



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 39 OF 2014**

DAVID NJAGI KAVUIYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(An Appeal from the Sentence and Conviction by the Senior Principal Magistrate Embu in Criminal Case No. 298 of 2013 on 10th July, 2014)*

**J U D G M E N T**

The appellant was charged and convicted of the offence of grievous bodily harm contrary to Section 234 of the Penal Code and sentenced to six years imprisonment. On 16/7/2014, he lodged this appeal and relies on four grounds which can be condensed as follows:-

1. *That the case was framed against him due to an existing grudge;*
2. *That the case was not proved to the standards required;*
3. *That his defence was not considered;*
4. *That the magistrate failed to comply with Article 49(I)(f) of the constitution.*

During the hearing of the appeal, the appellant presented written submissions explaining his grounds. In the submissions he added more grounds as follows:-

- (a) That the trial court failed to observe that the appellant was intoxicated;
- (b) That identification of the appellant was unreliable due to poor lighting at the scene;
- (c) That the prosecutions case was full of inconsistencies.

The facts leading to this appeal are that the appellant worked as a carpenter and one Onesmus Gitonga was his customer at the material time. PW3 (Onesmus) took to the appellant 8 pieces of timber for making a bed. The appellant delayed to carry out the job leading to PW3 to request for the return of the timber.

The duty of the first appellate court was explained in the case of ***NJUGUNA MWAURA & 2 OTHERS [2013] eKLR:-***

*“The duty of the first appellate court is to analyze and reevaluate evidence which was before the*

*trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision”.*

PW1 Joseph Njiru accompanied PW3 to the house of the appellant's parents to collect the timber. PW2 and PW4 were also in the company of PW1 and PW3. On reaching the home, PW3 talked to the appellant and demanded his timber be returned. The appellant gave 6 pieces instead of 8 to PW3. PW3 then demanded for the remaining 2 pieces. The appellant entered the house and came out armed with a panga. He vented his anger on PW1 and cut him with the panga on the head. The complainant was treated at Kenyatta National Hospital where he was admitted for one month after remaining unconscious for 3 days from the date of the attack. The appellant was subsequently arrested and charged with the offence.

PW1 testified that he was accompanied by one Wilson Njiru when he went to Gakwegori market on 24/4/2013 in the evening hours. He found the appellant and PW3 standing outside Mawaida Bar and he joined them. The two men had a conversation concerning a bed which PW3 said he had given the appellant timber to make for him and had paid a deposit of Shs.500/=. He said that PW3 requested that the timber be returned to him.

The appellant led the party to his mother's house nearby and produced 6 pieces of timber and handed over to PW3. When PW3 asked for the other two pieces, the appellant entered the house and came out holding a panga. For no apparent reason he set upon PW1 and cut him on the head. He fell on the ground and lost consciousness and was to gain it three days later at Kenyatta National Hospital where he was admitted.

The testimony of PW2, PW3 and PW4 corroborated the evidence of PW1 on the attack by the appellant. PW5 the doctor examined the complainant after he was discharged from Kenyatta Hospital. He found a healed cut wound on the left side of the scalp extending to the frontal parietal region; a healed wound on the left parietal aspect of the neck and weakness on the left hand. A CT scan revealed a fracture on the head bone which caused 4/5 weakness on the left arm. The probable type of weapon was sharp and the injury was assessed as grievous harm.

In his defence the appellant said he had been given timber by someone and deposit of Sh.500/= for labour. In the evening of 24/4/2003 he met the man at Mawaida Bar and he demanded refund of his money and the raw materials he had delivered. He expressed his desire to give the work to another carpenter. The man was accompanied by two others. The three fought the appellant and injured him on the ribs. They later came for their timber at 1.00 a.m. They forced his door open thereby damaging it. They also took the appellant's phone. He raised alarm and neighbours came to find out what what happening. He was taken to hospital where he was treated and discharged. The matter was reported to the police the following morning. The appellant was later arrested and charged with the offence.

The appellant called one witness, DW2 who said that on the material day he heard commotion from the house of the appellant. On reaching there, he found the appellant and his wife screaming. The door and the window had been broken and things scattered around. The complainant was injured and was taken to hospital.

DW3 said he runs a bar at Gatunduri market. The appellant was his customer on the 24/4/2013 from 9.00 p.m. The complainant came to the bar, took some beer. He picked a quarrel with the appellant about timber. The two were advised to resolve their differences the following day but did not take the advise. The appellant was attacked and taken to his house by two others. DW3 closed the bar and later heard screams later from the home of the appellant's mother. When he went there, he found the complainant had been attacked and assisted to take him the Embu Provincial hospital from where he was referred to Kenyatta National Hospital.

It is not disputed by the witnesses of both sides that there was a quarrel about pieces of timber which the appellant had received in the cause of his work from PW3. The appellant and the two defence witnesses all agreed that this timber fracas developed into a fight between the appellant, PW3 and PW1 who had accompanied them.

It progressed to the appellant going for a weapon. He came with a panga from the mother's house with which he attacked PW1. The bar owner, DW3 testified that the fracas started in his bar earlier in the evening. He advised the appellant, PW1 and another to leave the bar and sort out their issues outside. DW3 said he had closed the bar and while in his house heard the noise from the house of the appellant. When he went to answer the distress call, he found PW1 lying on the ground with cut wounds. He assisted to take him to hospital.

The evidence of PW1 was corroborated in material particular by that of PW2, PW3 and PW4 that it is the appellant who cut the complainant with a panga on the head. Although the appellant said he was injured on the ribs during the fight, he did not obtain a P3 form in order to confirm the injuries. Neither did he call any witnesses to support his evidence on the injuries and on the existence of a report made at the police station. PW6 an officer from Manyatta police station testified that the report of the complainant was booked at the station. There was no mention of the appellant having made a report.

In his defence, the appellant admits the incident on the disagreement on the pieces of timber and the fracas that followed but denies assaulting the complainant. His defence puts him at the scene of crime at the material time and puts the complainant and his friends there. The defence witness (DW3) confirms he found the complainant already injured outside the house of the appellant. The presence at the scene and the evidence of the eye witnesses whom the trial court found credible rules out the possibility of any grudge or framing up. The medical evidence corroborates the evidence the prosecution witnesses including the probable type of weapon. The injury was assessed as grievous harm.

The contention by the appellant that his defence was not considered is disapproved by the judgment. It is clear that the trial magistrate considered the whole defence including the testimony of DW2 and DW3 and found it not tenable.

The appellant states that he was not taken to court within 24 hours as provided by Article 49(1)(f). The record shows that the appellant was arrested on 24th April 2013 on a Wednesday. He stayed in police custody until Monday the following week when he was taken for plea on 29th April, 2013. Excluding the weekend the appellant was in police custody for 3 working days before he was taken for plea. He was therefore remanded for 72 hours as opposed to 24 hours. It is established law that the charges against the appellant will not be quashed for non-compliance with Article 49(1)(f) of the constitution. The charges against him must be pursued to logical conclusion. However, he is entitled to claim compensation from the state for unlawful detention in a civil claim.

I find that the prosecution proved the case against the appellant to the standards required in criminal cases. The conviction by the trial magistrate was safe since it was based on cogent evidence. The maximum set for the offence of grievous harm is life imprisonment. The sentence of six (6) years was therefore lawful and lenient considering the circumstances of the offence.

The appeal is dismissed for lack of merit. The conviction and sentence are hereby upheld .

It is hereby so ordered.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 3RD DAY OF MARCH, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**The Appellant in person**

**Ms. Matere for the State**

**F. MUCHEMI**

**JUDGE**