00 p.m according to Jane, PW2 and PW3, Jane was categorical that it was not completely dark and that she was able to recognize the respondent, who she knew very well.

As a matter of fact on that very day she had seen the respondent earlier in the day dressed in the manner he was dressed in the evening of the attack. She left him standing on the same spot as she went to the shops. The respondent held Jane's hand and was dragging her until she screamed before he cut her. That also afforded her an opportunity to see the respondent. The respondent admitted that Jane was known to him as she lived only 200m from his home. In my view, from all the foregoing, the circumstances prevailing at the time of the attack as well as the scene of the incident were favourable for positive recognition of the respondent by Jane. Her evidence was adequately corroborated by that of PW2 and PW3 who testified that Jane told them on arrival at the scene that it was the respondent who had attacked her. Although the trial magistrate dismissed the evidence of PW2 as untruthful on the ground that he could not have seen the respondent as it was dark, that finding was a misdirection as PW2 was categorical that he saw the respondent.

He was equally categorical that the respondent was well known to him being his neighbour. The defence advanced by the respondent was rather disjointed in that he could not tell whether he cut any of the 6 miraa thieves. He stated that he was armed but not with a panga. Further, that he did not cut anybody. Yet again that if he cut anybody it was in self-defence. That defence was not capable of displacing the prosecution evidence which placed him at the scene of Jane's attack. The trial magistrate therefore erred

in finding that there was no evidence linking the respondent with the offence charged.

This appeal is allowed and the order of acquittal is quashed. The accused is guilty of the offence and is convicted accordingly.

DATED AND DELIVERED AT MERU THIS 26<sup>TH</sup> DAY OF JULY, 2007

W. OUKO

JUDGE