REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 143 OF 2016 [ASSAULT]

(CORAM: R.E. ABURILI - J.)

PATRICK SIALA WANAKEYA.....1ST APPELLANT

DOMISIANO ODHIAMBO SIALA.....2ND APPELLANT

DOMISIANO ODHIAMBO WANAKEYA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence on a judgment delivered

on 7/10/2016 at Ukwala SRM's Court vide Cr. Case No. 303 of 2015,

before Hon. C.N. Wanyama, RM)

JUDGMENT

1. The four appellants **Patrick Siala Wanekeya, Domisiano Odhiambo Siala, and Domisiana Odhiambo Wanekeya** (herein called the appellants were jointly charged with the offence of grievous harm contrary to ***Section 234 of the Penal Code***. The particulars of the offence are that on 15/7/2012 at Tingare East in Ugunja District Siaya County they jointly unlawfully did grievous harm to **Nicodemus Odhiambo Osundwa**.

2. The appellants pleaded not guilty to the charge. The trial commenced with the prosecution calling five witnesses. The appellants were put on their defence and they gave sworn evidence and called witnesses.

3. The trial court found the appellants guilty of the offence of grievous harm and convicted them accordingly. After considering their mitigations, the trial magistrate fined each appellant Kshs. 10,000 and in default to serve one year in prison.

4. Dissatisfied with the judgment, conviction and sentence meted out on them by the trial court, the appellants through their advocate Mr. Mwebi filed separate appeals for each appellant on 21st October 2016, which appeals Nos 143 of 2016, 144 of 2016 and 145 of 2016 were consolidated into one. The appeals set out eleven (11) common grounds of appeal namely:

(1) That the evidence did not prove the charge;

(2) That the prosecution's case was not prove beyond reasonable doubt;

(3) That the evidence convicting the appellants was contradictory;

(4) That there was no medical evidence to prove the charge of the assault against the appellants;

(5) That the evidence relied on to convict the appellants was hearsay evidence;

(6) That the trial magistrate shifted the burden of proof to the appellants;

(7) That after analyzing the prosecution and defence evidence the trial magistrate arrived at a wrong decision even after creating doubt in her mind on the evidence before her;

(8) That the trial court erred in law and fact in dismissing the defence evidence and also failed to consider the defence put before her after it had created a lot of doubt to the prosecution case;

(9) That in sentencing the appellants, the trial magistrate failed to consider their mitigations;

(10) That the sentence imposed was harsh and high (sic) in relation to the offence.

(11) The appellants prayed that the appeals be allowed and that the conviction be quashed and sentence be set aside.

5. In determining this appeal, this Court is alive to the principles laid down in ***Okeno Vs. 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 conclusions.

6. 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. ***(See Peters Versus Sunday Post [1958] East Africa 424.***

7. Examining the evidence adduced before the trial court, PW1 the Complainant **Nicodemus Odhiambo Osundwa** testified that on 13/7/2012 he had gone for a Land Case No. 319/1999 at Kisumu and that on arrival, he met the appellants herein who threatened to cut him. That Domisiano Siala and Domisiana Wanekeya who were the 2nd and 3rd accused persons threatened to cut him. He reported the threat to the police. On 15/7/2012, he went and recorded his statement at 7.30 pm and that on his way home he met four people. Paul, the 4th accused person arrived at his home first and asked Patrick the first accused to assault the complainant. He stated that the first accused had a rungu-club, 3rd accused person, Domisiana Wanekeya had a torch and a panga. He lit the torch for the rest as they cut the complainant. That the fourth accused had a panga. The rest were armed with pangas. They cut him on the right hand, head and legs. The complainant raised an alarm. The third accused tried to lift up the complainant and the appellants and other assailants ran away into the coffee plantation.

8. The Complainant was taken to St. Mary's Mumias Hospital for treatment and was admitted for a month. He later recorded his statement with the police. A P3 form was filled at Ambira Hospital. He stated that he identified some assailants and the four appellants with whom they share ancestry. He stated that they had gone for a land case.

9. In cross examination by Mr. Mwebi advocate, the complainant stated that the appellants were his cousins as their grandparents are brothers who stayed in different pieces of land. He stated that there was a land dispute since 1999 over land parcel No. 319 which the appellants had claimed was being occupied by the complainant's family. He stated that he was assaulted by six people and saw them since they had lit a torch. That he was injured on both hands and both legs but he could not tell who cut him where.

10. PW2 **Carolyne Anyango Ochieng** testified that on 15/7/2012 at about 8.00 p.m. she was in her kitchen preparing supper when someone went and asked for her husband. She told him that he had left. The husband later informed her that her brother-in-law had been cut by people of Domisiano Siala. She went out and heard shouts. Arriving at the scene, she found the victim on the ground. They took him home for first aid. He had a fractured leg. He was taken to St. Mary's Hospital and admitted. She stated that she knew all the accused persons.

11. In cross examination, she stated that she did not witness the victim being cut as she arrived and found him injured him.

12. PW3 **Zachary Mari Osundwa**, the father to the complainant Nicodemus Osundwa PW1 recalled that they had gone for a case in Kisumu on 13/7/2012 and that when they left the court, the third accused Domisiano person told the complainant that "they" shall cut him into pieces and that Nicodemus told PW3 who advised PW1 to report the threats to the police.

13. That on 15/7/2012 at 7.30 p.m. Nicodemus was attacked on the road. He heard the screams, went to the road and found Nicodemus had several cuts and a fracture. They took Nicodemus to Mumias where he was admitted.

14. In cross examination, PW3 stated that the appellants are his nephews and that there had been a land dispute from 1999 and a succession case in Kisumu. He however did not see the appellants cut Nicodemus.

15. PW4 **No. 93278 PC Kiprotich** testified that on 16/7/2012 he and IP Ewaton visited the scene of assault where they found evidence of dragging of a person in a maize plantation. He also noted traces of blood and signs of struggle. They went to St. Mary's Mumias Hospital and found Nicodemus Osundwa being treated. He had cut wounds on both legs, hands, head and swelling on shoulders. He recorded his statement. The four accused were arrested and Boniface Wesonga and one Ouma were at large. He issued the complainant with a P3 form.

16. In cross examination, he stated that he investigated the case and the appellants were arrested by another officer. That Nicodemus knew who the assailants were.

17. PW5 **John Otieno Okoth**, a registered Clinical Officer at Ambira Sub District Hospital testified that Nicodemus Osundwa visited Ambira Sub-county Hospital on 21/8/2012 for P3 filling and stated that he had been assaulted by people known to him. He had a healed compound fracture on the left lower limb which was four weeks old caused by a sharp edged object. He assessed the injury as main. He did

not have clinical notes for the complainant.

18. On being placed on their defence, Patrick Siala Wanekeya testified as DW1 and stated that he was at home on 15/7/2012 at about 8.30 pm when he heard screams. He went outside and found two groups of people fighting, one from his family another from Nicodemus' family. He tried to separate them. He was told Domisiano was hurt. The next day they reported to Kirindi AP Post. They came later and found 18 houses being torched as well as animals. They were chased to the forest and that upon their return home, they found everything burnt and on 19/7/2012, he was arrested and charged. He stated that they have a land dispute.

19. In cross examination, he stated that he knew the people who were fighting. That he saw Charles Ochieng, Christopher Onyango Siala and Lucas Omondi Ndeke and Vitalis Ochieng (deceased). He later learnt that they fought because of land. That he sustained injuries on the left eye but denied assaulting Nicodemus. He stated that they had a land dispute which may have led to the fight.

20. Domisiano Odhiambo Siala testified as DW2 and recalled that he left home on 25th June 2012 and returned on 19th July 2012 at about 1 pm and that on arrival from Port Victoria where he was fishing he found that his cousins had been arrested. He was also arrested. On being cross examined he stated that he left for Port Victoria on 26/6/2012 and returned on 17th July 2012.

21. Domisiano Odhiambo Wanekeya testified as DW3 and recalled hearing screams on 15/7/2012 at 8.30 pm. He went out and asked that they stop fighting. He denied assaulting Nicodemus. He denied seeing the people who were fighting but heard them say 'hit'. He went and reported the disturbance. He heard that the complainant was hurt. He stated that he may have been hurt by the people who were fighting. On 16th July 2012, he saw Administration Police with the complainant's group burning houses. He stated that they had a land dispute with the complainant's family since 1999.

22. In cross examination, he denied being a blood relative to any of his co-accused persons. He stated that he saw people fight but that he did not see the people who were fighting. He stated that he was told that Patrick was hurt and denied that he had been involved in any family dispute. He stated that he knew the complainant but denied assaulting him.

23. Paul Onyango Wanekeya testified as DW4 and denied the charge and stated that on the material day he had gone and returned home tired so he slept and went to work the following day and that upon his return the following day on 16/7/2012 at about 2 pm, the police went to their home with villagers and burnt their houses and that when he inquired, he was told that it was because Nicodemus had been assaulted. He denied hearing or seeing any assault case until he was told by the police.

24. In cross examination, he stated that he was woken up by his brother Wycliffe Ouma who asked him whether he heard what had happened in their compound. He stated that villagers burnt their cattle and houses during the day and that 18 houses were burnt.

SUBMISSIONS ON APPEAL

25. In support of this appeal, the appellants' counsel, Mr. Mwebi filed written submissions which he highlighted orally. In the said submissions, counsel grouped the 10 grounds of appeal into 5 broad grounds namely: -

(1) Insufficient evidence

(2) Contradicting evidence

(3) Medical and hearsay evidence

(4) Rejection of the Defence evidence

(5) Sentence imposed was harsh

26. According to the appellants' counsel, the charge against the appellants was not established and that the case was not proved beyond reasonable doubt as required in a criminal trial. He submitted that the offence took place at night and it was dark. That the complainant stated that he used a torch to see the appellants but that he does not say he had a torch himself. He further admitted it was at night and dark. That it was only PW1 who allegedly saw the appellants. That this was evidence of a single witness which ought to be corroborated but that in his case, there was no corroboration. That the source of light is not clear hence it was not possible that the appellants who used the torch had to flash against themselves for PW1 to see them. Further, that as PW1 was being assaulted, he was scared and not stable to identify the appellants. Counsel urged the court to find that identification was not proper and was not proved.

27. It was further submitted that in his evidence, PW1 does not mention any role allegedly play by the 2nd Appellant one Domisiano Odhiambo Siala, whether he was present, or if he played any role. It was therefore submitted that it was wrong for the Learned Magistrate to reject the 2nd Appellant's defence of alibi which was corroborated, given the fact, which was also admitted by PW1, PW2 and PW3 that there exists a grudge over land and that therefore the chance of the case being planted on the Appellant was high and that on this ground alone, the conviction is not safe.

28. On contradictory evidence, it was submitted that there was contradicting evidence in the prosecution which would not allow a safe conviction. That in his evidence PW1 stated that he was injured on the right hand, head and legs where he had cuts. That he however, admitted in cross examination that the P3 form which was produced by PW5 showed that the injury noted was that of the fracture of the leg (not even legs). That no explanation was given for this contradiction which raises doubt if PW1 had suffered such injuries. That the Investigating Officer was not called to explain away the contradictions hence the conviction was not sound.

29. On medical evidence, it was submitted on behalf of the appellants that the evidence of the P3 form was hearsay evidence. That the P3 form was filled 4 weeks after the alleged assault, at No. 4 page 2 of the P3 form, nothing was filled to show any prior treatment received by PW1 before filling of P3 form. That PW1 stated that he was treated at St. Mary's Hospital and was admitted for a period of one month but that PW5 admitted he did not see the clinical notes and no reasons was given for failure to produce them in court as exhibits. That the Learned Magistrate found and correctly so, that an offence of assault or grievous harm had not been proved but that she erred in proceeding to convict them for common assault yet, there was no assault in the 1st instance. Reliance was placed on the case of **Charles Koli Anyose Vs. Republic (pg 74 of the record of Appeal)** where it was submitted that as the Learned Judge after finding the P3 form (medical evidence) was hearsay proceeded to acquit the Accused person (and not convict) them on any lesser offence). Further reliance was placed on **Solomon Amolo Onyango & Another Vs. Republic (at page 77 of the record of Appeal)** and a submission made that the Court of Appeal held that in absence of a medical evidence an assault cannot be established. In this case, it was submitted that there is no medical evidence which the Learned Magistrate agreed hence the conviction was not safe.

30. On rejection of the defence evidence, Mr. Mwebi submitted that the 1st and 3rd Appellants stated that they arrived at the scene after hearing the screams, and so was the evidence of PW2 and PW3. However, that the Learned Magistrate rejected the Appellants' evidence, yet there was insufficient evidence on identification and that the Prosecution evidence does not place the appellant at the scene of the crime.

31. Secondly, it was submitted that the 2nd Appellant gave an alibi which was supported by evidence of a letter from his Chairman, excluding him from the scene of crime, which letter was admitted as evidence but the Learned Magistrate wrongly dismissed the alibi. Counsel submitted that the Learned Magistrate erred in law in rejecting the Appellant's evidence in defence which had displaced the prosecution case and would only lead to an acquittal of the appellants.

32. Counsel further submitted that the Appellants stated and that it was admitted by PW1, PW2 and PW3 that there had been a long standing grudge between the family of the Appellants and that of the Complainant (PW1), which would be a reasons why this case would have been planted on the Appellant. That the Police did not displace this fact. Further, that the allegations of a threat of PW1 by some of the Appellants which was also mentioned by PW3 was not proved. That there was an admission that it was reported and O.B. booked, but that the O.B. extract was not produced in Court as an exhibit which goes to support the fact that this would be a case planted on the Appellants because of the grudge on the land hence the conviction was not safe.

33. On sentence, it was submitted that the sentence imposed was high in the circumstances, given the relationship of the parties here involved as neighbours and given that the trial court found that this was a misdemeanor offence, a sentence on probation would have been sufficient to assist restore the relationship. It was therefore submitted that if the Learned Magistrate was correct to convict the Appellant which was not the case, then she should have put the Appellants on a probation or community work to assist in restoration of their neighbourhood.

34. The appellants' counsel urged the court to find that the conviction was unsafe and to quash it and set the appellants free.

35. On the part of the Prosecution, Miss Odumba opposed the appeal herein as consolidated and argued that the appellants had not pointed out in their submissions what they considered to be insufficient evidence. That ingredients of grievous harm were proved and that the complainant who sustained serious injuries identified the appellants as his attackers as they are relatives who knew each other and that on the material night they had two torches. That PW2 found her husband injured and PW4 and PW5 are the Clinical Officer and the Investigating Officer who testified on the injuries sustained by the complainant.

36. On alleged contradictory evidence, it was submitted in contention that the victim was clear on what injuries he sustained although the P3 form only mentioned one injury. Further, that the Investigating Officer who visited the victim in hospital confirmed that the injuries were 4.

37. On the medical evidence, it was submitted that the P3 form produced as an exhibit showed the injuries sustained hence it was not hearsay.

38. On alleged alibi defence, it was submitted that the victim testified that the appellants were among those people who attacked him hence it is not true that the appellants went to the scene after the attack. Further, that the alibi defence was raised 4 years after the appellants were charged in court which is a fallacy.

39. In a rejoinder, Mr. Mwebi reiterated his submissions and urged the court to allow the appeal.

DETERMINATION

40. I have considered the appellants' grounds of appeal, the submissions by their counsel, the opposition thereto by the prosecution counsel and the entire as adduced before the trial court. In my view, the issues for determination in this appeal are: -

(1) Whether the medical evidence contradictory or hearsay;

(2) Whether the appellants were positively identified as the complainant's attackers;

(3) Whether the defence of alibi was rightly rejected;

(4) Whether the prosecution proved its case against the appellants beyond reasonable doubt and

(5) Whether the sentence imposed was manifestly excessive.

41. On the issue of whether the medical evidence was contradictory or hearsay, the appellants contended that the complainant did not produce the treatment notes showing the injuries for which he treated. In addition, they submitted that in an case, the P3 form produced only showed one injury on the leg and no other, although the complainant claimed in his testimony that he suffered injuries on the head, hands and the legs.

42. PW1 testified and stated that he was cut on the right hand, head and legs and he was taken to St. Mary's Hospital and the following day, the OCS visited him at the hospital where he remained admitted for one month. In cross examination, he confirmed that only one injury was noted on the P3 form filled at Ambira Hospital. He however maintained that he was injured on the left hand, right leg which had four cuts and on the head.

43. PW2 found the complainant injured and they assisted him with first aid and took him to Hospital at St. Mary's. She stated that his leg had been fractured. PW3 stated that he found the complainant injured with several cuts with a fracture.

44. PW4 the Investigating Officer visited the complainant in hospital and found him injured with several cut wounds on both legs, hands, head and swelling on shoulders. He recorded the victim's statement in hospital. PW5, a Clinical officer at Ambira Hospital filled the complainant's P3 form on 28th August 2012. He had a healed compound fracture on the left lower limb caused by a sharp edged object. He classified the injury as maim. He relied on the patient's history.

45. The trial magistrate after analyzing the evidence adduced by the prosecution found that the prosecution had only proved common assault and not grievous harm as the treatment notes were not produced. She convicted the appellants of assault harm contrary to **Section 250 of the Penal Code** and in accordance with **Section 179 of the Criminal Procedure Code.** She relief on the decision in **Vincent Koki Muli Vs R[2015] eKLR.**

46. The Law is clear as stipulated in **Section 107 of the Evidence Act** that he who alleges must proof and in criminal cases, the burden of proof lies on the prosecution to prove the charge facing an accused person beyond reasonable doubt. That burden does not shift to the accused person save in exceptional cases.

47. It is the duty of the Prosecution to establish the guilt of an accused person beyond reasonable doubt and not for the accused person to prove his innocence. From the evidence adduced as reproduced above, it is clear that indeed the complainant was injured after being attacked at night by persons whom he claims he knew very well. He also described the injuries that he sustained and the same injuries were seen by the Investigating Officer.

48. However, the complainant who was allegedly admitted in Hospital at St Mary's in Mumias was, surprisingly, not able to produce the treatment notes from the said Hospital and more so he did not attempt to explain where the treatment notes were and why he could not produce them in court. Neither did the Investigating Officer tell the court where the treatment notes were.

49. Albeit the complainant cannot be faulted for having the P3 form filled after 4 weeks of the alleged assault as P3 forms are filled after the complainant has been treated, the P3 produced in evidence only shows one healed injury of a fracture on the right lower limb. The complaint claims that he was cut with pangas on the head and hands but no such injuries were noted on the P3 and assuming they were fully healed, treatment notes would have identified the injuries.

50. In my humble view, therefore, albeit the trial court had the power to convict on a lesser charge of common assault under **Section 179 of the Criminal Procedure Code,** I find that the medical evidence adduced was not waterproof. A fractured leg cannot be a common assault and it there were no treatment notes to proof the injuries for which the complainant was being treated, there was no basis upon which the trial court reduced the charge to common assault. The clinical officer who filled the P3 form did not treat the complainant and therefore he could not confirm the injuries. He did not even rely on the medical treatment notes filling the P3 form.

51. This not being a Civil Suit, it was incumbent upon the prosecution to proof their case beyond reasonable doubt and not to throw pieces of evidences in court and expect the court to make conclusions out of it in its favour. It is not clear why the clinical officer did not enumerate in the P3 form all the injuries allegedly suffered by the complainant even if the said injuries had since healed. That in my view raises a cloud of doubt on the injuries allegedly suffered by the complainant which doubt must always go in favour of the accused persons.

52. The other aspect of the Prosecution's case that creates doubt in the mind of this court as to whether the prosecution proved its case against the appellants beyond reasonable doubt is that the complainant and his father testified that after leaving court in Kisumu, the appellants threatened the complainant to cut him into pieces and that the complainant's father advised him to report to the police which he did and it was entered in the Occurrence Book. However, the said OB was never produced in evidence to link the appellants with the alleged threat and more so, the Investigating Officer never alluded to such report. He also did not state why no investigations were carried out in respect of the alleged threat or linking the alleged threat with the subsequent attack on the complainant.

53. Nonetheless, I find no evidence to suggest that the appellants were framed simply because the OB was not produced. That in itself does not give credence to the aspersions by the appellants that they were framed. Further, the fact that the appellants' family and the complainant's family had a land dispute does not automatically mean that the complainant had reason to frame the appellants with the offence.

54. On the issue of whether DW2's alibi defence raised reasonable doubt in the Prosecution's case, in his testimony, the appellant stated that on the material day he was at Port Victoria fishing and he produced a letter dated 1st August 2012 written by the Chairman of the Beach to confirm that between 26th June 2012 and 19th July 2012, the appellant was away. However, the appellant's own evidence in cross examination was contradictory in that he stated that he went away on 26/6/2012 and returned on 17/7/2012. This contradicted his evidence in chief that he went on 26th June 2012 and returned on 19th July 2012 at 1.00 pm and that after a short while the same day he was arrested.

55. Therefore, on the issue of alleged alibi, I find that the trial magistrate correctly rejected that evidence for reasons that the same was not credible as it was contradictory and in addition, it was brought in too late in the day contrary to the principles espoused in ***Karanja v R [1983] KLR 501.*** In ***VICTOR MWENDWA MULINGE V R, [2014]eKLR*** the Court of Appeal rendered itself thus on the issue of alibi:

> ***"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see KARANKA V R, [1983] KLR 501 .... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it will all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."***

56. In this case, the appellant raising the defence of alibi had all the time, from the time he was arrested to state that he was not present at the time of such incident. However, he waited until his defence which was nearly 4 years that he raised the alibi and purported to bring a letter to that effect, which letter was not even produced by its author. In the premises, I find and hold that the alibi raised was an afterthought as it was brought too late thereby denying the prosecution an opportunity to challenge it.

57. On whether the appellants were positively identified as the complainant's attackers, the complainant testified that on 13/7/2012 he had come from Kisumu to attend a land case No. 319 and on arrival at home, he met the appellants who threatened to cut him. He mentioned the 2nd and 3rd accused persons. He then went to the police station to report and recorded a statement on 15th July 2012 and on the same day at 7.30 pm is when he was attacked by people among them, the appellants herein. However, in his testimony, he only mentioned the 1st, 3rd and 4th accused persons not the 2nd accused. The complainant stated many people assaulted him and four were in court but he never mentioned the 2nd accused Domisiano Odhiambo Siala but in cross examination he stated that the second accused had a panga. In addition, it was only during the cross examination that the complainant narrated the identity of each accused person, what weapon each of them held and how they were dressed.

58. According to the complainant, he identified the accused persons among many assailants because the third accused had a torch which he lit for the other assailants as they cut him. He stated that he used the light of the torch they had to see the assailants who were his cousins.

59. From the above evidence, it is clear that the complainant was alone when he was attacked. His father and sister in-law all came after he had been assaulted and assisted him. However, none of the witnesses PW2 and PW3 stated that the complainant told them that he had been attacked by the appellants herein. Not even the Investigating Officer, PW4 who recorded the statement of the complainant told the court that the complainant told him or gave him the names of the people who attacked and assaulted him. This raises doubts as to whether the complainant identified or recognized his attackers that night which according to him, was dark.

60. In my humble view, it is possible that the appellants were among the attackers but the prosecution failed to tie loose ends in their case. The motive of the attack could have been the land dispute but again the prosecution failed to produce evidence of the report made to the police on 15th 2012 by the complainant that the appellants herein had threatened to cut the complainant owing to the pending land dispute. In my humble view, the case was poorly investigated and casually prosecuted.

61. The identification of the assailants and how they were dressed that night was only stated in cross examination. Answer in cross examination cannot build a case for the prosecution. The prosecution must build its case based on evidence adduced by witnesses. In this case, the complainant was very economical with facts and it had to take cross examination for him to divulge more. That in unacceptable.

62. On the whole, in as much as the court can accept evidence of a single identifying witness, but in this case, I find that it was unsafe for the trial court to accept evidence of PW1 alone without any other evidence to corroborate his testimony. In ***Abdallah Bin Wendo & Another Vrs Republic (1953) 20 EACA 166*** the court held:

> ***"….subject to certain well known exceptions, it is trite law that a fact may be tried by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions following a correct identification were difficult.***
>
> ***In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt which a judge or jury can reasonably conclude that the evidence of identification, although based on testimony of a single witness, can safely be accepted as free from possibility of error."***

63. The assault in question happened at night at about 7.30 p.m. The trial court did not warn itself of the dangers of relying on evidence of a single identifying witness and neither did she state that that evidence of the complainant was free from possibility of error. The trial court simple stated that, "the victim was able to identify how they were dressed." Yet as I have observed above, the evidence on how the appellants were dressed only in cross examination and not from the complainant in his testimony in chief.

64. Accordingly, I find and hold that the trial court erred in law and fact in convicting the appellants on evidence of a single identifying witness which evidence was not supported by other evidence to eliminate possibility of error.

65. On the whole, I find and hold that the Prosecution did not proof their case against the appellants beyond reasonable doubt. Accordingly, I find and hold that the conviction of the appellants for common assault was unsafe, the same is hereby quashed and sentences imposed on the appellants set aside. The fines if paid shall be refunded to the appellants.

66. Appeal is hereby allowed.

Dated, signed and delivered at Siaya this 12th Day of June, 2019.

R.E. ABURILI

JUDGE

In the presence of:

Mr. Mwebi Advocate for the Appellants

Mr. Okachi Counsel for the State

CA: Brenda and Modestar