



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL CASE NO. 29 OF 2016

(An appeal from judgment in original Kitale CMCR Case NO. 1668/2013

delivered on 21/03/2016 by C.C. Kipkorir Resident Magistrate)

OBADIA BARASA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant was charged with the offence of **Greivous Harm contrary to Section 234 of the Penal Code**. The particulars were that on the **15th day of July 2013 at Chepkoilel farm in Trans Nzoia County unlawfully did greivous harm to Antony Khamala Wanjala**. He was convicted and sentenced to 1 ½ years imprisonment hence this appeal.

Before delving into the petition herein its worthwhile summarising the facts as presented before the trial court. The complainant testified that on 15th July 2013 at 5 pm he was walking home when he saw a man ahead of him walking in a zigzag manner with his hands inside his pocket. As he approached he threw a stone at him which hit his mouth causing great pain and to in the process

loosing one tooth.

The assailant then ran away.

He went to Endebess and made report at the police station. He was referred to Endebess District hospital who later referred him to Kitale District hospital. He said that the appellant was arrested at the police station.

On cross examination he denied that he was drinking alcohol on the material day together with others and that his tooth was intact. He said that one Biketi took him to hospital when he raised alarm.

PW2 Dr Charles Macharia produced the P3 form and notes on behalf of Dr Gakundi. It showed that there was one missing canine tooth and wound on his upper lip which was swollen.

PW3 P.C. Simon Kirui said that he was at the station when at around 8.30 pm the complainant reported that he had been assaulted by the complainant.

He had fresh wound on the side of his mouth with a missing tooth on cross examination he confirmed that the appellant was arrested when he went to report about being beaten by the complainant.

When put on his defence the appellant gave sworn evidence . He said that they were drinking alcohol at the home of one Mama Rael.

In the process a fight ensued over lack of payment of the alcohol they were drinking. The appellant stated that he was assaulted by the complainant and the following day when he went to report at the police station he was arrested. He maintained that the complainant had always had a missing tooth and that he was always a violent man.

Analysis and Determination

The appellant did file the Petition of Appeal which contained several grounds. The appellant counsel argued the same separately and jointly.

The learned state counsel did oppose the same arguing that the decision arrived by the trial court ought not to be disturbed.

In this appeal the court is enjoined to arrive at an independent finding with full knowledge that it did not have the opportunity of seeing the witness – *See Ekeno Vs Republic (19972) E.A. 32*

The first issue herein is whether the complainant sustained the injuries on the road or as the appellant puts it at the drinking den.

The complainant stated that he was walking alone when out of nowhere a passerby simply threw a stone at him. He raised alarm and that is when one Biketi came and rushed him to the hospital. He said that he only knew the assailant by face but did not know his name. This materially contradicted what PW3 told the court. He said that the complainant reported that he had been hit with a stone by one Obadiah Barasa.

When did he get to know the name of the assailant?

Further why did the said Biketi not called to corroborate what he saw? If its him who rescued the complainant I would agree with the appellant counsel that in the absence of any other witness it was necessary for Biketi to corroborate what the complainant stated.

What I find intriguing is how the appellant was arrested. The complainant seemed to have gone ahead of the appellant. He said that the appellant was arrested at the police station for the reasons he could not explain.

I find it very interesting for the appellant to assault the complainant then goes again to report at the police station.

I find that the court ought to have put weight on the defence evidence. Though he did not call any witness I find that its most probable that the appellant as well as the other fellows mentioned by the appellant were in a drinking joint when there ensued a fight. I say so because there is nothing to suggest that the tooth got removed on that particular occasion.

Further there was no X-ray report to buttress what PW2 gave. It would have been relevant to show how old the injury on the gum was.

All in all the evidence as presented by the prosecution was to say the least shaky to warrant the conviction. I do not find the evidence of the complainant foolproof.

Consequently I shall allow the appeal set the appellant free unless lawfully held.

Delivered this 6th day of October 2016.

H.K. CHEMITEI

JUDGE

In the presence of

Abele for prosecution

Appellant present

Kirong – Court Assistant.