

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

Criminal Appeal 217 of 2004

MWITA MACHERA NGOINA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence of the RM's court at Kehancha in criminal No. 23 of 2004)

JUDGMENT:

Appellant was convicted by Kehancha Resident Magistrate for the offence of Grievous Harm contrary to s.234 penal Code. He was sentenced to 7 years imprisonment.

The prosecution case was that early in the morning of 27th October 2003 the complainant, Mogasi Marwa who was the 1st witness found the appellant ploughing his land. When PW1 asked him why he was doing so he attacked him with a panga. He cut him on the hands and on the face. Report was made to the police. Apparently the appellant had also reported that the complainant assaulted him. Both were charged with the offence of affray. However later that charge was dropped and appellant charged with Grievous harm.

The appellant denied the offence and called two witnesses. He said it was the complainant and another who attacked and assaulted him.

This being a first appeal I have re-evaluated the evidence. I find that the evidence left serious doubts as to the guilt of the appellant and benefits of these doubts should have gone to the appellant.

There are no doubts that there was a fracas between the appellant and the complainant and that is why both were charged with affray. Apparently each of them was injured. PW2 and 3 testified that it was the appellant who first attacked the complainant but the appellant and his two witnesses said it was the complainant who attacked the appellant. Complainant was actually not a truthful witness. He denied even on cross-examination that there was a land dispute between him and the appellant. However all the other witnesses said that there had been a land dispute between the two. PW4 SAMSON MARWA the area chief told court that he had at one time arbitrated over the dispute. All witnesses were in agreement that the cause of the fight was the land dispute. It seems that complainant found the appellant ploughing the disputed land and attacked him. Appellant retaliated and both were injured. It is possible the complainant got more serious injuries than the appellant but that does not mean they did not fight. The allegation that the appellant cut himself deliberately on the hand was not plausible.

If the trial court considered all the above circumstances it would have found that there were very serious doubts as to the offence of grievous harm.

I therefore allow the appeal, quash the sentence and set aside the sentence imposed.

Appellant be set at liberty forthwith unless otherwise lawfully held.

Dated 17th March 2006.

KABURU BAUNI

JUDGE

Cc – Mobisa

Mr. Kemo for State

Appellant present