



**REPUBLIC OF KENYA**

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

**HCCRA NO. 61 OF 2018**

**NESTO MUVITI MAKAU .....APPELLANT**

**-VERSUS-**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence of Hon. C. A. Mayamba (SRM) in Kilungu Resident Magistrate's Court Criminal Case No. 71 of 2017 delivered on 2<sup>nd</sup> February, 2018).*

**JUDGMENT**

1. **Nesto Muviti Makau** the Appellant herein was charged and convicted of the offence of grievous harm contrary to Section 234 of the Penal Code. The particulars were that the Appellant on 31<sup>st</sup> January 2017 at Mitini Village in Kikoko Location within Kilungu Sub-County caused grievous harm to **Stephen Musyoki Makau** by cutting him deeply on his left hand and on his left lower limb using a sharp object thus maiming him.

2. Upon conviction he was sentenced to fourteen (14) years imprisonment. He was aggrieved by the whole Judgment and filed this appeal citing the following grounds:-

*(i) **That** the learned Trial Magistrate erred in both law and facts by convicting him on evidence which did not meet the minimum threshold as required by law.*

*(ii) **That** learned Trial Magistrate erred by observing that he was identified by recognition where as the said identification was not positively established.*

*(iii) **That** the learned Trial Magistrate erred in law and fact by co-relating the alleged offence with another one that he was said to have been involved in two years ago which was said to an arson offence where as the facts and circumstances were totally different.*

*(iv) **That** the learned Trial Magistrate blatantly dismissed his defence without much consideration.*

3. The prosecution case is premised on the evidence of three (3) witnesses. **PW1 Mary Makau** is the mother of both the complainant (PW2) and the appellant. She testified that on 31<sup>st</sup> January 2017 at 8.00 p.m., she was asleep at her home with her granddaughter Josephine Syokau who sleeps in a room near the kitchen. Josephine informed her she had heard Musyoki (PW2) screaming saying he had been cut. PW1 went out and found PW2 lying down and was bleeding. He had a cut on the left hand and left leg.

4. Josephine continued screaming and people came. Arrangements were made and PW2 was taken to Kilome police station and then Kilungu Sub-District hospital. The weapon used to assault PW2 was bloodied. She said PW2 was in the kitchen eating when he was assaulted.

5. **PW2 Stephen Musyoki Makau** testified that on 31<sup>st</sup> January 2017 at 8.00 p.m. he was having supper in his mother's (PW1) kitchen when his younger brother (the appellant) arrived. He knocked the door severally using a panga. He then told him, "*leo ni leo msema kesho ni mwongo.*" He stood up as the appellant entered holding a panga which he aimed at PW2's head.

6. PW2 shielded his head with his hand and he fell down. The appellant cut his left leg. The panga fell and PW2 picked it while screaming loudly. PW1 and the appellant's daughter Josephine came and found him injured. Arrangements were made and he was taken to report and for treatment.

7. He identified the P3 form (EXB1) that was filled for him after treatment. He identified the Appellant as the person who had assaulted him by voice and by use of the fire light in the kitchen. In cross examination he said the appellant took himself to Kilome police station.

8. **PW3 Eric Kasyamani** is the clinical officer who examined PW2 and filled his P3 form. On 1<sup>st</sup> February 2017 he found PW2 having the following injuries:-

- Cut wound on palm with a severed digit – 6cm x 2cms<sup>2</sup>. It was deep.
- Cut wound front and a bone was visible 3"x4" (left leg).
- The injuries were 18 hours old.
- Weapon used was a sharp object.
- Degree of injury was assessed as maim.
- He produced the P3 as EXB1.

In cross examination he said there was deformity as a result of the injury.

9. When placed on his defence the Appellant elected to make a sworn statement of defence. He testified that on 2<sup>nd</sup> January 2017 he took ten chicken to Precious blood.

10. He left the place around 11.00 a.m. and went to Kiboko town. While at the stage he received news through a phone call of his brother having been injured. He went to Kilome station where a report was being made. He was charged with the offence. In cross examination he said his mother (PW1) lied against him.

11. In his written submissions which he wholly relied on, the appellant raised issue with the prosecution's failure to call a material witness called Josephine his daughter. It is Josephine who was alleged to have been the first to arrive at the scene and saw him. Relying on the case of **Nganga –Vs- Republic (1981) KLR 483**, he said failure to call Josephine, was fatal to the prosecution case.

12. He questions his identification by PW1 and PW2 even if they knew him. He refers to the case of **Wanunga –Vs- Republic (1989) KLR 424**. He argues that the learned trial magistrate used a previous matter to convict him for this offence which is contrary to Article 50(2) (0) of the Constitution.

13. He contends that he was never issued with witness statements in time for preparation of his case. He particularly laments on the evidence of PW3 (Clinical officer) whereby he was not served with his witness statement among others. He says failure to call the investigating officer was fatal to the prosecution case.

14. He is lamenting that he was denied a chance to have the case start denovo when Mr. C. A. Mayamba (SRM) took over the case from the previous magistrate. He recalled when earlier on the prosecution had opposed his request to have the case start denovo. Finally he states that his defence was never considered by the trial court.

15. The appeal was opposed by the respondent who also filed written submissions through its counsel Mrs. Owenga Monica. She submitted that the prosecution adduced sufficient evidence to support the charge. That the appellant had attacked his brother without any provocation and the injury suffered was classified as "grievous harm." She argued that the appellant's mother who testified against him could not have lied.

16. She supported the sentence saying it was commensurate with the offences committed. Secondly that the appellant was not a first offender.

17. This is a first appeal and this court has a duty to re-analyze and re-evaluate the evidence on record to and arrive at its own over this matter as was stated in the case of **Okeno –Vs- Republic [1972] EA 32** and followed in **Kiilu & Anor –Vs- Republic [2005] I KLR 174; David Njuguna Wairimu –Vs- Republic [2010] eKLR**.

18. I have carefully considered the evidence on record and would wish to address one issue before I move to consider the grounds raise. The issue I wish to address has been mentioned by the appellant in passing in his submissions under grounds 3, 4 and 5.

19. The appellant was initially charged with the offence of assault contrary to Section 251 of the Penal Code. Two witnesses (PW1 & PW2) testified on 14<sup>th</sup> June 2017. Soon after PW2's evidence the prosecution applied to substitute the charge sheet following the findings in the P3 form, which showed the degree of injury as "maim". The leave sought was granted. On 21<sup>st</sup> August 2017 the appellant was informed of the intended amendment to the charge.

20. On 28<sup>th</sup> August 2017 the matter came for mention and this is what transpired at page 15 of the record of appeal.

**Prosecutor:** *I request to substitute this count to a count under Section 234 Penal Code.*

**Court:** *Ruling: Allowed. It is the prosecution's right to substitute, add or amend a charge before judgement. Allowed.*

*Charge read to accused. Accused states*

*Si kweli. Not true.*

*Plea of not guilty entered.*

**Prosecutor:** *we have no witnesses. We were expecting Dr. Kasyamani.*

**Accused:** *I request that this case starts afresh.*

**Prosecutor:** *the evidence we have produced is sufficient to us and we do not want to call them back.*

**Accused:** *I am only talking of the witnesses who are to come.*

**Court:** *No need to start afresh since the earlier witnesses have been called to prove assault. The charge has only changed as to degree of injury. This is an issue proved by the doctor. He has not testified. Application denied. Further hearing on 6<sup>th</sup> September, 2017.*

21. The substituted charge was a more serious charge with a maximum sentence of life imprisonment. It was the duty of trial court to clearly inform the appellant of his right to recall any witness for further cross examination in view of the amended and enhanced charge. There would have been no prejudice even if the case started *denovo*. The words of the prosecutor to the effect that the evidence produced was sufficient and they had no intention of calling back the witnesses were misplaced.

22. The issue was not about the prosecution but the accused person at that time. It was wrong for the learned trial court to rule that since the charge had only changed in terms of the degree of the injury there would be no need for the case to start *denovo*. He never mentioned anything about the recall of witnesses for further cross examination.

23. Failure to give the appellant an opportunity to further cross examine PW1 and PW2 or even have the case start *denovo* in view of the enhanced charge amounted to a defective trial. This in the end amounts to a mistrial, the omission having been caused by the trial court.

24. To order for a retrial or not depends on the particular facts and circumstances of each case. See **Pius Olima & Anor –Vs- Republic (1993) eKLR; Erimat –Vs- Republic (2005) I KLR 182; Njenga & Anor –Vs- Republic (2006) I KLR 18; Joseph Macharia Miano & Others –Vs- Republic (2009) eKLR; Charo Mole –Vs- Republic (2010) eKLR.**

25. The appellant was first arraigned in court on 2<sup>nd</sup> February 2017. He was convicted and sentenced on 2<sup>nd</sup> February 2018 to serve 14 years imprisonment. He has served only two (2) years of the sentence. An order for a retrial will not prejudice the appellant but will ensure justice for both the appellant and the victim.

**26. I therefore allow the appeal, set aside the conviction and sentence and order for a retrial.**

**27. Let the appellant appear before the P.M. Kilungu Law Courts on 12<sup>th</sup> February 2020 for a fresh plea to be taken and the matter listed for hearing before any magistrate with competent jurisdiction other than Hon. Mr. C. A. Mayamba. In the event of a conviction the sentence already served must be considered during sentencing.**

**28. Further the case should be heard and determined within the next nine (9) months.**

Orders accordingly.

**Delivered, signed & dated this 5<sup>th</sup> day of February 2020, in open court at Makueni.**

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**H. I. Ong’udi**

**Judge**