



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA OF KISII**

**Criminal Appeal 107 of 2004**

**(From original conviction and sentence of the RM's court at Kehancha in criminal case No. 729 of 2003)**

**THOMAS NYAKIRORO NGIBITI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT:**

The appellant THOMAS NYAKIRORO NGIBITI was convicted by Resident Magistrate Kehancha for the offence of maim contrary to s. 234 Penal Code. Particulars were that on 30<sup>th</sup> October 2003 at Tagare Location in Kuria District with others not before the court unlawfully did grievous harm to RASHID HAMISI. Appellant was jailed for 21 years. His appeal is against the conviction and sentence.

The complainant (PW2) told court that on the fateful day at 9 p.m. he had gone to pay rent to his landlord. There was moonlight. He met with the appellant who without uttering any word slapped him with a panga on the left cheek. He then cut him on the left leg near the knee. He screamed and the appellant threatened to kill him. He bit him on left thumb and the nail came out. People went to the scene. Among them was DORRIS MOGESI (PW3) who said he found the complainant lying on the ground and the appellant standing there with a panga.

Appellant denied the offence. The trial magistrate after analyzing the evidence that the complainant was indeed assaulted and that it was the appellant who did so, he found the evidence of the complainant to have been corroborated by that of PW3.

This being the first appellate court I have evaluated the evidence. There are no doubts the complainant was injured. PW1 the clinical officer confirmed the injuries he suffered. However from the evidence there are doubts as to the identification of the person who assaulted the complainant. The incident happened at 9 p.m. in the night. Though the complainant said there was moonlight he did not say how bright that moonlight was. In the case of Maitany –VS- R. 1986 KLR 198 the court of appeal emphasized that the quality of light where identification is at night is crucial and the prosecution has to adduce evidence to that effect. This was echoed in the case of WANJOHI and others –VS- R. (1989) KLR 415. In this case the only evidence was that the complainant stated that there was moonlight. Was it full moon or half moon and how bright was it. Nobody addressed those facts and that makes the reliance an evidence of such identification to be suspicious. There should have been other independent evidence to corroborate that evidence. The trial magistrate found such corroboration in the evidence of PW3.

However the evidence of PW3 could not corroborate that of PW2 on the issue of identification. PW3 identified the assailant under the same circumstances as the complainant. Infact she never even said there was moonlight. Her evidence itself needed corroboration and therefore could not corroborate that of the complainant.

It seems both the complainant and PW3 placed a lot of emphasis on the appellants past record. They stated that they knew he was a thief and even his colleagues had been lynched there before. With respect that cannot be evidence to be relied on. It is either they identified the appellant or not and not that they know he had a criminal past record.

If the trial court carefully considered the issue of identification it would not have considered the appellant. I therefore allow the appeal, quash the conviction and set aside the sentence.

Appellant be set at liberty forthwith unless otherwise lawfully held.

Dated 14<sup>th</sup> May 2006.

**KABURU BAUNI**

JUDGE

Cc – Mobisa

Mr. Kemo for Appellant

Appellant present