



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 44 of 2015**

**BETWEEN**

**KELVIN NAMEMA VIDAR.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(An appeal from the original conviction and sentence in the No. 840 of 2013*

*at the Chief Magistrate's Court at Kibera Cr. Case delivered*

*by Hon. E. J. Osoro, SPM on 18<sup>th</sup> February, 2015)*

**JUDGMENT**

**Background**

1. The Appellant herein was charged with the offence of grievous harm contrary to Section 234 of the Penal Code. It was alleged that on 5<sup>th</sup> February, 2013 at Kagemi Gichagi within Kangemi of Nairobi County jointly with others not before court unlawfully did grievous harm to Moses Muthee Muriithi. The Appellant was arraigned in court and at the conclusion of the trial found guilty and sentenced to 15 years imprisonment.

2. He was dissatisfied with both the conviction and sentence against which he preferred the instant appeal. His grounds of appeal were filed contemporaneously with the written submissions on 24<sup>th</sup> May, 2018. They were (i) that Section 200(3) of the Criminal Procedure Code was not complied with, that the charge was a cover-up of an attack on him, that the prosecution evidence was contradictory and that his defence was not considered.

**Submissions.**

3. The Appellant relied on written submissions filed on 28<sup>th</sup> May, 2018. Learned State Counsel, Miss Atina for the Respondent made oral submissions. On the issue of non-compliance with Section 200(3) of the Criminal Procedure Code, the Appellant submitted that his case was heard by two different magistrates, namely Hon. Juma and Hon. Osoro. He submitted that Hon. Juma heard and recorded the evidence of PW1 to PW4 whilst the succeeding magistrate, Hon. Osoro recorded the evidence of the rest of the witnesses. He submitted that the latter magistrate did not inform him of his right to choose to recall the witnesses who had earlier testified or have the case heard afresh as required by Section (3). He submitted that this violated his right to a fair trial which effectively vitiated the entire trial. He cited several cases to buttress the submission.

4. He then submitted that he was charged merely as a cover-up and to silence the truth that he was actually the victim of the attack and had acted in self defence. He submitted that the truth could be glimpsed from the contradictory versions of the attack put forth by each of the witnesses; PW1, PW3 and PW4. He questioned the failure by PW3 and PW4 to lodge assault complaints against him if indeed they had been attacked. He submitted that the prosecution's case corroborated his evidence that he was attacked and acted in self defence. That therefore the witnesses colluded with the complainant in an effort to cover up the truth. In that case, he submitted that the prosecution evidence was contradictory, inconsistent and unreliable and could not found a basis for his conviction. His view was that the trial court ought to have believed his defence as a result of which he would have been vindicated. He urged this court to properly reevaluate the evidence and arrive at a different conclusion which is to quash the conviction.

5. Ms. Atina begun on her part partially opposed the appeal. She conceded that Section 200(3) of the Criminal Procedure Code was not complied with. She however submitted that the evidence was overwhelmingly against the Appellant and urged the court, in order to balance the interest of justice, to order that a retrial be conducted. She submitted that a retrial would not prejudice the Appellant as he was out on bond throughout the trial before the conviction. He had therefore not served a substantial part of his sentence.

### **Evidence.**

6. **PW1, Moses Muthee Murithi** who was the complainant testified on 5<sup>th</sup> February, 2013 he was alongside one Chege and “Captain” at around 10.00 p.m. headed home when they found two people fighting. They moved to try and stop the fight when they realized that one man was actually beating the other. He identified the assailant as the Appellant. After they separated the men the Appellant took a piece of wood and started beating them. He hit him in his right eye and head leading to loss of vision of the eye as it was blown out. But when his two colleagues saw what had happened they rescued him and arrested the Appellant who was taken to Kabete Police Station. He received treatment at Rehab Hospital and later at Kenyatta National Hospital where he was admitted for a month. That after his discharge he followed up on the case at the police station leading to the Appellant’s arrest. He testified that he knew the Appellant before the events as he was a cobbler in the area.

7. **PW2, Jane Njeri Wambui**, was the wife of PW1. Her testimony was that she was informed that her husband had been attacked. She visited the scene but found that he had already been taken to hospital. He visited him at Kenyatta National Hospital where he was admitted for one month and two weeks. She testified that she knew the Appellant who repaired shoes next to a footpath.

8. **PW3, John Chege Kimani** who accompanied PW1 on the fateful day, in corroborating the evidence of PW1 testified that on 5<sup>th</sup> July, 2013 he was also alongside one Muthee Njoroge and that on their way home they met three men and a lady who were standing by the road. They did not talk to them but as they went past them they heard the people talk about them and they turned back to inform them that they did not harbor bad intentions. That the three men then attacked them with one hitting PW1 with a piece of timber on the head twice leading to the rupture of his eye. The assailant was the Appellant. He got hold of him after which the other persons who accompanied the Appellant fled. That there was a struggle but good Samaritans helped him apprehend him. The mob wanted to lynch the Appellant but was stopped and they all went to Kabete Police Station where the Appellant was arrested. They then took PW1 to hospital. After PW1 was discharged from hospital he recorded his statement. In cross examination he testified that he did not know the Appellant before the incident. **PW4, William Mwaniki Njoroge** who accompanied PW1 and PW3 entirely corroborated their evidence.

9. **PW6, Dr. Zephania Kamau** of Police Surgery examined PW1 on 12<sup>th</sup> March, 2013. The patient had a scar on the frontal scalp and a fracture which was depressed but had been elevated through a surgery. There was also no eye ball in the right eye. He opined that the injury was caused by blunt force trauma and he assessed the degree of injury as grievous harm. **PW5, CPL Richard Keli** was the investigating officer. He summed up the evidence of the prosecution witnesses and preferred the charge against the Appellant.

10. After the close of the prosecution case the court ruled that the prosecution had established a prime facie case warranting the Appellant to be put on his defence. He gave an unsworn statement of defence and did not call any witness. He denied he committed the offence. He recalled that on the date in question he closed work and went to take a bottle of beer but on his way home he was followed by two men who attacked him and tried to steal his shoes. That they struggled and he overpowered them and when he looked around he saw the complainant lying four to five meters away from him. That two men then accosted him who said that he had attacked the complainant and they took him to the police station.

### **Determination.**

11. It is now the duty of this court to re-analyze and reevaluate all the evidence afresh before arriving at its own independent finding. I have accordingly considered the submissions and the evidence on record before arriving at the following issues for determination: whether Section 200(3) of the Criminal Procedure Code was complied with and whether the offence was proved beyond a reasonable doubt.

12. The first issue arises from the Appellant’s contention that the trial was conducted by two magistrates, with Hon. Juma hearing and recording the evidence of PW1 to PW4 while Hon. Osoro hearing and recording the rest of the prosecution’s case. A perusal of the typed proceedings clearly confirms this fact. However, a look at the original hand written proceedings attests that the matter was undertaken by the same trial magistrate, Hon E.J. Osoro. The only discrepancy is that in some instances she was indicated as Hon. J. Osoro and in others as Hon. Osoro or Hon. J. Osoro or Mrs. E. Osoro. This court is seized of the knowledge that the names referred to one and the same magistrate who has worked for the judiciary for a while. I then arrive at the inevitable conclusion that the change in names was occasioned by either a change in the status of the judicial officer or the lack of keenness with the court in guiding the recording of a constant name in the proceedings. Hence, the discrepancy did not occasion an injustice and is one of want of form which is curable under Section 382 Of the Criminal Procedure Code.

13. On proof of the case, the Appellant argued that the prosecution case was riddled with contradictions. He contended that he was arrested as a cover up whereas he was indeed the victim. He pointed to the differing accounts of the attack by the key witnesses, PW1, PW3 and PW4.

14. It is factual that PW1’s evidence is at odds with the other witnesses with regards to the number of persons present at the scene. He testified that they met two men fighting whereas the other witnesses testified that they encountered three men and a lady. The issue of whether the men in question were actually fighting only emerges in PW1 and PW4’s testimonies with PW3 being mute on the matter. PW3 testified that as they passed the group, three men and a lady, they heard the group talking among themselves about their demeanor and they turned back to assuage their fears at which point the men attacked them. PW4 on the other hand testified that as they walked past the group, which was engaged in a fracas, one of the men was hit and bumped into them. They stopped to ask what was happening and then proceeded on their way at which point they noticed a motorcycle follow them with one of the men who proceeded to alight, stop them and then attack them leading to the complainant’s injury.

15. The test is whether the contradictions were material in nature. The Appellant submitted that they were and were meant to cover up the fact that he was the victim of the circumstances. I am of a contrary view. I find that the contradictions and inconsistencies were not material as to negate the fact that it is the Appellant who assaulted PW1 and inflicted the grievous harm. The discrepancies only relate to the number of persons who were present at the scene and whether the assault was occasioned at the first instance when PW1 met the Appellant and another or after the PW1 returned to the scene when he and his friends found the Appellant quarrelling with a friend. If indeed there was a fight between the two groups, at least one or more persons would have been injured, but it is only PW1 who sustained injuries. Again, one prominent thing stood out; that it is the Appellant who injured PW1. These are issues that do not lessen the fact that the Appellant viciously attacked PW1 on the head and face as a result of which his right eye was badly injured and he lost vision of it.

16. The extent of the injuries was confirmed by the medical examination form filled by Dr. Kamau (PW6) who assessed the degree of injury as grievous harm. That said I come to the conclusion that the prosecution sufficiently proved its case beyond a reasonable doubt. The Appellant's defence amounted to a mere denial that could not bail him out. I accordingly uphold the conviction.

17. On sentence, the Appellant was sentenced to fifteen years imprisonment against a possible life imprisonment. In his mitigation, he urged the court to take into account that he was the sole bread winner of his parents and siblings as he was the eldest son. In sentencing, the court noted that the Appellant looked remorseful but owing to the trauma caused by the nature of the injury a sentence of fifteen years was passed. I have read the proceedings in detail. I agree with the learned trial magistrate that the loss of vision is a life trauma that PW1 will have to live with for the rest of his life. I add that the attack was also vicious as PW1 had to be admitted to hospital for one month and two weeks. In addition, the complainant sustained a fracture to the scalp. The injuries were occasioned without provocation. A deterrent sentence was therefore called for. I have no reason in the circumstances to disturb the sentence. The same is also upheld. Consequently, I dismiss the appeal in its entirety.

**DATED and DELIVERED** this 17<sup>th</sup> day of **July, 2018**

**G.W. NGENYE-MACHARIA**

**JUDGE**

***In the presence of:***

1. Appellant in person.
2. Mr. Momanyi for the Respondent.