



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**APPELLATE SIDE**

**CRIMINAL APPEAL NO.269 OF 2001**

SAMUEL GICHURUMAFULA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO.270 OF 2001**

JOHN MARTIN KITHEKA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being appeal from Original Conviction and Sentence in Criminal Case No.3965 of 2001 of the Resident Magistrate's Court at Mombasa –A.W. Ngugi, RM)

**J U D G M E N T**

The appeals Nos.269 and 270 both of 2001 were consolidated at the request of the State Counsel and with no objections by the Appellants. The appellants were both charged with the offence of causing Grievous Harm contrary to Section 234 of the Penal Code in that on 26th November 2000 at Changamwe in Mombasa District jointly with others not before the court unlawfully did grievous harm to Thomas Onyango George.

They were sentenced to serve 6 years imprisonment.

The prosecution evidence is that on 26/11/2000 the complainant was seated outside the house at 7.00 p.m. He was talking to 2 friends. A gang of 7 people with pangas, pipes and swords appeared. He said that the 2nd accused told him that the village elder was calling him. Then they started slashing him with pangas on head and neck. He screamed. Apparently his friends ran away. Neighbours came and accused No.1 was arrested. He said he saw the second accused on 29/12/2000. At the end of this evidence the court observed that the accused was mad and suggested he be taken to a psychiatrist. No further of his observation was heard.

PW.2 was a police constable said that when accused was brought to the station on 26.11.2000 by members of public he had assaulted someone. Later complainant came to police station on 29/12/2001. The second accused was also brought. PW.2 arrested him.

PW.3 is the friend who was sitting with the complainant outside the house when a group of 7 men appeared, one of them said "he is here" (Thomas complainant) He saw one man with rastas and he thought he was the ring leader. This witness was not able to identify any of the accused persons.

The State Counsel does not support conviction and sentence. She submitted that the accused persons were not identified and that there was no reliable evidence. I agree with her. There were 7 persons armed with pangas and it is essential that the person or persons who hit the complainant should be identified positively. As it is no one saw the appellants hit the complainant. The principle in criminal law is that it is better for an accused person to be let free than an innocent person be punished.

In this case the principle is most applicable. There was no positive identification that the appellants out of the seven men were the ones who assaulted the complainant. In the circumstances the trial Magistrate convicted on unsafe evidence. I therefore allow the appeal. The appellants shall be set free forthwith unless lawfully held.

Dated at Mombasa this 10th Day of July, 2001.

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**