



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CRIMINAL APPEAL NO. 60 OF 2018**

**1. OMONDI OWUOR OMBEWA**

**2. VICTOR OTIENO OYOLA.....APPELLANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the judgment, conviction and sentence of*

*Hon. Kamau C. M. Senior Resident Magistrate in Rongo Court*

*Criminal Case No. 143 of 2016 delivered on 08/11/2018)*

**JUDGMENT**

1. **Omondi Owuor Ombewa** and **Victor Otieno Oyola**, the Appellants herein, were jointly charged with others not before court with the offence of **Grievous Harm** contrary to **Section 234** of the **Penal Code, Cap. 63** of the Laws of Kenya. The particulars of the offence were that *'On the 11<sup>th</sup> day of February 2016 at around 1900Hours at Kawao village, East Kamagambo Location within Migori County in the Republic of Kenya, jointly with others not before court unlawfully did grievous harm to Jactone Omondi Oketch.'*

2. The Appellants denied the offence and were tried. Four witnesses testified in a bid to prove the charge. The complainant was **Jactone Omondi Oketch** who testified as **PW1**. A Clinical Officer from Rongo Sub-County Hospital testified as **PW2** whereas one **Pamela Adhiambo** testified as **PW3**. The investigating officer was **No. 88873 PC(W) Asunta B. Baraza** attached at Kamagambo Police Station who testified as **PW4**. I will for the purposes of this judgment refer to the witnesses in the sequence in which they testified save PW1 whom I will refer to as **'the complainant'**.

3. At the close of the prosecution's case the Appellants were placed on their defences and they gave sworn evidence. The first Appellant herein, **Omondi Owuor Ombewa**, called two witnesses to buttress his *alibi* defence. The witnesses were **Robert Ouko Otieno (DW3)** and **Josephine Achieng (DW4)**.

4. The trial court subsequently rendered its judgment on 08/11/2018 and the Appellants were found guilty as charged and convicted. On taking mitigations, each of the Appellants were sentenced to twenty years' imprisonment.

5. Aggrieved by the convictions and sentences, the Appellants mounted an appeal through **Messrs. Oguttu, Ochwangi, Ochwal & Company Advocates** who filed the Petition of Appeal on 12/11/2018. The Appellants raised 14 grounds of appeal. On 29/11/2018 the Appellants filed a Notice of Motion seeking bail pending appeal. On the consensus of the Counsels and the approval of this Court the Notice of Motion was withdrawn and the main appeal instead heard.

6. The appeal was canvassed by way of oral submissions. In a nutshell, the Counsel for the Appellant expounded four issues. They were how the court dealt with the *alibi* defence raised by the First Appellant, identification, contradictions and that the offence was not proved. In response Counsel for the State submitted that the charge was clearly and certainly proved as the Appellants were properly identified by recognition and that all the ingredients of the charge were proved. Counsel prayed that the appeal be dismissed.

7. This being a first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and

give allowance for that.

8. In discharging the foregone duty, I have carefully read and understood the proceedings, judgment of the trial court, the appeal record and the submissions. I will endeavor to deal with the following issues: -

**(a) Whether the Appellants were part of the assailants;**

**(b) Whether the offence was proved as required in law; and**

**(c) The sentences.**

I will consider each of the above issues singly.

**(a) On whether the Appellants were part of the assailants:**

9. The alleged incident took place at around 07:00pm. According to PW3 she used a torch to see whereas the complainant used the moonlight. On that background, this Court is under a legal duty to weigh the evidence on identification by the witnesses with such greatest care and to satisfy itself that in all circumstances, it is safe to act on such evidence of identification. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under; -

***It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.***

10. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

11. In **R -vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

***.....The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.***

12. I have carefully addressed my mind to the facts and the law in this case alongside the defenses tendered. It is not in doubt that the complainant knew the Appellants well as they were relatives and that the parties were embroiled in a land case. In fact, a sitting had been held before the Area Chief during the day the complainant was attacked in the evening. The complainant testified that he passed the home of the second Appellant and met one Ochieng who stopped and told him that he would kill him that day. The complainant responded and assured Ochieng that unless he was in the company of others, he should not dare. However, the complainant decided to seek refuge in the home of the second Appellant. He met the second Appellant and informed him that Ochieng had threatened him. The second Appellant asked him to report the matter the second Appellant's father. The complainant then left the homestead.

13. As he approached a bridge, the complainant was accosted by five people who included the said Ochieng and the Appellants herein. They were armed with pangas, rungs and nuts. The complainant was indiscriminately beaten and sensing that he was likely to be killed he feigned death. He was also smeared with Robb ointment in his eyes. He heard the second Appellant say that the complainant was dead. He also heard Ochieng say that they should bury him while one made a call and said in Kiswahili that '*hii mbuzi tumeuwa*'. The attackers then left. The complainant managed to run away and in doing so he ran into two other attackers who were running to the scene of attack. He immediately ran towards the homestead of PW3 while screaming and his mother, who heard the screams, also screamed. The attackers backtracked.

14. PW3 used a torch to see who was screaming. He shone it in the direction the screams came from and saw the complainant run past her into the house and fell on the verandah. PW3 observed the complainant and noted several injuries on the hands and head and was bleeding profusely. PW3 testified that the complainant told her that he had been attacked by Ayug, Jossy and Ochieng. As the complainant tried to walk away he collapsed on the outside of the house. Members of public who had gathered in response to the screams called the family members of the complainant who took him to hospital.

15. Those were the circumstances under which the complainant was attacked and injured. This Court is now to juxtapose the principles guiding identification with the foregone in determining the issue. There is no doubt the attack was sudden. The complainant had been threatened by one Ochieng with death and fear engulfed him leading him to seek assistance from the homestead of the second Appellant. He did not get any and decide to proceed home. The distance between the home of the second Appellant and the bridge where the complainant was attacked was not given. The complainant did not also state whether he met other people on the way prior to reaching the bridge. It was also not made clear how the second Appellant and the said Ochieng whom the complainant had left behind reached the bridge before him as to be part of the attackers.

16. There is also the issue of whether the complainant was able to recognize the attackers with precision. The complainant sustained very serious injuries which were categorized as 'grievous harm. Indeed, they were life threatening. They included 12 cuts on the head which had to be stitched, bruises on the lumbar region and back and injuries on the hands leading to loss of the distal middle finger. There were also injuries on the knees. Again, those injuries were not mean injuries and the complainant had to be admitted into hospital for 5 days.

17. The lighting at the scene is also worth looking at. PW3 had to use a torch to see. The complainant managed to see using the moonlight. One must not lose sight of the fact that PW3 was not in any fear or attack but still needed the aid of a torch to see. On the other hand, the complainant was suddenly ambushed by weapon-wielding gang of five members. The complainant did not testify on the strength of the moonlight, the size of the moon, how the weather was that evening, how far one could see and also how the scene of attack was; whether it was bushy and/or around a corner. It is also not clear the distance from which the complainant saw the attackers before they pounced on him.

18. There is evidence that when the complainant feigned death the attackers stopped assaulting him and left. That means by then the complainant had already sustained all the said injuries. However, while in that state the complainant stated that he heard the Appellants among others talking and he even went ahead and reiterated the alleged words.

19. Of importance is also the fact that the complainant stated that he was attacked by the Appellants herein who were in the company of Kura Oyola, Kennedy Ochieng and Odiwuor Opiyo. When the complainant ran to PW3's homestead he told her that he had been attacked by three people being Ayug, Jossy and Ochieng. There was need for clarification as to whether the said Ayug, Jossy and Ochieng were among the five attackers whose names the complainant gave and more so whether they included the Appellants herein. Again, the complainant told PW4 that he had been attacked by two people; Victor Olum and one Oyala. Were the two the same as the Appellants herein?

20. The foregone analysis brings forth how prosecution of cases ought to be handled. I remain alive to the truism that I may not be able to discuss a lot on the wide subject of prosecution in this judgment. I will however only deal with some salient aspects thereof which come to the fore in this case, albeit briefly.

21. Prosecution of cases is not only an art, but also a technical duty. Today, Prosecutors in Kenya are trained legal professionals and whose role is to *inter alia* guide the investigators on the evidence needed to prove a charge and to present that evidence before court. That duty is two-fold. First, it is what I will call '**the out-of-court duty**' where the Prosecutor must prepare the case well before it finds its way to the court. It involves ensuring that appropriate charges are preferred in accordance with the evidence gathered and witnesses are availed before court. The second part is what I will refer to as '**the courtroom dynamics**' which deals with happens actually in the courtroom during the hearing. As a legal surgeon, the Prosecutor must first know the ingredients of the charge at hand. He/She must then lead witnesses to adduce evidence in proof of those ingredients. A Prosecutor must closely knit the evidence as to unfold the case and to attain credibility of the witnesses. Contradictions, including those between the statements recorded during investigations and the evidence before court, must be reconciled and all loose ends tied up. With an exception of witnesses with a good grasp and experience in adducing evidence before courts, rarely should a Prosecutor put a witness in the witness box and leave him/her to narrate some events. A Prosecutor must take charge of a witness and guide him/her by putting across appropriate questions thereby navigating the evidential boat to the desired port of call. Suffice to say, the need for pre-trial conferences cannot be gainsaid.

22. Coming back to the case at hand, I must say and with tremendous respect to the prosecution, that the prosecution failed to attain that required bar. The evidence, especially on the key aspect of identification, as presented left a lot of gaps that the trial court had to often resort to asking the witnesses some salient questions. I have no doubt in my mind that the complainant may have known the attackers and had he been properly guided, that aspect would have been well covered. Maybe that will happen when the other suspects who are still at large are charged. Sadly, as it may appear and in view of the injuries sustained by the complainant, the evidence on record fell short of satisfying the requirements on proper recognition. I must find, as I hereby do, that the identification of the Appellants herein was in error.

23. Having so found, venturing into the other grounds will have no meaningful value to this appeal, I choose to stop here. Consequently, the appeal is allowed, the convictions quashed and sentences set-aside. The Appellants shall be set at liberty forthwith unless otherwise lawfully held.

24. Those are the orders of this Court.

**DELIVERED, DATED and SIGNED at MIGORI this 12<sup>th</sup> day of March 2019.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

**Mr. Oguttu-Mboya**, Counsel instructed by Messrs. Oguttu, Ochwangi, Ochwal & Company Advocates for the Appellants.

**Mr. Kimanthi**, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State

**Evelyne Nyauke** – Court Assistant