**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO. 1 OF 2003**

**JOHN KIMANI NGANGA……APPELLANT**

**VERSUS**

**REPUBLIC…….RESPONDENT**

**JUDGMENT**

The appellant, **JOHN KIMANI NGANGA** alias **KUBUKUBU** was convicted on two counts, both of **ASSAULT CAUSING ACTUAL BODILY HARM**, contrary to section 251 of the Penal Code.

The particulars of the charge were that the appellant, jointly with others not before the court unlawfully assaulted Samuel Muchiri Wanjuguna and Kiarie Nguru Alias Ndichu, thereby causing them actual bodily harm. The assaults were said to have been committed at Gitwe Trading Centre, within Thika District on 22nd July 2001.

Following the conviction of the appellant, the learned trial Magistrate sentenced him to two years imprisonment on each of the two counts. The court also directed that the sentences should run consecutively. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal against the judgement of the trial court.

When canvassing the appeal, Mr. Sichangi advocate pointed out that as PW2 and PW3 had been beaten until they were unconscious, that must have been a serious assault.He said that one person could not have occasioned such serious injuries to two people.

The answer to that submission is to be found, first, in the particulars in the charge sheet, which clearly states that the assault was carried out by the appellant, jointly with other people who were not before the court. Secondly, although PW1, Antony Mwende Kamau, assessed the degree of PW2's Injury as harm, when PW2 testified, he did not say that he ever lost consciousness. The person who did loose consciousness was PW3, Kiarie Nguru.

Therefore, to my mind, even if the appellant had not assaulted the two complainants, on his own, that alone could not exonerate him from criminal liability, even if the others had not been tried alongside him.

The second issue raised by the appellant was to the effect that there had been no independent witness. In order to understand that submission, one must first appreciate the circumstances prevailing at the time the crime was committed. The incident is said to have occurred during a period of electioneering for the positions of directors of Thetha Tea Factory company Limited.The complainant in court 1, Samuel Wanjunguna (PW2) is said to have belonged to one camp, whilst the appellant belonged to a rival camp. PW2's camp had successfully sought court orders barring the rival group from holding positions of directors. The court is said to have ordered the bona fide directors to conduct elections a particular date. It

is on that said (elections) day when the incident occurred. And it is in that context that the appellant contends that all the prosecution witnesses were people who were in the same camp as PW2. The said people are even said to have travelled in the same vehicle, when they arrived at the scene where the incident occurred.Furthermore, the appellant finds fault with the fact that the prosecution witnesses were so consistent as if their evidence had been rehearsed.

When responding to this line of submissions, the learned state counsel, Mr. Makura described the prosecution as being consistent because the incident occurred in broad day-light, which enabled the witnesses to clearly see the events as they unfolded.

I have perused the record of the proceedings before the trial court. As far as I am concerned, the evidence cannot be said to have been so consistent as to give rise to suspicion that the same was rehearsed. For instance, PW3 did not talk about PW2 having been beaten by the appellant, when PW2 had fallen to the ground, near his car. Indeed, PW3 could not have given that evidence, even if he had wanted to do so, as he was being beaten unconscious, as the appellant and the rest of the mob was attacking PW2.

Simiarly, PW4, Jane Wanjiku Kamau, did not say exactly what either PW2 or PW3 had said. She had remained inside PW2's vehicle with the driver, when PW2 and PW3 had got out, at Gitwe trading centre. She also talked of helping PW2 into the vehicle after the appellant and the rest of the mob had beaten the complainant. But just before PW4 helped the driver to get PW2 into the vehicle, PW4 had pleaded with the appellant to stop hitting PW2 with a stone. Insofar as none of the other witnesses mentioned what PW4 said to the appellant, it cannot be said that the witnesses were parroting their evidence, as if they had been coached.

In any event, I have no reason to conclude that if witnesses saw the same event as it was taking place, they cannot give consistent evidence. I therefore hold that there is no merit on this ground of appeal. I also hold that there is no legal requirement for independent witnesses in every case. Therefore the fact that witnesses were either friends, relatives or members of the same organization or entity, cannot by itself diminish the evidence they tender.

The evidence of PW2 was to the effect that he had known the appellant for a considerable length of time. Seven years, to be precise. PW2 saw him at Gitwe shopping centre on the afternoon of 22nd July 2001. The appellant did not deny having been at the scene of crime. Indeed, he confirmed that he had attended a meeting at the place. The only thing he then said, is that he had no idea why the police arrested him two months after the meeting, and then preferred the charges against him.

In that respect, PW2 explained the role played by the appellant, in assaulting him.That evidence was corroborated by other eye-witnesses, being PW3, PW4 and PW5. To my mind, therefore, the identification of the appellant, as one of the assailants, cannot be faulted. If anything, the said identification was by way of recognition, in very conducive circumstances, and by not less than four people.

The next issue raised by the appellant was that he was arrested after about 2 months from the date of the incident. Thereafter, he was only charged on the instructions of the Attorney General. If I understood the appellant correctly, he seemed to have been suggesting that there was some doubt about whether or not he should have been arrested and charged.

The factual position is that the complainant reported the incident to the police on the same day it took place. He went straight from the scene to Gatundu Police Station. In his statement

to the police, PW2 gave the names of all his assailants, including the appellant.

On his part, PW3 reported to the police on the next day, as he had been beaten unconsciousness. By the time he came to, it was rather late. But when he did make his report, PW3 also gave to the police, the names of his assailants.

The investigating officer, PC Edward Kao was PW6. He was given instructions by the OCS, to investigate the offence. The said instructions were given to PW6 on 23rd July 2001, which was the day after the incident. PW6 testified that PW2 had given the names of ten people. PW6 therefore summoned all the ten people and took their statements under inquiry. The file was then submitted to the Attorney General for advice.

According to PW6, the Attorney General returned the file, with instructions that the appellant be charged. It is then that the appellant was charged.

It is the appellant's contention that there was something wrong in the fact that he was only charged after the Attorney General gave instructions. As far as I can see, the steps taken by the police, in consulting the Attorney General is perfectly in order. By virtue of the provisions of Section 26(1) of the Constitution of Kenya, the Attorney General is the Principal Legal advisor to the Government of Kenya. Therefore, the police cannot be criticized for seeking advise from the Attorney General. Similarly, the police cannot be blamed for receiving advice or instructions from the Attorney General, and complying with the same.

I therefore hold that PW6 adequately explained the reasons why the appellant was arrested some two months after the incident. PW6 had acted swiftly in summoning the 10 people who were named by the complainant. He then took their statements under inquiry, which were then forwarded to the Attorney General, for advice. The period of time taken in recording the statements, seeking advice from the Attorney General and getting the said advice, explains the delay in the appellant's arrest. To my mind there was nothing irregular or unlawful in the delay of two months.

The next issue raised by the appellant was that he ought not to have been convicted on the 2 counts of assault. Inasmuch as the people who were assaulted were two, it did not matter that they were injured during one incident. The number of counts with which the appellant was charged was a reflection of the number of people who were assaulted. But in this case, it would appear that the evidence tendered fell short of proving that PW3 was also assaulted by the appellant.

PW3 had testified as follows:

> "***Those people approached us where we were. Kamau Kamuyu said***
>
> ***"Wanjunguna say what you have always wanted to say."***
>
> ***The were interested in PW2 and kept throwing stones at him. PW2 rushed to his motor vehicle and people rushed after him, and I spotted accused rushing towards PW2. The accused was throwing stones at PW2. I was left where I was standing. I saw Kimani running after PW2.I was left there and PW2 ran to his vehicle. Those people said I was with Pw2 and they hit me with stones till I became unconscious."***

Clearly, the main target of the attack was PW2. He was pursued by the appellant, leaving PW3 standing where he was,. The fact that PW2 was pursued was confirmed by himself, as well as PW4 and PW5.

According to PW2, PW4 and PW5, when the appellant caught up with PW2, the complainant fell down, and the appellant continued to assault him. Indeed, PW4, testified that she pleaded with the appellant to stop beating up PW2.

In those circumstances, I cannot understand how the appellant, who had his hands full, assaulting PW2, could possibly also have been assaulting PW3. In fact, I believe that the answer lies in the passage cited above, in which PW3 said that ***"those people said I was with PW2, and they hit me with stones."***

For those reasons, I hold that the appellant's conviction, on count 2, cannot be sustained. However the conviction on count 1 is well merited, and the same is upheld.

As regards sentence, section 251 of the Penal Code provides that a person who is convicted for the offence of assault is liable to imprisonment for five years.The appellant herein was jailed for two years on each count. In my understanding, a jail term of two years cannot be deemed excessive or too harsh, when the maximum penalty is five years imprisonment.

In conclusion, the appeal succeeds in respect to count 2. The conviction and sentence in that regard are vacated. However, I uphold conviction and sentence on count 1.

It is so ordered.

Dated at Nairobi this 16th day of May, 2005

**FRED A. OCHIENG**

**JUDGE**

Delivered in the presence of:

For State

For Appellant

Mr. Odero Court Clerk