



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL APPEAL NO. 9 OF 2012**

**GILBERT MUKUNDI LUBARUA..... APPELLANT**

**V E R S U S**

**REPUBLIC.....PROSECUTOR**

**JUDGMENT**

The Appellant, Gilbert Mukundi Rubarua was charged with two counts of grievous harm contrary to section 234 of the Penal Code CAP 63 of the Laws of Kenya. The particulars of the offence were that on 10<sup>th</sup> August 2010, the appellant unlawfully caused grievous harm to Noreen Karainto and Rosemary Kabatia respectively.

The appellant was tried and convicted of the two counts and sentenced to life imprisonment in respect of both counts with an order that the sentences do run concurrently.

The Appellant was aggrieved by the convictions and sentence and filed this appeal. In his petition of Appeal, the Appellant raised the following issues:

- a. *that the learned trial magistrate erred in both law and facts in failing to make a finding that the prosecution witnesses gave contradictory and conflicting testimonies;*
- b. *that the learned trial magistrate erred in both law and facts in failing to note that the prosecution failed to summon vital witnesses mentioned during the trial for a just decision to be reached;*
- c. *that the learned trial magistrate erred in both law and facts by failing to note that there was an existing grudge between I the appellant and the complainant;*
- d. *that the learned trial magistrate erred in both law and facts by ignoring the inconsistencies and irregularities in the case;*
- e. *That, the learned trial magistrate erred in both facts in dismissing the preferred defense without sufficient reasons for the same.*

The appellant therefore prays that the court do quash the convictions, and set aside the sentence. In addition, the Appellant had filed written submissions on which he relied.

When the appeal came up for hearing on 20<sup>th</sup> April 2015, Mr. Mulochi, Learned State Counsel opposed the appeal. He submitted that the prosecution evidence was overwhelming and reliable and therefore the conviction was proper.

This is the first appellate court and as such I have subjected the evidence adduced before the trial court to a fresh evaluation and analysis and will draw my own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided the Court of Appeal decision of *KIILU AND ANOTHER V R (2005) 1 KLR 174* on the duties of a first appellate court, where the Court of Appeal held thus:

***“an appellant in a 1<sup>st</sup> appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision in the evidence. The 1<sup>st</sup> appellate court must itself weigh conflicting evidence and draw its own conclusions..”***

***It is not the function of a 1<sup>st</sup> appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrate’s finding 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..”***

The evidence before the trial court was as follows; Noreen Kirainto (PW1), told the court that the accused was her husband; that on 10<sup>th</sup> August 2010, she was coming from Kiamore police post in company of her mother Rosemary Kabatia Benson (PW2), when she heard a bicycle behind her and upon looking back, saw the appellant who was holding a *panga* high. The appellant then suddenly cut her at the back once and proceeded to cut her mother who was accompanying her on the arm. PW1 tried to escape but the appellant followed her and cut her again on her head. PW1 then fell down whereupon the appellant cut her again severally on her head, hands, neck and near the ears. She then lost consciousness. She was later taken to Chaaria Cottolengo hospital where she was admitted for 2 days and later transferred to Chogoria PCEA hospital where she was admitted for 5 months. She later reported the assault at Kiamore police post, was issued with a P3 form which was filled at Meru General Hospital. PW1 told the court that she had a dispute with the appellant and that is why she had gone to report at the post.

PW2 Rosemary Kabatia corroborated PW1’s evidence by testifying how on 10th August 2010, they were attacked by the appellant, who cut PW1 severally, on her hands, head and near the neck and ears till PW1 lost consciousness. She then screamed to attract the attention of the villagers, whereupon the appellant ran away leaving behind his *panga*, that he had used to attack PW1 and 2. PW2 was cut on her hand when she blocked an attempt to cut her. She was then assisted by villagers and took PW1 to hospital using a *bodaboda* of one Luka. PW1 was later transferred to Chogoria hospital where she was admitted for 5 months. She later reported the incident at Kiamore police post and was issued with a P3 form.

PW 3 Benson Muthukuru, the father of PW1, corroborated PW1 and 2’s evidence by testifying that he was with PW1 and 2 on 10th August 2010, when coming from Kiamore police post when the appellant attacked PW1; that PW2 tried to intervene but she was also cut on her hand. PW3 said that he did not interfere for fear of being attacked but screamed for help. The appellant then ran away leaving behind the *panga* that he had used to attack both PW1 and 2. They later took PW1 to St Luke’s clinic whereupon they were advised to take her to hospital.

PW 4 PC Sebastian Leka testified that on 10th August 2011, he was at Kiamuri Police Base performing crime duties when PW3, PW2 and 1 reported that they had been attacked by the appellant and seriously injured. He testified that they had several *panga* cuts and they were rushed to hospital in serious condition. Later on, the appellant surrendered himself to the police claiming to have killed somebody whereupon he was charged with the offences.

PW5 Dr. Makandi Mutwiri of Meru Level 5 Hospital produced P3 forms in respect of PW1 and 2 which had been filled by Dr. Matu with whom he had worked at Meru Level 5 Hospital. According to the Doctor, PW1 sustained multiple deep cut wounds on the head, cut wound on right side of the neck, upper limbs, deep cut wound on the forehead to the dorsum of hand with fracture and deformity, deep cut wounds on side’s left hand tendon involved and bone fracture. The degree of the injury was assessed as grievous. On the other hand PW2 sustained deep cut wound on the left hand and was unable to flex middle three fingers. The degree of injury was similarly assessed as grievous harm.

In his defence, the appellant testified on oath. He stated that it all began on 6/8/2010 at midnight when Noreen, PW1 woke up and informed him she wanted to die, took a wire and tried to commit suicide but he screamed for help whereby his mother intervened and so did the sub-area and elder who told them whoever wanted to die should go ahead. Next day, he cut grass for his cows and returned home at 8.30 a.m., had tea. He wanted to go for a journey to Marimanti but returned home where he had forgotten something. He took the tea that was left in the jug and immediately started having stomachache. His neighbour took him to St. Luke's Cottage Hospital where he was admitted, treated for poisoning and discharged on 8/8/2010. He reported the incident at Kiamuri Patrol Base where the Officer Commanding Station (OCS) ordered that Noreen be taken to the Base with the remaining pesticide. After hearing the case the police gave her free bond to return on 10/8/2010 whereby they left the police station. The father offered to pay him KShs.2, 500/= for hospital costs and they were told to go home to try and resolve the matter. They left the Patrol Base, walked to Kiamuri Market and parted and after he had walked 400 metres, he saw a motor cycle carrying injured people who stopped near him and the father lifted a *panga* and he ran away to Kiamuri Patrol Base where he was locked up.

I have considered the submissions by both the appellant and the State Counsel and the grounds of appeal. In addition, I have re-evaluated the evidence on record.

PW1's and 2's evidence was clear, and consistent. PW1 testified how she was viciously attacked by the appellant who was her husband as they were coming from Kiamore police post in the company of PW2, 3 and others. She vividly recalled how the appellant cut her severally on the head, hands, neck and near the ears to a point of loosing consciousness. When PW 2 tried to intervene, the appellant attacked her by cutting her left hand with a *panga*. PW1 and 2's evidence was further corroborated by PW 3's evidence who witnessed the attack since he was in their company at the time of the attack. Both PW1, 2 and 3's evidence remained unshaken during cross examination and I have no reason to doubt the testimonies of the three witnesses. Further, the evidence of these three witnesses was further corroborated by the evidence of PW4 PC Sebastian Leka and PW5 Dr. Makandi Mutwiri as to the nature of the injuries that PW1 and 2 sustained.

It was contended by the appellant that the prosecution witnesses gave contradictory and conflicting testimonies. However contrary to the appellants assertions, I find the evidence given by the prosecution witnesses to be clear, consistent and reliable and I have no reason whatsoever to doubt the same. The appellant did not allude to any of the inconsistencies.

With regard to the contention by the appellant that vital witnesses were not summoned, the appellant did not specify the vital witnesses who were not called. In any event, there is no requirement in law that a particular number of witnesses be called to prove a fact. Section 143 of the Evidence Act CAP 80 of the Laws of Kenya is instructive in this regard. The same provides as follows:

***“no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”***

It is the discretion of the Prosecution to call relevant witnesses unless ulterior motive is shown to be the reason for the failure to call the witness i.e., unless the witness presented disclose a weak case. See *Bukenya V Republic* 1972 EA 549. Consequently, nothing turns on this point.

With regard to the allegation that the court failed to consider that there was an existing grudge between the appellant and the complainant (PW1) and that it disregarded the appellant's defence, that is far from the truth. It is not in dispute that there was indeed a dispute between the appellant and PW1. In cross examination PW1 admitted that there was a dispute between her and the appellant and that was why she had gone to the police station to make a report whereupon she was attacked by the appellant on her way from the police station. The Learned Trial Magistrate in her judgment observed as follows;

***“when the accused was put on his defence he gave a rather detailed story of why exactly they had been at Kiamore police post that 10/8/10 but failed short of admitting how the injuries sustained by the complainants were occasioned. In his defence the accused enumerated the***

***possibility that the first complainant had some days attempted to poison him and that is probably the reason they were at Kiamore police post early that morning , before whatever had been arrived at the police post could be implemented, the accused resolved to perform natural justice on the complainant's herein. By going to the police post, that was indeed the correct approach, why then did the accused turn on the complainant? He may have been aggrieved by the accused turn on the complainant's perceived actions but he had absolutely no RIGHT to attack her and injure her in the manner he did as described by the complainant"***

From the above passage, it is evident that indeed the Learned Trial Magistrate considered the fact that there was a dispute between the appellant and PW1. The appellant's defence was also considered. If PW1 had any intention of framing up the appellant, she would have denied the same. I have also considered the appellant's defence. The same was lengthy but vague and was not of any value to the appellant's case. In any event, the defence was an afterthought. The appellant had an opportunity to cross-examine PW1, 2, 3 and 4 and at no time did he bring up the allegation of being poisoned by PW1. PW1 talked of the appellant having sold all house hold goods as being the source of their disagreement. Having found the prosecution witnesses' evidence to be strong, credible, reliable and consistent I am satisfied beyond any reasonable doubt that it was the appellant who inflicted the injuries on PW1 and 2. I find that the conviction is safe and I find no good reason to interfere.

With regard to the sentence, the maximum sentence for this offence is life imprisonment. The appellant was handed the maximum sentence. As was rightly observed by the Learned Trial Magistrate, even though there was a disagreement between the appellant and PW1, the appellant had no right whatsoever to attack PW1 in the manner he did. The appellant continued to attack PW1 even after she fell down until she lost consciousness. As a matter of fact PW1 survived by sheer luck since the injuries that were inflicted on her were very serious and when the appellant surrendered himself to police, he reported that he had killed someone. The cruel and vicious attack on both PW1 and 2 was totally uncalled for as this will have far reaching effects on especially PW1.

The sentence meted out on the appellant is legal, lawful and deserving and I find no basis of disturbing the same. In the end, the appeal is without merit and the same is dismissed in its entirety.

**DATED, SIGNED AND DELIVERED ON 2<sup>ND</sup> DAY OF JUNE, 2015**

**R. P. V. WENDOHO**

**JUDGE**

**PRESENT:**

Mr. Mulochi for State

Faith, Court Assistant

Appellant, present in person