REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

Criminal Appeal 212 of 2004

(From Original Conviction(s) and Sentence(s) in Criminal case No. 944 of 2003 of the Resident Magistrate's court at Githunguri (C.V. Odembo – R.M.)

MOSES MATHU KIMANI…………..………………….................……….……..APPELLANT

VERSUS

REPUBLIC ……………………..……….………………................…….…………..RESPONDENT

J U D G M E N T

The Appellant was convicted for one count of **GRIEVOUS HARM** contrary to **Section 234** of the **Penal Code**. He was sentenced to serve 8 years imprisonment with hard labour. Being aggrieved by the conviction and sentence he lodged this appeal.

The facts of the prosecution case are that on 31st January 2003, the Appellant went to the Complainant's house at 8.30p.m. He demanded to see the Complainant, forcing the Complainant's wife (PW2) to call him from the bed. That when the Complainant appeared the Appellant demanded Kshs.500/- which the Complainant owed him. The Complainant then requested him to go for it the next day. The Complainant then escorted the Appellant out of his house but after a few paces, the Appellant produced an axe he had in his clothes and cut the Complainant on the neck. The Appellant was a butcher. That when the Complainant screamed before loosing consciousness, his wife PW2 heard and went out to check. PW2 found him near their shamba, lying with an injury on the neck. She screamed and the Complainant's mother and sister went out to them. Eventually they looked for a vehicle and took the Complainant to hospital where he was admitted for seven days. The Complainant was issued with a P3 form which the doctor completed showing that the Complainant had suffered grievous harm. The Doctor found that there was a deep cut on neck region which caused paralysis of the left hand.

In his defence, the Appellant stated that when he went for his money in the Complainant's house, PW2 told him that he was not in. He then left. That the next day he learnt that the Complainant had been attacked. He said that the Complainant was a drunkard according to PW2. He denied the offence.

The advocate, **MR. KAMANDE** argued the appeal on behalf of the Appellant. His first ground of appeal was that the charge was defective in that it did not give sufficient particulars. He submitted that the charge sheet did not show the time when the offence was committed, neither did it give details of any injury suffered or how in terms of the weapon used, the injury was inflicted. That the said particulars should have been included in the charge to enable the Appellant to know what charge he was facing since he was unrepresented.

MISS NYAMOSI, learned counsel for the State submitted that the charge was not defective as alleged

by counsel for the Appellant. **MISS NYAMOSI** submitted that the injury suffered was clearly indicated as grievous harm. The counsel further submitted that the time of the offence was not necessary to be included in the charge. The counsel submitted that the Appellant knew the charge he was facing.

The charge against the Appellant read as follows: -

> ***"Grievous Harm contrary to section 234 of the Penal Code MOSES MATHU KIMANI. On the 31st January 2005 at Karia Village in Kiambu District of the Central Province did grievous harm to JOSEPH THUKU KAMAU."***

The particulars of the charge indicate the date of the offence. That date is sufficient particulars to enable the Appellant to know when it is alleged that he committed the offence. The actual time of the offence need not be shown on the charge.

The particulars of the charge also sufficiently indicate the nature of the injury that the Appellant is alleged to have caused the Complainant. Indeed the injury named in the particulars of the charge was at tandem with the offence charged and the section of the Penal Code invoked. It was not necessary to include in that charge the weapon alleged to have been used to cause the injury. That would be in my view superfluous. How the offence was committed and with what weapon was a matter of evidence.

In **YONGO vs. REPUBLIC 1983 KLR 319** it was held that a charge is defective under **Section 214(1)** of the **Criminal Procedure Code** where the charge does not accord with the evidence adduced at the trial or where it gives a misdirection of the alleged offence in the particulars.

I have carefully re-evaluated the evidence on the record of the proceedings. I am satisfied that the evidence adduced by the prosecution was in accord with the charge and its particulars. I am also satisfied that there was no mis-description of the offence in the particulars of the charge.

I have also considered the Appellant's defence. The Appellant gave a complete answer in response to the charge admitting that indeed he visited the Complainant's home on the night in question in the charge as the Complainant and his wife alleged. He however denied that the Complainant was home. The Appellant said that PW2 informed him that the Appellant was not home.

From his defence I am satisfied that the Appellant knew what charge he was facing, the time of the alleged offence and what it is that he was alleged to have done to the Complainant. Having applied all the tests and the principles applicable in determining whether the particulars of the charge were sufficient and whether the charge was defective, I am satisfied that the charge was proper and that the particulars were sufficient to disclose the offence charged.

The second issue argued is that of identification. It was **MR. KAMANDE's** contention that apart from the arresting officer PW5, none of the other witnesses identified the Appellant. He submitted that the nature of lighting at the area where the offence was committed was poor. He submitted that the fact that PW2 went out with a lamp to look for the Complainant was evidence that the area was dark. **MR. KAMANDE** also submitted that since the Complainant did not tell his wife, PW2 and his mother, PW3, at the scene who had attacked him, that was evident that he did not know who did so. **MR. KAMANDE** challenged Complainant's failure to report to police immediately the offence was committed and the delay in the Appellant's arrest as proof that the Complainant did not know who attacked him.

MISS NYAMOSI submitted that the evidence of PW1 and PW2 was clear that the Appellant had gone to their house to demand for money before the Complainant offered to escort him. That in the circumstances, identification by recognition is not in issue.

The Complainant's evidence of identification by recognition is very clear in this evidence. The Complainant said he was visited by the Appellant who demanded back Kshs.500/- that he had lent to the Complainant. That evidence is corroborated by PW2. After the Complainant persuaded the Appellant to get the money the next day, the Appellant agreed to be escorted out by the Complainant. The

Complainant stated that it was at the time that he escorted the Appellant that he removed an axe from his clothes, then told him to keep the Kshs.500/- before cutting him on the neck region. PW2 confirms that the Complainant and the Appellant left their home together and that shortly later he heard the Complainant's cry before going to find him lying on the ground.

The fact that PW2 went out with a lamp is proof that outside the house was dark. However, I am satisfied that the Complainant was very clear of how the Appellant attacked him since the Complainant had both seen and spoken with the Appellant before the attack. The lamp carried by PW2 came in after the act and long after the Appellant had been with the Complainant and PW2 in the house before leaving with the Complainant. The fact that the attack was soon after the Complaint and Appellant walked out and the fact that the Appellant disappeared from the scene soon thereafter points irresistibly to the Appellant's guilt. That evidence should also be considered against the Appellant's admission that he had been to the Complainant's house that evening to get his money back.

I have also considered the submission by **MR. KAMANDE** that delay in reporting to the Police should be interpreted to mean that the Complainant did not know his assailant. The Complainant's evidence was that he fell unconscious after the attack and was admitted in hospital for a week. We see from the doctor's evidence that the Complainant suffered paralysis of the left hand as a result of the injury inflicted on him. Taking all into account, the Complainant's delay in going to the police is perfectly explained and excusable. As for the delay in arresting the Appellant, PW5 explained that he tried to look for the Appellant at least once but failed. The evidence of PW5 is clear that several attempts to arrest the Appellant were made before he was arrested. All these show clearly that the Complainant was clear who caused him the injury and that he had given the information, first to his wife and later to his mother and finally to the Police.

On the Complainant not being clear on whether an axe or butchers knife was used by the Appellant to cut him, I do not find this inconsistency in Complainant's evidence material. An axe and a butcher's axe may well fit the same description. It is material that what the Complainant saw was a sharp object which was consistent with the doctor's finding of what may have caused the injury in question.

MR. KAMANDE submitted that **Section 211** of the **Criminal Procedure Code** was not complied with by the learned trial magistrate because the Appellant indicated he had no witness to call on a different date.

I have looked at the proceedings on 27th January 2004, the magistrate read the following ruling to the Appellant:

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> ***"Court***
>
> ***I find the accused person has a case to answer. Section 211 of the Criminal Procedure Code has been complied with.***
>
> ***Accused – I will give unsworn statement. I want another date.***
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> ***Court:***
>
> ***Defence hearing 11.02.04.***
>
> ***C.V. ODEMBO R.M.***
>
> ***27.1.04***

On 11.02.04 the record shows;

"Accused present unsworn statement – No witness"

Having considered the totality of what was entered in the record on 27.01.04 and 11.01.04, I am satisfied that the court sufficiently complied with the provisions of Section 211 of the **Criminal Procedure Code.**

More importantly, I am satisfied that the Appellant fully appreciated his rights under the said provisions and he opted to give an unsworn statement and to call no witness.

On remarks made by the trial Court, both in the proceedings and the judgment. The remarks ***"Mother of Accused in Court. Elizabeth Nyamira***" at page 7 have been challenged. Whereas the remarks have no relevance to the case at hand, I do find they were in the nature of a slip of tongue. They were irrelevant and should not have been recorded. I am however satisfied that they did not prejudice the Appellant in any way. On the trial magistrate's finding that the Appellant went into hiding, I consider that an observation which could be made having considered the totality of the prosecution case. The Appellant did run from the scene on 31.01.03. He was not seen again until 20.05.03. It's also clear that attempts to arrest the Appellant were made by PW5 but in vain. The inference that the Appellant went into hiding in my view was justified from the evidence before court. **MR. KAMANDE** challenged the trial magistrate's finding that the Appellant asked the Complainant to escort him while PW1 said it was him who offered to do so. It is important for the trial court to get the facts of the case as per the evidence before it. However, on the particular issue raised, I do not see what prejudice the Appellant could have suffered. The fact is that both the Complainant and the Appellant left the Complainant's house together and voluntarily just before the attack.

MR. KAMANDE submitted that the learned trial magistrate was a Resident Magistrate and so exceeded her jurisdiction when she imposed 8 years imprisonment. **MISS NYAMOSI** did not think that the jurisdiction was exceeded. In any event, **MISS NYAMOSI** contended, if any jurisdiction in sentencing was exceeded, the appellate court could exercise its discretion under B of the **Criminal Procedure Code.**

Section 7(2) (a) of the **Criminal Procedure Code** provides;

> ***"Subject to subsection (1), a subordinate court of the first class may pass the following sentences in cases where they are authorized by law –***
>
> ***(a) Imprisonment for a term not exceeding seven years."***

The first schedule of the Criminal Procedure Code shows that an offence under Section 234 of the Penal Code can be tried by a magistrate of the first class. Under **Section 2** of the Magistrate's Courts Act "a magistrate's court of the first class" is defined as follows: -

> ***"The resident magistrate's Court or a district magistrate's court held by a district magistrate's court of the first class."***

Under **section 7(2)** of the **Criminal Procedure Code** the subordinate Court of first class also means a Resident Magistrate. Resident Magistrate was the rank of MISS C.V. ODEMBO, the leaned trial magistrate at time she heard and determined this case. The jurisdiction of a Resident Magistrate under **Section 7(2) (a)** of **Criminal Procedure Code** is seven years imprisonment. The learned trial magistrate therefore exceeded her powers by one year when she imposed the sentence of 8 years imprisonment.

I have considered the offence committed by the Appellant and the circumstances of the same. The sentence of 8 years is neither harsh nor excessive. In exercise of the powers given to this Court under **Section 354** of the **Criminal Procedure Cod**e, I would maintain the sentence of 8 years imprisonment with hard labour as imposed by the trial magistrate, from the date of sentence. Even though the jurisdiction of the Court was exceeded by one year, I now confirm the sentence imposed as an appellate Court in its discretion under Section 354 of the Criminal Procedure Code.

Having considered this appeal, I find it has not merit at all and do dismiss it in its entirety.

Dated at Nairobi this 13th day of July 2005.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of;

LESIIT, J.

JUDGE