



REPUBLIC OF KENYA

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

CRIMINAL DIVISION

**Criminal Appeal 151 of 2004
(From original conviction(s) and Sentence(s) in Traffic case No. 2830 of 2003 of the
Senior Principal Magistrate's Court at Kiambu (M. W. Wachira - SPM))**

STEPHEN NJOROGE MBURU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant, **STEPHEN NJOROGE MBURU** had been charged with two counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296 (2)** of the **Penal Code** and one count of **GRIEVOUS HARM** contrary to **Section 234** of the **Penal Code**. After the trial, the Appellant was found guilty and convicted of count 3 for the offence of **GRIEVOUS HARM** contrary to **Section 234** of the **Penal Code** and sentenced to serve 7 years imprisonment. The Appellant was aggrieved by the conviction and sentence and therefore lodged this appeal.

The facts of the prosecution case were that on the night of 15th February 2003 at Kiambururu trading centre, robbers struck. They broke into the house of PW1 and PW2, the Complainants in counts 1 and 2, and robbed them of cash and other items. PW3, who had walked out of his house to look for the watchman after hearing commotion was attacked outside. PW3 is the Complainant in count 3. PW3 said that as he stood under electric lights, along the corridor of buildings at the trading centre, he came face to face with the Appellant whom he knew before. The Appellant struck him with a 'panga' on his face and he fell down unconscious. He woke up at Kenyatta National Hospital the next morning. The next morning PW3 gave the name, the identity and particulars of the Appellant to the Area Chief, the Assistant Chief and PW1 when the three visited him in Hospital. PW3, the investigating officer of the case arrested the Appellant on 17th, 2 days later. The Appellant was then charged. PW5, Dr. Kamau confirmed the injuries suffered by the Complainant, PW3, to be grievous harm and produced the P3 form in that regard.

The Appellant gave an unsworn statement in which he stated that he was asleep at home at the time the offence was committed. He said that he learnt of the robbery the next morning.

In this appeal, the Appellant raised three grounds of appeal. The first is that the evidence against him was that of a single witness which received no corroboration. Secondly that the learned trial magistrate rejected his alibi defence yet it was not dislodged by the prosecution. Finally that the sentence was harsh and excessive.

This appeal was opposed. **MISS MWENJE**, learned counsel for the State submitted that the

circumstances of identification were favourable and that PW3 knew the Appellant quite well.

On the issue of identification it is true that the basis of the Appellant's conviction was the identification evidence of PW3. PW3 came from the same place as the Appellant and he demonstrated clearly that he knew the appellant quite well prior to the incident. In fact he described him to PW1, the Complainant in count 1 and the Area Chief and the Sub-Chief and that was how the Appellant was arrested. The matter of concern however is how PW3 identified the Appellant. First of all, PW3 had woken up from sleep and had gone out of his house to look for the watchman. PW3 was therefore fully awake and alert by the time he was attacked. PW3 explained that he searched for the watchman at his position but could not find him. He then walked along the verandah of the shops at the trading centre which he said was well lit. He was aware that there were intruders before he came face to face with a group of people carrying crude weapons including 'pangas' and rungas. It was as he started screaming that the Appellant, whom he knew, approached him carrying a panga, under the full glare of the lights. The Appellant then struck him on the face with the panga, upon which he fell down and lost consciousness.

The evidence of identification by a single witness must be treated with extreme caution especially where the identification is at night under difficult circumstances. See **REPUBLIC vs. TURNBULL & OTHERS (1976) 3 WLR 455**. Applying the principles in the **Turnbull's case** (Supra) I find that PW3 saw the Appellant for some time and that, his was not a fleeting glance of the Appellant. PW3 saw the Appellant both from a distance and as he approached him until the point when the Appellant struck him with a 'panga'. The evidence of PW3 is very clear that his view of the Appellant was not impeded in any way. PW3 also knew the Appellant and even the Appellant's family before and it was the description and names he gave to PW1 and others that led to the Appellant's arrest. The lighting at the corridor where the Complainant, PW3, was attacked was described by him as electric lights. Taking into account the sequence of events leading to the attack, the fact that the Appellant approached PW3 from a distance unimpeded before striking him, the fact that PW3 knew the Appellant and was already aware of an unusual commotion as he walked out of his house and was fully awake and alert, the fact that there were electric lights on at the scene, all these factors in my view clear any doubts one may have of PW3's ability to see and recognize the Appellant.

I have re-evaluated the evidence adduced before the trial court while bearing in mind that I neither saw nor heard the witnesses and I have given due allowance for that as expected of a first appellate court. See **OKENO vs. REPUBLIC 1972 EA 32, NGUI vs. REPUBLIC 1984 KLR 729**. I am fully satisfied that the identification of the Appellant by PW3 was both positive, safe and free from any possibility of error or mistake. The Appellant contends that his alibi defence was not considered. That is far from the truth. I have on my part considered his defence, that he was asleep at the time this offence was committed. I am satisfied that he was properly identified by PW3 as the one who attacked and grievously injured him using a panga. PW3's evidence as to the nature of the injury and the kind of weapon that could have caused the injury was corroborated by Dr. Kamau's evidence. The charge was therefore proved as required. I find no merit in the Appellant's appeal against the conviction and consequently uphold the same.

In regard to the sentence, it was the Appellant's contention that it was manifestly harsh and excessive to the level of being unjust. **MISS MWENJE** submitted that in light of the injuries suffered by the Complainant and the fact that he was admitted in hospital for two months, that the sentence of 7 years was lenient.

The offence of **GRIEVOUS HARM** contrary to **Section 234** of the **Penal Code** calls for a maximum sentence of life imprisonment. I see from the P3 form in respect of PW3, exhibit 1, that the injuries the Complainant suffered caused a depression, a scar and fracture on the nose, nasal bridge and zygomatic bone, the fracture of maxillary segments and fracture of the hard palate. The Complainant was admitted in hospital for two months. These injuries were very severe. The Appellant is also not remorseful for the offence.

Considering the circumstances of the offence, the seriousness of the injuries suffered by the Complainant and the Appellant's lack of showing any remorse for the offence, the sentence of 7 years imprisonment is

quite fair. I will not disturb it instead I confirm the sentence as well.

The upshot of this appeal is that it is dismissed in its entirety.

Dated at Nairobi this 17th day of June 2005.

LESIT, J.

JUDGE