



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 184 of 2005

WILFRED NGOLUA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence in Criminal Case No.1224/04 before Mr.G. Oyugi, RM on 23.9.2005)

JUDGMENT

The appellant, Wilfred Ngolua was tried and convicted in the court below(G. Oyugi, RM) at Tigania RM Court of the offence of causing grievous harm contrary to Section 234 of the Penal Code. According to the particulars in the charge sheet it is alleged that on 27th July, 2004 at Karama Location the appellant unlawfully did grievous harm to Martha Kanana.

After a full trial the appellant was sentenced to serve 4 years imprisonment. He was aggrieved and preferred the present appeal in which he has challenged both the conviction and sentence on five grounds, which can be summarized as follows;

1. *that the charge was not proved to the required standard*
2. *that the evidence was contradictory*
3. *the trial court ignored the appellant's defence and evidence by his witnesses*
4. *that the sentence was harsh and excessive.*

Learned counsel for the respondent supported both the conviction and sentence arguing that the charge was proved beyond any reasonable doubt. That the appellant was known to the complainant and the attack was in daylight. Before I consider these arguments and the appeal, I must remind myself of the duty imposed on me to re-evaluate the evidence on record afresh in order to arrive at an independent conclusion.

While doing so it is appreciated that I have not had the benefit of seeing and hearing the witnesses in their testimony. The prosecution led evidence in support of the charge through the complainant, PW2, Martha Kanana, of how she was attacked by the appellant as she walked home from buying paraffin. The appellant claimed that the complainant was bragging. In the process of the attack the complainant

suffered multiple cut wounds on the head and hand which were assessed by Ali Gababa on whose behalf, the P3 form was produced by PW1, Charles Lengapase, as grievous harm.

During the attack and following the complainant's screams, several people were attracted to the scene. Among them were PW3 Benjamin Mwambia(Mwambia). He told the court that as he got close to the scene he saw the appellant hitting the complainant.

Upon seeing Mwambia and others, the appellant took to his heels. The complainant was rushed to the hospital and a report made to the police. The appellant was subsequently arrested. In his sworn statement the appellant maintained that he did not cut the complainant. That infact it was the complainant who had tried to cut him but was prevented by people when the appellant and the complainant's husband had a scuffle. Although the appellant confirmed that indeed the complainant was cut, he nonetheless was categorical that he did not see or know who cut her.

The appellant called Peter Mwika(DW2) and Morris Nkando(DW3), both of whom claimed that they witnessed the scuffle between the appellant and the complainant's husband.

The complainant on seeing this came armed with a panga but was restrained. That is the evidence adduced at the trial. While there is consensus that the complainant sustained multiple cut wounds, there is no agreement as to how she sustained them.

It is the prosecution case that she was attacked by the appellant. The appellant, on the other hand, insists that someone else must have cut the complainant with the panga she was carrying in the cause of being restrained.

This is what has to be resolved. The incident took place at 5.30 p.m. There is also evidence that the complainant and the appellant had no personal differences before this day. The two knew each other well.

Although Mwambia's evidence is mixed-up as to what he saw at the stage he got to the scene, I am persuaded that he at least saw the appellant run away from the scene of the attack.

From the foregoing I come to the conclusion that the surrounding circumstances were such that a positive identification; indeed, recognition was possible and that the complainant having exchanged greetings with the appellant had ample time to see the appellant before she was attacked.

Medical evidence was adduced as to the degree of injury which was assessed as grievous. I find no merit in the defence of the appellant and the evidence of his witnesses who elected to see everything that happened on that day except the person who cut the complainant.

There was no scuffle between the appellant and the complainant's husband. I rule out the possibility of the complainant being cut by her own panga as alleged by the appellant because if that were so then the nature of injuries would be different.

The appellant acted unlawfully and was properly convicted. The sentence of four years imposed as opposed to life imprisonment provided for under Section 234 of the Penal Code cannot be described as excessive.

Finally it is immaterial that only one independent witness was called as no specific number of witnesses is required to prove a fact in a criminal trial.

This appeal fails and is dismissed in its entirety.

Dated and delivered at Meru this 2ND Day of AUG 2007

W. OUKO

JUDGE