



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 170 OF 2014**

**CHANGOMA ABDALLA MWAMVUMO ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

(From Original Conviction and Sentence in Criminal Case No. 491 of 2013 of the Chief Magistrate's Court at Mombasa – **Hon. Kimanga - RM**)

**JUDGMENT**

The Appellant was Convicted and Sentenced to life imprisonment for the offence of grievous harm contrary to section 234 of the Penal Code.

The particulars are that:-

***“On the 2nd day of January, 2013 at [Particulars withheld] Academy in Likoni- Mombasa County he unlawfully did grievous harm to H I”.***

The main ground in this appeal is that the Conviction was against the weight of the evidence adduced before the Court.

This being the first appellate Court its obligated to consider and re-evaluate the evidence on record so as to arrive at its own conclusions but bearing in mind that it was not in a position to hear the Witnesses and observe their demeanor. **Republic – Vs- Okeno 1972 EALR page 36.**

The Complainant a boy aged seven (7) years at the time of the incident was a standard 2 pupil at [Particulars withheld] Academy – Likoni – Mombasa County.

The Accused Changoma Abadalla was the class teacher for class one.

The learned trial magistrate conducted a ***Voire dire examination*** of the Complainant who is a child of tender years and found that the minor was In capable of understanding the nature of an oath and directed that he give unsworn testimony.

In his unsworn evidence he told he Court that he had been left behind in School while in the company of one J O when the other pupils had gone home.

The Accused told him to go to class and lie on a desk. He furtherer told him to remove his shorts. He proceeded to cut him on his private parts with a razor blade. When he screamed the teacher let him go. He put on his shorts went and joined his friend J O and they proceeded home where he reported the matter to his mother who in return reported to his father and he was taken to Hospital.

Complainants father (PW 2) was called while at his place of work by his wife. He went home and observed the Complainant. His private parts had been cut and were hanging loose. He was not crying. When he asked him what happened he did not answer. He was taken for treatment at Salama Hospital. The child later said that it was teacher Changoma who had cut him.

The Complainant was examined by Dr. Ngone (PW 3) who found that he had sustained an injury on the right scrotum which had exposed the testis. He. Had a cut on the left scrotum.

The injuries were three days old at the time of the examination which was on 25th January, 2013.

PW 4 (J L) was a classmate of the Complainant. He gave unsworn testimony after the court found that he was not capable of understanding the nature of an oath. On the material day he was in the company of the Complainant. Other students had gone home. The Accused was with them in the classroom. He was writing notes on the black board.

The Complainant got cut on his private parts but the Witness did not know how this happened. He stated that he did not see who cut him. He did not see the Complainant go to where the teacher was.

PW 7 George Oguda the government chemist recovered exhibits from Mr. Michael Situma for DNA analysis. He carried out his tests which showed that the blood at the desk and the one on the blue trouser shared similar characteristics.

PW 8 Sergeant Michael Situma was the investigating officer in this case. He testified of how two teachers from [Particulars withheld] School went to the police station and reported that members of public had gathered at the school and were threatening to attack members of staff. In the company of the OCS and other officers went to the school while on riot gear. They found a crowd of people. There was no specific person who could tell them of what had happened but there were allegations that one of the teachers in the school had cut the testicles of a pupil. They managed to cool the tempers of the crowd and took the pupil and the father to the police station so as to record a statement. While at the police station the Accused presented himself there and the Complainant pointed to him as the teacher who had cut him. They placed him in the cells. The following day they proceeded to the school and took one desk for purposes of further analysis. The trouser the Complainant was wearing was also taken to the government chemist for analysis. They later received a report from the Government analyst.

Upon cross – examination he conceded to have recorded statements of three teachers from the school but decided not call them as witnesses as their evidence was a cover-up.

In his defence the Appellant testified that he was a teacher at [Particulars withheld] Academy and on 21st January, 2003 he had worked till 5:00 p.m. When he went to the staff room to sign out. At the staff room, the other teachers were present including the Academy manager, from there he went home straight, the next day when he was preparing to go to school he received a call from the Academy manager that there was a parent at school who was complaining that he had cut the child's private parts. He was advised not to go to the school as a mob was baying for his blood. He decided to go to Inuka police station where he reported and presented himself. Later the parent and the child went to the station and when the child was asked who had assaulted him he was unable to state, but he was placed in cells and later charged.

DW 2 Mubarak Abdalla was the Academy manager at the Academy. He testified to have been at the school from 6:00am till 6:00 pm when he handed over to the school caretaker. There were no accidents or incidents that had been reported to him. He further testified that the Accused had left school at 5:30pm in the company of Mwanasiti and Rehema. He did not return to the school.

Rehema Bakari (PW 3) was a fellow teacher at [Particulars withheld] Academy she testified to have left school on the day in question at 5:30 pm after all the pupils had left. They were in the company of the Accused and another teacher by the name Mwanasiti.

Section 124 of the Evidence Act requires corroboration in criminal cases where the evidence is that of a child.

The Court of Appeal in the case of *Johnson Muiruri –Vs- Republic 1983 KLR* held,

***“Where a child of tender years gives unsworn evidence then corroboration of that evidence is an essential requisite”.***

That failure by a Judge to direct himself and the assessors on the danger of relying on uncorroborated evidence of a child of tender years and the reliability of such evidence was a fatal error and Conviction could not stand.

In the present case the Complainant was a child of tender years. The learned trial magistrate had rightfully observed that he was incapable of understanding the nature of an oath and had received his unsworn testimony.

The learned trial magistrate does not appear to have appreciated the demeanor of the child who appeared very hesitant to point out who had inflicted injuries on his private parts.

PW 2 the father of the child testified that when he went home and observed the child. He was not talking. He was not crying. When asked what had happened he did not respond. Fatma Mohamed PW 8 also testified of how she called the Complainant and demanded to know what had happened to him but he was not willing to talk.

One would have difficulty in agreeing with the learned Trial magistrate that he found the minors evidence coherent and consistent in light of the above. The Complainant had testified that at the time of the incident he was in the company of J O. This J O turned out to be J L (PW 4) who told the Court that he was present with the Complainant at the time and did not see the Accused cut him. That he also did not know who cut the Complainant though he merely told him that he had been injured but he did not show him where.

In this case its not in dispute that the complainant had sustained serious injuries to his scrotum which had exposed one of his testicles.

The evidence against the Accused is that of a child of tender years. His evidence as to who inflicted the injuries on him has not been corroborated. Indeed the Witness who was with him at the time of the incident did deny having seen the Accused inflict the injuries on the Complainant.

The investigating officer did concede to have recorded Witness statements from three teachers who were colleagues of the Accused but he had not seen it fit to call them as Witnesses. The presumption that would naturally follow is that their evidence would not be favourable to the prosecution case. These Witnesses were later called by the defence in support of its case. The evidence of the three (3) Witnesses was in support of the case for the defence which is to the effect that at the time of the alleged incident the pupils had gone home and so had the teachers including the Accused. There is evidence however, to the effect that some blood stains were found in a desk in the Complainants class room. Samples were taken to the government analyst who matched them with the blood stains found on the trouser the Complainant was wearing. This cannot in itself lead to the conclusion that it is the Accused who assaulted the Complainant.

The attacker could have been anybody else, another pupil or any other person from the school or from outside school as the exact time of injury was not stated. I find that this was a case crying for corroboration but none could be found. This was an unfortunate incident where the Complainant could

have lost one of his testicles. It was a beastly act. However, the standard required in criminal cases is that of proof beyond reasonable doubt. Such a standard was not attained in this case and the Conviction of the Accused was not safe. The Conviction is quashed and the Sentence is set aside.

The appellant is set at liberty unless otherwise lawfully held.

**Judgment delivered, dated and signed this 12th day of October, 2015.**

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**M. MUYA**

**JUDGE**

**12TH OCTOBER, 2015**

**In the presence of:-**

Learned Counsel for the prosecution Mr. Masila

Learned Counsel for the defence Mr. Were holding brief Nabwana

Court Assistant Musundi

**M. MUYA - JUDGE**