



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 3 27 OF 2018

REPUBLIC (through Office of the Director of

Public Prosecutions-Siaya County).....APPELLANT

-VERSUS

1. NICHOLAS OOKO NJUNGA.....1ST RESPONDENT

2. MICHAEL OTIENO JUNGA2ND RESPONDENT

3. ALICE OWUOR NJUNGA.....3RD RESPONDENT

(Appeal from the proceedings, Judgment and acquittal of the Respondents by Hon. T. M. Olando, SRM in Siaya Principal Magistrate's Court Criminal Case No. 379 of 2017 on 3rd May, 2018)

JUDGMENT

1. The appellant herein being the Republic through the **Office of the Director of Public Prosecutions** at Siaya was the **Prosecutor** in the trial Court whereas the Respondents herein were the Respondents. The Respondents were jointly charged with two counts of the offences of grievous harm contrary to section 234 of the Penal Code. In the second count they faced a joint charge of assault causing actual bodily harm. Particulars of the offences were that on the 24th day of July 2017 at 13.30 hours at Achewa Village, Kogelo Sublocation, South Alego Location in Siaya sub county within Siaya County, jointly with another not before court, the three Respondents did grievous harm to Daniel Otiemo Odaga. In the second Count, the Respondents were Respondent of assaulting one Kennedy Ouma Owadho.

2. The Respondents denied the offences in a plea of not guilty entered on 28/7/2017 and the trial commenced on 3/8/2017. The Respondents were represented during the trial by Mr. Dola Advocate. They were also released on bond pending trial. At the end of the trial, the Respondents were found not guilty of the offence and were acquitted under section 215 of the Criminal Procedure Code. Aggrieved by the said acquittal of the Respondents, the Office of Director of Public Prosecutions, Siaya County filed this petition of appeal setting out the following grounds of appeal:

- i. The Learned Senior Resident Magistrate erred in law and fact to find and hold that it is not possible to conclude that the Respondents actually assaulted the Complainants in the case.*
- ii. The Learned Senior Resident Magistrate erred in law and fact to hold that the Respondents were not guilty as charged.*
- iii. The Learned Senior Resident Magistrate erred in law and fact in acquitting the Respondents under Section 215 of the Criminal Procedure Code against the weight of evidence available on record.*
- iv. The Learned Senior Resident Magistrate erred in law and fact in disregarding the evidence adduced by all Prosecution witnesses and failing to properly analyze and/or evaluate the evidence on record to assist the Court come to ad conclusion that is sound in law and compatible with the evidence adduced at the trail.*
- v. The Learned Senior Resident Magistrate erred in law and fact by acquitting the Respondents when the Prosecution had proved the Respondents' actual presence at the scene of crime.*
- vi. The Learned Senior Resident Magistrate erred in law and fact in failing to consider that the contradictions in evidence, if any, were of a minor nature which should not have been used as a basis of acquitting the Respondents.*
- vii. The Learned Senior Resident Magistrate erred in law and fact in acquitting the Respondents when the Prosecution had proved*

the Respondents guilt beyond reasonable doubt as required in law.

3. The appellant prayed that this appeal be allowed; the judgment dated 3.5.18, by Honourable T.M. Olando, SRM, Siaya, be quashed and/or set aside and the Respondents herein be convicted and sentenced as appropriate and/or that the Siaya Principal Magistrate's Court Criminal Case No. 379 of 2017, be referred for retrial before a different Magistrate altogether.
4. In determining this appeal, this Court is alive to the principles laid down in ***Okeno v Republic [1972] E.A. 32*** that an Appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (***see also Pandya Versus Republic [1957] E.A. 336***) and to the Appellate Courts own decision on the evidence, the first Appellate Court must itself weigh conflicting evidence and draw its own independent conclusions.
5. Further in ***Shantilal M. Ruwala Versus Republic [1957] East Africa 570*** it was held that it is not the function of a first Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the Lower Court's findings and conclusions, it must make its own findings and draw its own conclusions, only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses as they testified. (***See Peters Versus Sunday Post [1958] East Africa 424.***)
6. Examining the evidence adduced before the trial court, **PW1 Elizabeth Atieno**, from Kisumu and working in the United Kingdom testified that on 24/7/2017 she had some issues with her mother in law Alice Owuor who is the third Respondent in this appeal. PW1 therefore sent two ladies to go and talk to the third Respondent. The two ladies went but were told by Alice to go tell PW1 to personally go to meet and talk to Alice at her home.
7. According to PW1, she did not know that her ex-husband Nicholas Ouko who is the son to the first accused and the first Respondent herein was there. She therefore went to the home but did not find her said mother in law the 3rd Respondent. She called the 3rd Respondent to inform her of her arrival and that as they talked on phone, PW1 could hear the 1st Respondent Nicholas saying that PW1 should leave. PW1 saw the door to her former house open so she entered the house and picked two of her suit cases and she told her brother Daniel Otieno the complainant in count one to place the suitcases on a motor bike. They then left and on their way, the 1st Respondent Nicholas attacked them and punched PW1 on the right side and she fell down. Her brother and cousin went to her rescue but the 1st Respondent called his brother Michael, the 2nd Respondent who went where they were on a motor cycle while carrying a panga. He jumped and tried to cut PW1's brother. They put PW1's brother down and they began to assault him. The 3rd Respondent got hold of the neck of PW1's brother and the other two Respondents began to assault him. PW1 stated that there was also another man. PW1 then heard women making noise and the Respondents left and went to report to the police that they had killed a thief. They took PW1's bag. PW1 and her entourage left and reported the incident at Kogelo police station. That at that time, the attackers had had tied PW1's brother with the rubber.
8. She stated that she had known the 1st Respondent in 2014 and that they had been married and had a home in Kenya and they planted trees at their matrimonial home.
9. PW1 further testified that she had simply gone to her matrimonial home to collect her belongings when her and those who accompanied her were attacked by the Respondents.
10. On being cross examined by Mr. Dola Advocate for the Respondents/accused persons, PW1 stated that Francis was her white husband but that they were since separated. She stated that she was a citizen of the UK hence she did not require a Visa to travel to the UK. She stated that she was separated from her husband at the time she met and lived with Nick the first Respondent as husband and wife. She denied that the 1st Respondent told her that he was married but that later she learnt that he was a married man that is why she ended the relationship. She maintained that she could not have had the relationship with the 1st Respondent if she knew that he was married. She stated that he did not pay dowry. She also stated that her child was not born of the 1st Respondent, and that she helped the 1st Respondent to build their home and they also renovated the house of her mother in law. She denied the suggestion that the 1st Respondent forced her to build the house as they were building the home as husband and wife.
11. She stated that she ended her relationship with Nick in February of the same year after she learnt that he was married but that she had not left with her belongings.
12. PW1 also stated that they were six people on the material day and that before going to the home, she had called the 3rd Respondent who asked her to go. She added that once she was in the home is when she called 3rd Respondent.
13. She stated that when the 3rd Respondent told her to leave, she obliged but took her suitcases only and that she later learnt that what was in the said suitcases did not belong to her. She also stated that she heard the 1st respondent talk and say that she should take her belongings and leave. She maintained that she was assaulted by Nick and his brother and their mother. She reiterated that Nick attacked them on the main road. She stated that they had two pangas and that there was no rungu, and that another person was hitting Daniel with stones and Mike also used stones. She stated that the 2nd Respondent is the one who had a panga and that they tied her brother and put the firewood on him.
14. **PW2 Daniel Otieno Odaga** from Kathomo recalled that on 24/7/2017 his sister Elizabeth Francis (PW1) requested him to take her to see the mother to Nick. They first went to a bar to take some soft drinks and she sent some ladies to call for her mama Nick and when they returned, the ladies Nyaloka and mama Liz told her that mama Nick had said that she should go home. They therefore accompanied PW1 to the home of Nick but they did not get Nick and the mother. They only found his father. PW1 then called Mama Nick and that Nick told her that she was free to take her things as the door was open. They therefore entered the house and Elizabeth took the suit case then gave the luggage to a motorcyclist commonly known as bodaboda to carry for her as PW2 and other walked on foot. About 600 metres into the road, they met Nick who began to assault Nyaloka and he also hit Elizabeth with a panga.

15. That they held Nick but he called his brother and the brother came together with the mother and they had a panga and they began to cut PW2 with the panga. The 3rd Respondent cut PW2 on the waist and the 2nd Respondent cut PW2 on the legs. That the 1st Respondent cut PW2 several times and they went and reported to the police that they had killed a thief. That they also took fire wood and they wanted to burn PW2.
16. The police came and he was taken to Nyangoma hospital and later to Kisumu hospital and later brought to Siaya Referral hospital and Bama hospital. He was issued with a P3 form. He identified the P3 form and treatment notes from Hospital and the trouser, shirt with blood stains and the rope. He denied having had a prior dispute with the respondents.
17. In cross examination, PW2 maintained that they had no dispute with PW1's Mother-in-law. He stated that they sent the two ladies to call the 3rd Respondent but she asked them to go to her home. He stated that there was a dispute between Nick and Elizabeth and that they were taking Elizabeth (PW1) to go and see the mother in law. He stated that he is the one who told PW1 to call her mother-in-law to come to the Centre.
18. He further stated that they had 4 motor cycles and that they were 6 people, all siblings, namely, **Benter, Ken** and **Okolo, Janet, PW2** and **Elizabeth**. He acknowledged that there was a problem between Elizabeth and Nick but stated that on that material day they were not going to solve any problem. He stated that the Bar where they took only soft drinks had a restaurant .
19. He stated that they had heard that Nick had another wife but that he did not know that there would be any disagreement or a fight. He stated that Mama Nick called all of them and that Elizabeth told them to go together. He said that when Elizabeth called Mama Nick, Nick took the phone and told Elizabeth to take her property. He stated that they did not call Nick but that Nick was talking in the back ground.
20. PW2 also added that they found Nick's father in the house and Elizabeth talked to him. He reiterated that they entered the house which was open and took the belongings of PW1 but later they discovered that there were children's clothing in the bags so they took them to the police station. He stated that Nick told PW1 to take her things including the iron sheets but that she only took two suit cases and one mattress. He stated that the father of Nick was present and another woman who was there told Nick that they were taking their items. He stated that Elizabeth told Nick's father that they were now leaving. He maintained that Nick is the one who told Elizabeth to take her property.
21. He stated that there was a house under construction and that a person who came from the construction site is the one who wanted to burn PW2.
22. PW2 further stated that Nick and the brother came with a panga and assaulted PW2. He stated that the incident took place on the public road. He stated that Nick cut him on the hand and Micheal cut him on the head. That Nick's brother came with a panga and another person also came with the panga. That Nick and the brother and the mother all cut PW2 with the panga. That there were two pangas and that Nick pushed PW2 down and the 2nd Respondent Michael cut PW2 on the head. That Kennedy was present and that the 2nd Respondent chased Kennedy with a panga and cut him, while the other person who tied PW2 with a rope had not been arrested. He maintained that the 1st and 2nd Respondents cut him and that Nick took the panga and cut him on the hand. He also stated that the 2nd Respondent cut him on the head, the 3rd Respondent also took the panga and hit him on the thigh and that Kennedy was also cut with the panga. He stated that he had been disabled by following the assault.
23. In reexamination PW2 stated that the other person only put firewood on him with a view to burning him but that he did not cut him.
24. **Kennedy Ouma Owadho the complainant in the second count** testified that as PW3 and recalled that on 24/7/2017 they were at Nyangoma, having escorted his sister PW1 who wanted to speak to her mother-in-law and that PW1 had a dispute with her husband, Nicholas, the 1st respondent herein. PW1 sent Benter and Auma to go and call Mama Nick. When they went there she told the team to go home so that they could talk at home. They went to her home but they did not get Mama Nick, and only found baba Nick.
25. That Elizabeth called the mother in law on phone but Nick said that Elizabeth should take her things and go. Elizabeth went into the house and took two bags and a mattress. On their way they met Nick (1st accused) who began to assault Elizabeth. The said Nick called the brother and mother on phone that is the 2nd 3rd Respondents respectively who came and they had a panga. PW3 held Nick and another person came with a panga and gave Nick the panga and Nick cut the witness on the hand. The 2nd Respondent also cut PW3 on the head with a panga and the 3rd hit PW3 on the legs. PW3 ran away and hid in a bush and later some people went and helped him and took him to Siaya Referral hospital. PW3 reported at Nyangoma police station and he was given a P3 form which was later filled. PW3 also identified treatment notes from Siaya County Referral Hospital as PMFI8, the clothes he wore on the material day which were blood stained, the blood stained striped shirt PMFI 9.
26. PW3 stated that Nick and Elizabeth had been married for about two years.
27. In cross examination by Mr. Sakwa Advocate for the Respondents, PW3 stated that Elizabeth and Nick were not living together. Further, that when they went to the home of the Respondents, they did not expect any problem as they were welcome by Mama Nick (3rd Respondent herein) whom Elizabeth had called earlier and as they had received information from Benter and another lady that Elizabeth was welcome.
28. He reiterated that they had motor bikes and that after PW1 had entered her house and taken out her items of two bags and a mattress, she gave them to PW3 and others who left on a motorbike but were attacked about 600 away on the road as they were leaving the home of the Respondents. He stated that the door to the house was open.

29. He maintained that Nick's brother and the mother began to assault Dan and that someone came with a panga and gave Nick the panga and Nick's brother the 2nd Respondent also hand a panga and he cut Dan first while Nick cut PW3 with a panga and the brother cut PW3 on the leg and the other person also hit him on the leg. He maintained that the Respondents assaulted him. He denied knowing the other people who went to the scene. He stated that the 2nd Respondent cut him on the head and the 1st Respondent cut him on the hand. He also stated that the 3rd Respondent had a stick and when PW3 fell down he could not tell if she hit him.

30. **PW4 Benter Akinyi** testified and recalled that on 24/7/2017 she left home after being called by PW1 her Aunt to escort her to her mother in law's home. They went to the home and found Mama Nick and they told her that Liz wanted to see her. Mama Nick told them to go and tell Liz to come home. Mama Nick gave them tea after which they went and told Liz that the mother in law had said that she should go home. They then left and went home but when they got there they did not find Mama Nick. She was in the company of Dan, Ken, Liz, Euncie and Janet. They found Nick's father and on asking him where Mama Nick was, he told them that she had gone out shortly. Liz then called her mother in law on phone and she said that they should wait and as they were talking with the phone on loud speaker, Nick spoke and said that Liz should carry her belongings.

31. They then went to the house and Liz removed two bags and a mattress and she told the motor rider to carry the luggage. On leaving the home, Dan and Ken did not board a motor bike since the motor bike they were using was the one which took the luggage. On their way out, they found Nick assaulting Janet and Eunice. Liz then asked Nick why he was assaulting the woman. Nick then turned onto LIZ and started assaulting her. Dan intervened to stop Nick from assaulting LIZ and that is when Nick began to assault Dan and the rider. Nick is said to have ran away to the next home and returned with other people and he took a phone and after some minutes Mama Nick and the brother to Nick arrived with a panga which Nick used to hit people with.

32. She stated that Nick held Dan and they fell down and Mama Nick sat on Dan and the brother to Nick then came with a panga and he began to cut Dan and PW4 picked her phone and left since it was getting worse. She went and reported to the police and recorded her statement. She identified Nick as the 1st Respondent his brother the 2nd Respondent and their mother as the 3rd Respondent.

33. On being cross examined by Mr. Sakwa Advocate for the Respondents herein, PW4 stated that she was the wife to the brother to Liz and that she knew the house of Nick but she had never been to that house. She stated that Dan was her husband while Kennedy was her brother in law. She stated that Liz and Nick used to live together but that they had marital problems and so Liz wanted to speak to Mama Nick.

34. She stated that they were six people who went to the home, with 4 motor bikes and that they all went to Nick's home as a family. She stated that she heard how Elizabeth and Nick were talking and that Mama Nick told Liz to wait but Nick told her to carry her things and leave so Liz went to her house which she build herself, removed two bags and a mattress and put them on a motor cycle. she reiterated her testimony in chief adding that Nick told Liz to take her items and that later on reaching their home, they found the items in the bags not belonging to Liz so they took them to the police station.

35. She stated that one of the people who came from the construction site brought a panga. She stated that she found Nick assaulting the two women who were ahead. That she saw Michael cut Dan with the panga. She did not know who cut Kennedy on the head hand and leg. She added that Mama Nick came and she helped hold Dan down. She stated that they went to the police station at about 1 pm the same day. She blamed Nick for telling Liz to carry away her things.

36. **PW5 Sila Omondi Oluoch** a Clinical Officer attached to Siaya County Referral hospital examined DANIEL Otieno Adala aged 41 years and produced his P3 form as an exhibit. The patient alleged to have been assaulted on 24th July 2017 at around 1.30pm by persons known to him. He was first treated on 24/7/2017 at Kogelo Health Center and later taken to Bama hospital the same day where he was admitted and discharged on 25/7/2017 and upon examination he had blood stained clothes. He was in pain and he had a bandage on the left hand and on the leg.

37. On examination of the head and neck, he had a stitched cut wound on the head at the frontal region measuring around 8cm in length. It was also tender and swollen. At the back of the head he had bruises and slight swelling a skull X ray was conducted and results were normal. He had chest pain on the left lateral region of the chest. Chest x-ray was done and it revealed a fracture of the left 7th rib. He also had scratch marks at the back. He had a stitched cut wound on the left hand and bruises on the hand which were tender and swollen. On the lower limbs he had scratch marks and shallow cut wound on the left leg. He had redness and tenderness and slight swelling. The injury had lasted for two days. The injuries were caused by both sharp and blunt objects. He had been treated and the injuries were classified as grievous harm. He also produced the discharge summary form from Bama Hospital and a treatment book issued at Kogelo dispensary as exhibits.

38. PW4 also examined Kennedy Ouma Owalo who was 36 years and signed the medical report on 26/7/2017. The patient was first treated on 24/7/2017 at Kogelo health center and was taken to Siaya County Referral Hospital the same day. He was admitted on 24/7/2017 and discharged on 25/7/2017. He alleged to have been assaulted on 24/11/2017 at about 1.30pm, by persons well known to him. He had blood stained clothes and he was in fair general condition. On examination of the head and neck he had a stitched cut wound on the head 5cm long and was swollen and tender. A skull x-ray was done and the same was normal. He had tenderness and slight swelling on the right side of the abdomen and he also had chest pain and tenderness. He had bruises on the upper back and on the abdomen. The chest x-ray was done and results were normal. On the upper limb he had cut wound on the left 5th and 4th finger which was tender and swollen. On the lower limbs he had a stitched cut wound on the right leg. The injury had lasted for two days and would have been caused by both blunt and sharp object. He produced discharge summary from Siaya county hospital, treatment book from Kogelo dispensary and medical report as exhibits

39. In cross examination, PW4 reiterated his evidence in chief.

40. **PW6 EUNICE Atieno Omollo** testified that on 24/7/2017 at 8 am, her sister Liz the wife to Nicholas came from abroad she is and requested them to take her to Nicks home as she wanted to speak to Nick's mother. They went up to Nyangoma and were with Benter. They told Nick's mother and she told them to go and tell Liz to go to Mama Nick's home. They relayed the message to Liz who requested them to escort her there. When they went the second time with Liz, they did not get the mother. Liz then called Nick's mother and she informed her

that they were at home. The mother told them to wait, but Nick said that Liz could take her things and go away. She stated that the house was open so Liz entered and removed two suit cases and a mattress and the motor bike that Dan and Ken used left ahead with the items. On their way out of the home, they met Nick and he slapped PW6 and she fell down. People went to the scene and Ken and Dan retreated to stop the assault. Shortly, mama Nick and the 3rd Respondent arrived on a motor bike and they had a panga, which they used to cut Dan. That they cut his head and after they were done, they ran to the police station to record their statements. PW6 went to Nyangoma police station. The police went to rescue Dan.

41. On being cross examined by Mr. Ooro Advocate holding brief for counsel for the Respondents, PW6 reiterated her testimony in chief and added that when they went to see mama Nick, she prepared for them tea hence they did not know of any problem or trouble awaiting them. She stated that they had no weapons and that neither did they go there for a fight. She denied the suggestion by counsel that the boda boda people had pangas. She maintained that it was Nick, his mother and brother who had the pangas, and that Nick cut the 2nd complainant with a panga and Ken, the second complainant sustained severe injuries.

42. **No. 79339 CPL Wilson Amboga** from Kogelo police station testified as **PW7** and recalled that on 24/7/2017 at 1400 hours he was at the office when one Elizabeth Achieng (PW1) reported that she had gone to visit her mother in law but she did not get her at home. She left the home and she was attacked on her way out by Nick, the mother, the brother OF Nick and someone who was a stranger. She reported that Daniel and Ken were injured. PW7 We went to the scene with other police officers and met Daniel on a motor cycle and advised the motorcyclist to take Dan to hospital. Ken also emerged out of the bush with injuries. They proceeded to Kogelo police station and got information that Nicholas and his brother were at the station and PW7 informed the OCS to detain them pending further investigations.

43. The injured complainants were escorted for further treatment at Siaya and P3 forms were issued to them. The 3rd Respondent was arrested and all the three Respondents were charged with the offences in the charge sheet. Blood stained clothes and the rope which they used to tie the 1st complainant were recovered. The blood stained trouser Exhibit 4 and blood stained shirt Exhibit 8 and striped shirt Exhibit 9 and the photographs which were taken of Ken and Daniel while at the hospital Exhibit 10. Were all produced as exhibits.

44. **PW8 No. 86640 P.C Douglas Wamalwa** of CID Siaya testified that on 26/7/2017 at around 10 am while in his office at Siaya police station he recorded a CD scene confirming photograph from Corporal Wilson Amboga of Kogelo police station. The photographs were taken from a scene of grievous harm. He printed the photograph as per the report for the investigating officer, showing the general view of the 1st injured person with injury on the head and the 2nd injured person with injury on the right leg and left hand. He produced as exhibits the gazette Notice number 217 of 28/12/2012 and certificate of Photographic print.

45. In cross examination by Mr. Bagada Advocate holding brief for counsel for the Respondents, PW8 stated that the photographs were not dated and that they were given to him by the investigating officer. He could not tell who took the photographs and where they were taken from.

DEFENCE CASE

46. Placed on their defence, the Respondents gave evidence on oath and denied the charges. The first respondent testified as DW1 and stated that he was Nicholas Njunga Ooko living in Nairobi. He testified that on 24/7/2017 which was a Monday, he left Nairobi for his home and arrived at 11 am. He found his wife sick so he was to take her for treatment. That later, a motor bike came with two passengers and they were people he knew. They entered the house, and followed his mother who was preparing fish in the kitchen and spoke to her for some time.

47. DW1 went and found them still talking to his mother and were saying that Liz his former girlfriend wanted his mother to go and see her at a place where she was. She asked them to go and ask Liz why she did not want to go to his home. That he told them that his mother could not go to see Liz since they had a sick person. That DW1 then left with his mother and his brother to take his wife to hospital. On the way, his mother got a phone call and she told DW1 that it was from Liz.

48. His mother told DW1 that Liz had told her to go home. His mother received another phone call and she was told that Liz had gone home and broken into the house and they had taken items and they wanted to remove the iron sheets. DW1 told his mother that they return home and so they took a motor bike and that on their way, they met a motorbike carrying his two suitcases and one person. He told his mother that the suit cases were his. They turned back to follow the motor bike but it was going at a very high speed and they left it and went back.

49. That on their way back home, they found his mother on the way and he told her to call the police as he boarded a motor bike to go home and his brother the 2nd Respondent was following. That he took the upper route and his brother took a lower route and that as he was getting into the home, he met a group of people on 6 motor cycles carrying 2 people each, so the motor bike he was on stopped to let them pass.

50. That when the people got to where DW1 was, one person called Okola got down and he hit DW1 on the head and DW1 lost a tooth. That Dan also came down and together they were about 13 people. That DW1 run away but Okola and Dan began to follow him, but he escaped into the bush and as they followed him as he screamed and the people who were constructing a house nearby went to his rescue so he got out of the Bush and Dan got hold of him and he began to pull him and his brother Okola came and he opened the motor bike sheet and he removed a panga. Dan pushed DW1 down and Okola came with a panga and DW1's brother also arrived. Okola wanted to cut DW1 but DW1 got hold of his hand and they were pulling the panga.

51. DW1 stated that as he was holding the panga, Mike came and also got hold of the panga. That Okola pulled the panga and DW1 left the panga and when he pulled the panga the panga cut his brother Dan. That DW1 was bleeding and he heard Dan saying that his brother had cut him.

52. That DW1 began to look for Liz his former girlfriend and asked her why they were doing that and she told him that she had gone to pick

her things. That his brother Michael went where they were and Liz took another bike and left. DW1 and his brother went to report the incident to the police at Kogelo police station and he saw Liz leaving with another police officer. His mother was already at the police station. They were detained and escorted to Siaya Police station and charged with the offences. He denied the charges.

53. In cross examination by the prosecutor, DW1 stated that he was injured but he was brought to court and later taken to Siaya district hospital by order of court. He stated that the incident took place on 24/7/2017.

54. **DW2 Michael Otieno Njunga** testified that on 24th July 2017 it was on Monday, at about 11 am, he had left the shamba to harvest maize. Later Nick went with another person and he got up and went to his mother's house where they had entered and after some time Nick told their mother that he wanted to take his wife to hospital. A motor bike carrying two passengers came and they were women, the people were invited into the house. His mother went to the kitchen and the two women followed her into the kitchen and so he also went to the kitchen to see what was going on and found them talking about Liz.

55. That one of the women said that they had been sent by Liz to call the mother to go and see her. They wanted his mother to go to Liz but it was not possible since they were taking Nicks wife to hospital. That they then left and as they were walking past the river, his mother received a phone call. They asked her who had called and she said it was Liz. She received another call. She told DW2 that the 2nd call was from Lilian. That Lilian told her that Liz had gone home and broken into the house and they had taken several items and they wanted to remove the roof.

56. That they took a motor bike to return home. Enroute, they met a motor bike carrying some bags. Nick said that those were his bags so they followed the motor bike but they did not get the motor bike so they returned and stopped near home as their mother went to get a telephone number for the police officer.

57. They then proceeded home and took different routes with Nick. DW2 heard noises calling the names of Nick and Dan and when they went to the place, they found Dan was on the ground while Nick, Okola and Kennedy were fighting. Okola then went to the motor bike and removed a panga. As Okola wanted to cut Nick, Nick got hold of the panga and DW2 also moved and got hold of the panga and Okola pulled the panga with a lot of force and he left the panga and the panga cut Dan where he was standing. That Nick went to talk to Liz and Kennedy took a stick and he wanted to hit DW2 on the head but he blocked and he hit DW2 on the hand. He went with Nick to report the matter to Kogelo Police Station. They were arrested for allegedly assaulting the complainants. He denied committing the offences.

58. **DW3 Alice Awuor Njunga** a community health worker testified on oath and stated that on 24/7/2017 it was on Monday at about 11 am when Nick called her and told her that he was coming with his wife. She was harvesting maize close by, so when Nick arrived, she left what she was doing and went to the house. They prayed and a motor bike came carrying two women. She knew one of the women. Nick told her to prepare some fish which he had bought. She took the fish and went to the kitchen to prepare, and the lady called Nyaloka went to her in the kitchen and informed her that they had been sent by her daughter-in-law who wanted to see DW3. That when DW3 asked her why Liz did not want to come home, she was told that Liz was afraid because she was not in good terms with Nick. That Nick entered the kitchen and that DW3 told the ladies that his mother could not go with them to Nyangoma as she was going somewhere. That the lady insisted that she goes for a few minutes but that Nick said that she could not go. She asked if they could come the following day and DW3 told them she was okay and they left. That they also left on foot and when they had passed the river DW3 received a phone call from LIZ saying she was at the home of DW3. Collins also called saying DW3 should return home urgently. His daughter also called DW3 and told her that Liz was at home and they had broken into the house and taken some items and they were planning to remove the roof.

59. That on hearing this, they took some motor bikes on the way to go back home. On their way they met a motor bike carrying two bags and Nick told DW3 that the bags were his and they turned to follow them but they did not get them. They returned and told DW3 to call the police but she told them that she did not have any police number. Someone in the next home told her to go and pick Alex's number and she took the number and she called the Alex and told him what was going on and he asked her why they had permitted them to go with the items. She then began to walk home and she found the people fighting and she passed and went to the police and when she got there she found Liz's sister. She told the police to go and stop the fighting but they took time and Liz came and talked with the police and she left with one police. Nick also came but he was arrested. She was later arrested and jointly charged with DW1 and DW2 with the offences herein.

60. **DW4 Fred Okoth Oluoch** a boda boda rider testified that he had taken some customers to Apwoyo and on his way back he met Nick, the mother, brother and the wife. That Nick stopped him and asked him to take them somewhere, while other motorbikes came and took the other people. That on their way they met a motor bike carrying two bags. Nick stopped him and told him to follow the motor bike which had the bags but they could not get them. They went back and on their way they met 6 people on motor bikes and he stopped and one person came down and hit Nick and Nick asked him "Okola why you are assaulting me.?" That another person also came and they began to fight and Nick's brother came.

61. That another person went and got a panga and Nick got hold of the panga and the person pulled the panga and it cut the person behind. DW4 stated that he heard someone saying Okola has cut Dan and at that point DW4 took off.

SUBMISSIONS

62. To canvass this appeal, both the Appellant's counsel and the Respondents' counsel filed written submissions which they highlighted orally reiterating the written submissions. The appellant's submissions are dated 10th May 2019 raising the following issues for determination: whether there was evidence that PW2 AND PW3 were assaulted. Under this issue, the Appellant's counsel submitted that the evidence by prosecution witnesses who were at the scene of crime which took place in broad daylight was clear that PW2 and PW3 were assaulted and that they sustained serious injuries as exhibited by the medical notes and p3 forms produced as exhibits.

63. On who caused the injuries it was submitted that the respondents and complainants knew each other very well and that the evidence of the eye witnesses was clear that the Respondents used pangas and sticks to assault the two complainants in broad daylight hence there was no

possibility of mistaken identity. Further, that there was no justification for use of such excessive force yet the complainants were not armed and neither were they on a mission to fight with the Respondents.

64. On alleged contradictions it was submitted that the evidence of prosecution witnesses who saw what transpired was clear that the Respondents acted in concert with a common intention of assaulting the complainants hence there was no material contradiction that would go to the substance of the prosecution's case.

65. The Appellant maintained that the trial court erred in law and fact and that it did not evaluate the evidence before it before arriving at a decision that it did thereby erroneously acquitting the respondents when the evidence adduced by the prosecution witnesses overwhelmingly proved the guilt of the Respondents beyond reasonable doubt. Counsel urged the court to allow this appeal and substitute the acquittal of the respondents with a conviction or an order for retrial.

66. The respondents submitted urging this court to dismiss the appeal and uphold the acquittal of the respondents by the trial court. They referred to the case of **Okeno V republic (1972) EA 32** on the duty of this court as an appellate court.

67. On alleged **Inconsistencies of the Prosecution's Evidence. Reference was made to the decision in Phillip Nzaka Watu vs. R** (2016) e KLR, adopted in **Kazungu Katana Ngoa v Republic [2017] eKLR**, and a submission made that notwithstanding the holding in the above case that appreciated minor inconsistencies not being material to the case, the appellants had not given this Honorable court any cogent reason for this court to disagree with the findings of the trial court.

68. On the **Burden of Proof it was submitted by Counsel for the Respondents that** the prosecution did not discharge its obligation by proving their guilt beyond reasonable doubt. Citing **Stephen Gitwa mani v Republic [2017] eKLR**, counsel argued that the burden of proof never shifts to the defence.

69. It was the respondents' counsel's submission that the prosecution did not discharge its duty during trial and being that the respondents never raised any statutory defense then the burden of proof never shifted to them but always remained with the prosecution till the end of the trial.

70. The Respondents' counsel urged the court to find that this appeal is bereft of any merit, is unfounded in law and dismiss it.

DETERMINATION

71. Previous legislation limited the right of appeal by the State against an acquittal to matters of law only. (See **Paul Mwangi Maina v. Republic, Cr. App. No. 93 of 200 (Nakuru)**). It is also important to point out that the right of the State, recognized by section 348A to appeal to the High Court from an acquittal by the Subordinate Court was introduced in 1967 by **section 3** of the **Criminal Procedure Code (Amendment) Act No 13 of 1967** which came into force on 16th June 1967. In addition, **section 10(1)** of the **Magistrates Court Act, cap 10** (repealed by the **Magistrates Courts Act. No 26 of 2015**) conferred a right of appeal against acquittal upon the Attorney General when it was enacted in 1967. By that provision, the Attorney General could appeal from an acquittal by a Magistrate's Court of the Third Class to the Resident Magistrate's Court.

72. An additional relevant provision is **section 354 (3) (c)** of the Criminal Procedure Code, which provides for the powers of the High Court in an appeal from acquittal by a subordinate court. The provision reads:

“354(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may -

(c) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of re-hearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as the High Court may think fit.”

73. As regards appeal to this Court against an acquittal by the High Court in the exercise of its original jurisdiction, the law did not recognize such a right. By dint of **section 379 (5)** of the **Criminal Procedure Code**, all that the Director of Public Prosecutions was permitted to do was, within one month from the date of the acquittal or such other period as extended by this Court, to sign and file a certificate with the Registrar of the High Court certifying that the decision of the High Court involved a point of law of exceptional public importance and that it was desirable in the public interest that the point be determined by the Court of Appeal. On its part the Court of Appeal was empowered to review the case and to deliver a declaratory judgment. Section **379(6)** of the Code provided expressly that such a declaratory judgment could not operate as a reversal of the acquittal, but it was thereafter to bind all courts subordinate to the Court of Appeal.

74. A fundamental change was introduced by the Security Laws (Amendment) Act, 2014 as regards the right of appeal to this Court from an acquittal by the High Court in the exercise of its original jurisdiction. **Section 19** of the Act repealed section 348A of the Criminal Procedure Code and replaced it with a new section providing as follows:

“348A (1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.

(2) If the appeal under subsection (1) is successful, the High Court or the Court of Appeal, as the case may be, may substitute the

acquittal with a conviction and may sentence the Respondent appropriately.”

75. The effect of the new amendment is to enable the Director of Public Prosecutions to appeal to the High Court and Court of Appeal against an acquittal in a trial by a subordinate court or this court against an acquittal in a trial, on both matters of fact and law.

76. For the record it is important to point out that the Security Laws (Amendment) Act, 2014 did not repeal or affect section 379 (5) and (6) of the Criminal Procedure Code, which continues side by side with the new section 348A of the Code.

77. The Security Laws (Amendment) Act, 2014 was the subject of a major constitutional challenge in the High Court in ***The Coalition for Reforms and Democracy & 2 Others v the Republic & Others, High Court Petition No. 628 of 2014***. A number of the provisions of the Act were declared to be unconstitutional. Section 19 of the Statute Law (Amendment) Act, 2014, which conferred on the State the right of appeal to this Court against acquittal by the High Court in the exercise of its original jurisdiction, was not among the provisions whose constitutionality was challenged.

78. Having said that, I have carefully considered the evidence adduced before the trial court, the grounds of appeal and the submissions in writing and orally, both for and against this appeal. I have also considered the legal provisions cited on the burden of proof and the cited cases.

79. In my humble view, the main issues for determination in this appeal by the Prosecution against the acquittal of the Respondents are:

Whether there was proof beyond reasonable doubt that PW2 and PW3 were unlawfully assaulted by the Respondents.

80. The testimony of PW2 and PW3 as reviewed is that they are brothers to PW1 and that they had accompanied to go talk to the 3rd Respondent whom they had known as PW1's mother-in-law from 2013. She was allegedly living with the 1st Respondent as husband and wife although they appear not to have been formally married. PW1 wanted to talk to the 1st Respondent's mother concerning her relationship with him and so she was accompanied by PW2, PW3, PW4 and PW6. On arrival at the Respondent's homestead, they did not find the 3rd respondent who had invited PW1 to come. PW1 called the 3rd Respondent and they spoke on phone. The 1st Respondent happened to be with the 3rd Respondent so when he heard the conversation between his mother and PW1, he said and this was overheard by the complainants as the phone was on a loudspeaker, the 1st Respondent telling his mother that let PW1 pick her belongings and go away.

81. PW1 entered the house which she allegedly constructed for the 1st respondent and picked 2 suitcases and a mattress and they left and on their way back home they were attacked by the Respondents together with others not before court.

82. PW1, PW4 and PW6 testified that PW2 and PW3 were assaulted by the Respondents starting with the 1st Respondent who called his brother and mother on phone and they emerged with pangas which they used to assault the complainants. The complainants, according to their respective P3 forms and treatment notes produced in evidence as exhibits, sustained serious injuries involving cuts and bruises and the Clinical Officer's conclusion was that the injuries sustained were caused by combination of sharp and blunt objects.

83. PW2 sustained more serious injuries and that is why the charge affecting him is grievous harm. He had multiple injuries involving cuts all over his body including the head and legs and fractures of the ribs. Firewood was also availed by his assailants who tied him with a rope with a view to burning his body. The P3 form in respect of PW2 sets out the following injuries: ***multiple cuts injuries on the left hand, left leg, neck and a cut wound measuring 8 cm in length on the head which was stitched, sustained injuries at the back of his head and had bruises and slight swelling. He had chest pains and an X-ray revealed that he had a fracture of the 7th rib. He had scratch marks and cut wound on the left hand same was observed on the left leg. He was treated at Kogelo Dispensary and further treated at Bama Hospital in Siaya where he was admitted.*** He was examined by PW5 who filled a P3 Form and was produced as exhibit 1.

84. PW3 also sustained injuries involving cuts on the head and neck with a stitched wound on the head measuring 5 cm long. He had swollen and tenderness on the right abdomen and chest pains. He also had bruises on the upper back and abdomen and a cut wound on the left 5th and 4th finger and a stitched cut wound on the right leg. His P3 form was produced as exhibit 2. PW5 confirmed that the probable weapons used were both sharp and blunt objects.

85. Accordingly, I am in agreement with the appellant's counsel that the Respondents sustained serious injuries as a result of an assault.

86. The next question is who assaulted the complainants? And whether there was any material inconsistency in the evidence of prosecution witnesses on who assaulted the complainants.

87. The offence took place in broad daylight just after midday. Nothing obstructed the complainants and their witnesses from viewing the assailants as the witnesses and the assailants were well known to each other and some of the evidence by the prosecution witnesses were corroborated by the Respondents' own defence evidence for example, they were all in agreement that PW1 lived with the 1st Respondent as husband and wife whether formally married or not and that PW1 had sent emissaries to the 3rd Respondent who was the mother to the 1st and 2nd Respondents, seeking to discuss issues relating to her relationship with the 1st Respondent. There was also no dispute as to the time when the incident took place. The respondents however denied assaulting the complainants.

88. PW1, PW2, PW3, PW4 and PW6 stated that they clearly saw and identified the Respondents as persons who attacked them and injured PW2 and PW3. PW1 was invited home by the 3rd Respondent who did not find it appropriate to talk with PW1 at the shopping center. This was confirmed by the 3rd Respondent in her testimony.

89. There was no evidence to the effect that the complainants went to the home of the Respondents armed with the intention of attacking the Respondents. There was also no evidence to the effect that the Respondents were prepared for war with PW1 and her entourage. However, it is clear that it was the act of PW1 taking her suitcases and mattress that attracted the wrath of the Respondents after they were informed that PW1 wanted to also remove iron sheets from the 1st Respondent's house claiming that she had constructed the house in question.

90. In my humble view, had PW1, PW2, PW3, PW4 and PW6 gone to the Respondents' home armed and ready for war, PW1 would not have sent emissaries to the 3rd Respondent and even called her on phone when she found the 3rd Respondent was not at her home.

91. All the Respondents confirmed being at the scene and the prosecution witnesses who were present vividly recalled how the Respondents acted in concert after the 1st Respondent called the 2nd and 3rd Respondents who arrived armed with pangas and embarked on cutting the complainants without any mercy.

92. Assuming the theory advanced by the 1st and 2nd respondents and their witness a bodaboda rider could be believable that DAN was cut by KEN, the question I must pose is who then cut DAN and if the cut was one, how did the complainants especially the first complainant sustain such grievous harm charge such multiple debilitating cuts and bruises and even fractures? That theory by the respondents and their witness is not believable at all. It was an escapist theory which this court is unable to buy. In addition, I refuse to accept the finding by the trial court that it is not clear who cut who. This is because the complainants who were under attack and screaming from the ground could not be expected to precisely state the exact parts of their bodies that were cut by their assailants and as to which assailant cut who where since the assault was done by three people. However, from the evidence on record, the complainants and their witnesses did not create any doubt as to the involvement of the Respondents who jointly participated in assaulting the complainants in broad daylight.

93. The P3 forms produced as exhibits show the extent of injuries suffered by the victims. The injuries which involved serious deep cuts and bruises and fractures could not have been accidental. There was an intention on the part of the respondents to inflict such injuries on their unarmed victims. There was no medical evidence that the Respondents sustained any injuries and even if they did, my view is that they could only have sustained the injuries in the process of assaulting the complainants as the latter struggled to free themselves from their armed assailants (Respondents).

94. The trial court also found that the evidence adduced by prosecution witnesses was contradictory. He concluded that the evidence of the Prosecution Witnesses was so inordinate [sic] that it was impossible to conclude that it was indeed the accused persons who assaulted the Complainants. According to the trial magistrate, the prosecution witnesses failed to pinpoint exactly who used a panga or a stick, and who cut who and where. The appellant's counsel argues that this alone does not exonerate the Accused persons from having assaulted the Complainants.

95. The evidence of PW1, PW2, PW3, PW4, PW5 and PW6 was clear that all the three Respondents participated in assaulting the complainants, using pangas and even sticks.

96. PW2's evidence was to the effect that *"About 600 metres into the road, they met Nick who began to assault Nyaloka and he also hit Elizabeth with a panga. They held Nick but he called his brother and the brother came together with the mother and they had a panga and they began to cut PW2 with the panga. The 3rd Respondent cut PW2 on the waist and the 2nd Respondent cut PW2 on the legs. The 1st Respondent cut PW2 several times and they went and reported to the police that they had killed a thief. They also took fire wood which they wanted to use to burn PW2."*

97. I have reproduced the said evidence in this judgment and no doubt, the witnesses stated what they saw each of the Respondents do to each of the complainants and I have no doubt that there were no material contradictions in that evidence which would vitiate the trial of the Respondents. Furthermore, the Trial Magistrate did not make any observations that he felt and/or saw that the prosecution Witnesses were not trustworthy and truthful having had the benefit of seeing and hearing them as they testified. Accordingly, I find and hold that there was no basis upon which the trial court concluded that the prosecution witnesses were contradictory and that therefore they could not be believed.

98. The evidence on record clearly show that the Respondents acted jointly, openly and overtly in furtherance of their common intention, that of assaulting the complainants who had merely accompanied PW1 to meet and speak to the 1st Respondent's mother (3rd respondent herein). There was no evidence on record to show that the Respondents were acting in self defence. Section 17 of the Penal Code stipulates:

"Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in defence of person or property shall be determined according to the principles of English Common Law."

99. The classic pronouncement on the issue of self defence was pronounced by the Privy Council in **Palmer v Republic** [1971]A.C.814 where Lord Morris stated:

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances."

.....some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence.... The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the

circumstances may be such that it will become an issue as whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”

100. Furthermore, the Respondents totally denied ever assaulting the complainants. They did not even plead the defence of self defence or defence of property.

101. The Respondents did not claim that they believed that they were being attacked by the complainants who were not even armed with any weapon to warrant that excessive force being used as the police station was nearby at Kogelo and therefore if the Respondents had thought that they were under any form of threat or that their property was being stolen by people who were very well known to them, nothing prevented them from reporting the incident to the police.

102. Section 21 of the Penal Code provides:

“when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, an in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

103. In **Njoroge v Republic [1983] KLR 197** AND **Solomon Munga v Republic [1965] EA363** both courts held as follows as to the elements of common intention:

“If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they actually aided or abated or not, provided that the death was caused by act of someone of the party in the course of the endeavours to effect the common object of the assembly.”

104. In the instant appeal, the Respondents were together when PW1 called the third respondent and she overheard the 1st respondent tell his mother to tell PW1 to pick her things and leave. There was no doubt that PW1 had lived in that home of the Respondents and with the 1st respondent as husband and wife. Therefore when PW1 picked what she believed to be her personal belongings, comprising two suitcases and mattress, she cannot be said to have been stealing property of the 1st respondent. Furthermore, PW1 did not know that the suitcases had some other items and when she reached home and discovered that the items therein were not hers, she surrendered them to the police. The Respondents never claimed that they assaulted the complainants in defence of their property. They also never stated that they lost any property to the complainants.

105. There was sufficient evidence that the respondents overreacted to the situation after the 3rd respondent was called and told that PW1 was taking her belongings and removing iron sheets from the house. No such iron sheets were exhibited in court. The Respondents did not have to pick pangas and assault the complainants as the complainants did not have any property at that time. From the evidence on record as a whole, the Respondents were all participating in assaulting the complainants and used lethal weapons.

106. I find no material contradiction in the evidence of prosecution witnesses who were at the scene as they all indicated what they saw happen. There is no legal requirement that witnesses must reproduce each other’s evidence as that would be possible only where they are coached.

107. In **Twehangane Alfred vs Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6** it was held that it is not every contradiction that warrants rejection of evidence. As the court put it:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

106. In the case of **Erick Onyango Ondeng’ vs. R [2014] eKLR**, the Court held as follows:

“The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyze that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers.”

107. In **Dickson Elia Nsamba Shapwata & another v Republic, Cr. App. No. 92 of 2007** the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view I respectfully adopt:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

108. In the circumstances of this case, and considering the prosecution evidence and the defence case as a whole, I find no material contradiction that would have vitiated the trial and conviction of the of the Respondents.

109. In **Jackson Mwanzia Musembi v Republic [2017]e KLR** citing with approval the Ugandan case of **Twahangane Alfred v Uganda**

CRA 139 of 2001[2003]UG CA, 6 it was held that the court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

110. In my humble view, the alleged contradiction or [inordinate] as put by the trial court on who cut who and where is immaterial because there was no credible evidence to suggest that the Respondents were also assaulted in the same manner as were the complainants and that therefore it was a fight of two sides each carrying pangas such that it was not possible to tell who cut who and where. The evidence which was not discredited by the trial court was that the complainants received serious panga cuts inflicted by the three respondents using pangas.

111. The eye witnesses' account of what transpired was consistent and corroborated by the Medical Reports produced in Court. On the whole, I find and hold that the prosecution proved beyond reasonable doubt that the Respondents jointly attacked and inflicted injuries on the complainants as shown by the medical notes and P3 forms which were produced as exhibits.

112. Accordingly, in accordance with section 348A of the Criminal procedure Code, I set aside the order of the trial court acquitting the Respondents under section 215 of the Criminal Procedure Code and substitute the acquittal with an order finding the Respondents guilty of the offence of Grievous harm as charged under section 234 of the Penal Code in respect of the 1st complainant and Assault causing actual bodily harm in respect of the second count for the second complainant. All The Respondents are therefore convicted accordingly under section 215 of the Criminal Procedure Code as read with section 348A of the Criminal Procedure Code.

113. Orders accordingly.

Dated, Signed and Delivered at Siaya this 21st day of January, 2020

R.E. ABURILI

JUDGE