



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 255 OF 2003

**(From Original Conviction and Sentence in Criminal Case No. 1254 of 2003
of the Senior Resident Magistrate's Court at Kwale L.N. Mbatia, SRM)**

MWARUWA NDOLO APPELLANT

- Versus -

REPUBLIC RESPONDENT

J U D G M E N T

The Appellant was, with two others, charged with the offence of conspiracy to murder contrary to section 224 of the Penal Code. He alone also faced two additional charges the first one was grievous harm contrary to section 234 of the Penal Code and the second charge was of assault causing actual bodily harm contrary to section 251 of the Penal Code. After a full trial the Appellant and the other two were all acquitted of the first count of conspiracy to murder. He was however alone convicted of the other counts.

In respect of grievous harm he was sentenced to 5 years imprisonment. On the count of assault causing actual bodily harm he was fined sh. 10,000/= or 12 months imprisonment in default and the sentences are to run consecutively. The Appellant has appealed against both conviction and sentence on the two counts.

The particulars of the two counts on which the Appellant was convicted were firstly GREVIOUS HARM CONTRARY TO SECTION 234 OF THE PENAL CODE in that on the 21st day of March 2002 at around 8.00 p.m. at Dairy Village, Mkongani location in Kwale District within Coast Province unlawfully did grievous harm to MWOLOLO MUTHIANI.

The other count was ASSAULT CAUSING ACTUAL BODILY HARM CONTRARY TO SECTION 251 OF THE PENAL CODE in that on the 21st day of March 2002 at about 8.00 p.m. at Dairy Village Mkongani location in Kwale District within Coast Province unlawfully assaulted CHARLES KIETI KISENGI thereby causing him actual bodily harm.

The facts of the case were that on the 21st March 2002 at about 7.30 p.m. the two complainants, Mwololo Muthiani (P.W.1) and Charles Kieti Kisengi (P.W.2) were seated out of P.W.2's house having a meal. There was bright moon light. The Appellant armed with a bow and an arrow went to the house of P.W.2 and asked for P.W.1. He could not clearly see P.W.1's face as P.W.1 was seated on a verandah. When asked why he wanted P.W.1 he said he wanted money which P.W.1 knew of. P.W.1 then spoke and asked the Appellant to sit and that he could give him money even if he did not owe him any. At this juncture the Appellant asked P.W.2 and his children to go into the house. Apparently apprehensive P.W.1 also attempted to enter the house but he was shot before he entered. The arrow went through one side of his abdomen and existed on the other and also hit P.W.2 on the buttock. The Appellant thereafter fled. The complainants reported the matter to police and sought medical treatment.

The complainants said they knew the Appellant very well as he was their neighbour. P.W.2 added that he knew the Appellant's voice. The Appellant on his part also said he knew P.W.1 very well since childhood.

He said that P.W.1 could not be mistaken on his identity just as he could not be mistaken on P.W.1's. At the hearing of the appeal the Appellant tendered written submissions in which he strongly submitted that his conviction was based on mistaken identification. He relied on the evidence of P.W.9, the Police Officer at Kwale Police Station who received the report of the attack from the complainants. That Police Officer in cross-examination by the Appellant and in re-examination said that "... the reportee did not know the name of the attacker. He did not tell me who it was. The complainant told me it was dark and he did not know who attacked him."

As I have said the Appellant strongly submitted on this evidence and even quoted authorities. One of the cases he cited is *Tekerali & Others Vs Republic Cr.App. No. 182 of 1952 Vol.9 EACA 259* in which it was held:-

"Evidence of first report to the person in authority are important as they often provide a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or made up case."

I have anxiously considered this evidence. It stands alone. P.W.1 and P.W.2 were emphatic on their identification of the Appellant. P.W.2 even knew the Appellant's voice. The Appellant was their neighbour and is someone they knew from childhood. Appellant himself said he could not be mistaken on the identification of P.W.1 and vice versa.

Apart from the evidence of the complainants there was also circumstantial evidence. There was evidence from several witnesses including the Appellant's mother that immediately after the attack on the complainants the Appellant went into hiding for about two months. When he returned he was anxious about what people said of the attack on P.W.1.

In ***Gathaga -Vs- Republic [1984] KLR 652*** circumstantial evidence of the accused's disappearance after causing grievous harm was taken into account and provided corroboration of other evidence.

There is also another Police Officer who testified as P.W.10. He did not say anything about the alleged report that the attacker was not known. On a full consideration of the evidence on record I am satisfied that the Appellant was positively identified by the complainants as their attacker.

They had no reason to frame the Appellant. I believe their evidence that there was bright moon light which enabled them to identify the Appellant.

Otherwise how could they have been eating outside in darkness.

Accordingly I dismiss the appeal against conviction.

The sentences are not harsh. Grievous harm carries a life sentence.

The appellant escaped with only a five year term after almost killing P.W.1

The Appeal against sentence is also dismissed. In the result the appeal against both conviction and sentence is dismissed.

DATED this 16th day of January, 2004.

D.K. Maraga

Ag. JUDGE