



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MARSABIT
CRIMINAL APPEAL NO.25 OF 2016
ADAN DIDA GUYO.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No.177 of 2014 of the Principal Magistrate's Court at Marsabit by Hon. B.M Ombewa – Senior Resident Magistrate)

JUDGMENT

The appellant, **ADAN DIDA GUYO**, was convicted for the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code.

The particulars of the offence were that on 26nd March 2015 at **Shauri Yako** in Marsabit Central sub county within Marsabit County, unlawfully assaulted **MOHAMMED DIDA GUYO**, thereby occasioning him actual bodily harm.

He was sentenced to four years imprisonment. He has appealed against both conviction and sentence.

The appellant was in person. He raised the following three grounds of appeal:

- 1.That he was denied a chance to call his witnesses in court.
2. That the learned trial magistrate erred in law and in fact by failing to appreciate the existence of a grudge with the complainant.
- 3.That the learned trial magistrate erred in law and in fact by convicting him on insufficient evidence.

The state opposed the appeal through Mr. Chirchir, the learned counsel.

The facts of the prosecution case were briefly as follows:

At about 2 p.m on 22nd March 2015, the complainant was in his home with some casual employees. The appellant who is his younger brother went to the home and demanded his share of inheritance. He threatened to kill the complainant if his demand was not met. He was armed with a knife. When he attempted to cut him he was overpowered. In the process of disarming him, the complainant was cut on the palm.

The appellant in his defence contended that when he went to his brother's compound, the latter accused him of being drunk and ordered him out. The complainant cut him on the head before he was tied and taken to the police.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC 1972 EA 32**.

When the appellant was placed on his defence, he informed the learned trial magistrate that he was going to call one witness who was on that particular day not present in court. However, immediately after he had testified, he informed the court that he was closing his defence case. He cannot be heard to complain that he was not given a chance to call his witness. He had a right to close his case even if he had earlier said he intended to call a witness.

It would appear the appellant was not satisfied with the distribution of their father's estate. This cannot be said to be a grudge but a disagreement. Even if we assume that a grudge existed, it cannot be isolated from the evidence. Such a grudge can only help the court to appreciate the facts as borne out by evidence on record. If a grudge existed, either party could exploit it for an advantage. The record clearly shows that the learned trial magistrate was guided by facts.

Upon my perusal of the evidence on record, I find that there was ample evidence to convict the appellant. The complainant (P.W 1) narrated to the court how the appellant went armed and threatened to kill him if he did not get his share of inheritance. Hussein Jillo (P.W 2) and Mohammed Juma (P.W 3) were casual workers in the complainant's compound. Their evidence agreed with that of the complainant and participated in apprehending the appellant. They, like the complainant explained how the appellant sustained an injury on the head. Mohamud Dida (P.W 4) a sibling to both the complainant and the appellant testified like the other prosecution witnesses.

The medical evidence by Dr. Makori (P.W 5) confirmed the injury the complainant sustained.

The contention of the appellant that when he went to his brother's home the latter fetched a machete and cut him on the head is not supported by any evidence on record. His version does not account for the injury the complainant sustained. The learned trial magistrate was right in dismissing it.

From the foregoing analysis of the evidence on record, I make a finding that the conviction of the appellant was founded on sound evidence. The appeal against conviction is hereby dismissed.

Although the accused had no previous conviction, the circumstances under which the offence was committed militate against any interference with the sentence which the trial court meted out. The appellant had threatened to kill. Even after he had been tied with a rope he continued to issue threats. His appeal on sentence is therefore dismissed.

DATED at Marsabit this 8th day of March, 2017

KIARIE WAWERU KIARIE

JUDGE