



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

**Criminal Appeal 196 of 2003**

**NICHOLAS MUTWIRI .....**  
**APPELLANT**

**AND**

**THE REPUBLIC .....**  
**RESPONDENT**

***(Being an appeal from original conviction and sentence in Criminal Case No. 1299 of 2001 the Senior Resident Magistrate's Court at Chuka dated 8.9.2003 – A.N. Kimani Esq)***

**JUDGMENT OF THE COURT**

NICHOLAS MUTWIRI, the appellant was the accused in Chuka Senior Resident Magistrate's criminal Case No. 1299 of 2001 which he was charged with assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence being that:-

***“On the 21<sup>st</sup> day of August 2001 at Giachunku Village, Gianchunku sub-location Chogoria Location in Meru South District within Eastern Province unlawfully assaulted David Kinjana thereby occasioning him actual bodily harm.”***

The facts of the case are that on the 21.8.2001 at about 7.30pm, the complainant DAVID KINJANA M'ARACHI (PWI) was at Gianchunku tea buying center when the appellant also went to the same center and leaned on a wall. The appellant and the complainant are neighbours. The appellant then suddenly removed a panga from under his long coat and cut the complainant on the middle of the head. This attack was unprovoked. The appellant fell down and only came to when he was at Chogoria hospital. The complainant remained in the hospital for three weeks. He was later issued with a P3 form which was produced as P exhibit 1. Later the appellant was arrested and charged with the offence.

The attack upon the complainant was witnessed by PW2, KENNETH MUREITHI who told the court that after the attack, the appellant ran away. PW3, KAARIA M'ARACHI, a step brother to the complainant also witnessed the attack on the complainant. PW3 stated that the appellant attacked the complainant without uttering a word.

The complainant was attended to by DR. MUREITHI MBAE who filled the P3 form. The form was produced in evidence as P exhibit 1. PW5 PC KILONZO arrested the accused and subsequently charged him with the offence.

The appellant gave unsworn evidence and denied committing the offence. He stated that he was arrested for no apparent reason. DW2 was NJAGI M'RITHA who stated he was with the appellant throughout on

20.9.2001 and up to about 6.00am on 21.9.06. He was surprised to learn that appellant had been arrested in connection with the offence of assault. DW2 however admitted while under cross-examination that since he parted company with the appellant at 6.00am on 21.9.2001, he could not tell if the appellant committed the offence during the day.

In his judgment, the learned trial magistrate found the appellant guilty as charged, convicted him and sentenced him to serve seven (7) years imprisonment.

The appellant appealed against both conviction and sentence by his Petition of Appeal filed in court on 23.9.2003. The appellant set out three grounds of appeal:-

1. That the learned trial magistrate erred in law and fact when he relied on the evidence of PW1 and PW2 who were relatives of the complainant.
2. That the learned trial magistrate erred in law and fact when he failed to consider the appellant's mitigation when delivering judgment.
3. That the learned trial magistrate erred in law and fact when he rejected the appellant's defence without giving any reasons for doing so.

The appellant told the trial court during mitigation that he was sickly and pleaded for leniency.

During the hearing of the appeal, the appellant only asked the court to reduce the seven-year jail term which he said was extremely harsh in the circumstances. In response, Mr. Oluoch learned counsel for the respondent contended that the sentence of seven (7) years imprisonment compared to life imprisonment for the offence was not excessive at all.

The duty of this court is to reconsider and re-evaluate all the evidence on record with a view to determining whether in the circumstances of this case, the seven year jail term was excessive as contended by the appellant. First of all, it is worth noting that the grounds of appeal do not include a ground against sentence, though perhaps it is only by implication from ground number 2 of the Petition of Appeal where the appellant contended that the learned trial magistrate failed to consider the appellant's mitigation when passing judgment.

I have myself reconsidered and reevaluated the evidence on record and particularly the evidence by PW4, DR. JOHN DAVIDSON who testified that the injuries inflicted upon the complainant by the appellant were classified as grievous harm. The complainant suffered a deep cut on the left forehead with a resultant fracture. It is also clear from the evidence on record that the appellant's attack on the complainant was not only cruel but was also most unwarranted. I see no reason to interfere with the learned magistrate's conclusions.

In the result, I find the appellant's appeal on both conviction and sentence to lack merit. The appeal is dismissed in its entirety.

Orders accordingly.

Dated and delivered at Meru this 26<sup>th</sup> day of July, 2006.

RUTH N. SITATI

J U D G E