



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**Criminal Appeal 53 of 2005**

**TIMOTHY DIMBU IBAI .....APPELLANT**

**V E R S U S**

**REPUBLIC .....RESPONDENT**

**J U D G M E N T**

The Appellant, *Timothy Dimbu Ibai*, was on 25-01-05 convicted by the learned Resident Magistrate, at Hamisi, J. N. MUKUT, Esq. in Hamisi R. M. Criminal Case No.441 of 2001 of the offence of causing grievous harm contrary to section 234 of the Penal Code and was sentenced to a fine of 7000/= and in default to a term of imprisonment of two years. The charge against the Appellant read:-

*On the 6<sup>th</sup> day of February, 1999 at Madaya village, GIVOGI Sub-location, BANJA location in Vihiga District within Western Province with others who have already been convicted unlawfully did Grievous harm to Herman Kimwogo.*

Aggrieved by the conviction and sentence, the Appellant filed the appeal herein and proffered 5 grounds in which he challenged the judgment of the trial magistrate on the grounds that (1) the evidence of the complainant did not tally with that of the medical doctor, (2) the complainant was examined 9 months after the offence and that the court therefore erred in relying on the doctor's evidence, (3) the judgment was against the weight of the evidence and therefore there was miscarriage of justice.

When the appeal came up for hearing before me, Mrs. Kithaka, Senior Principal State Counsel, pointed out that the evidence of the complainant (PW1) and the evidence of the doctor (PW5) did not tally. PW1 had testified that her teeth had been broken. In his evidence, PW5 did not allude to this. Instead, he referred to injury on the arm which did not amount to grievous harm. On account of this, Mrs. Kithaka conceded the appeal.

I have perused the record of appeal. The offence was alleged to have been committed on 6<sup>th</sup> February, 1999. PW1, Herman Kimwogo testified that her teeth had been broken by a stick on 6.2.99. PW5, Hudson Musindi, a medical doctor, examined PW1 on 19/1/99 and found that the Appellant had scars on the head and the right arm had a healing scar. He estimated the injuries to have been about 9 months old.

On the basis of this evidence, there is no way a court of law could make a finding that the appellant had committed the offence.

Mrs. Kithaka quite rightly conceded the appeal. It is quite clear that the evidence of PW1 was false and PW1 intended to maliciously cause the Appellant's arrest and prosecution.

I allow the appeal, quash the conviction, and set aside the sentence. If any fine has been paid, it shall be refunded.

Dated, signed, and delivered at Kakamega this 11<sup>th</sup> day of May. 2006.

G. B. M. KARIUKI

JUDGE