



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL 104 OF 2011

REPUBLIC.....APPELLANT

VERSUS

JOSEPHAT CHWEYA MUKOYA.....1st RESPONDENT

ISAAC MUKOYA MANYONYI.....2nd RESPONDENT

JUDGMENT

Background:

1. This is an appeal by the State against the acquittal of the Respondents by the trial Court.
2. **JOSPHAT CHWEYA MUKOYA** and **ISAAC MUKOYA MANYONYI**, the first and second Respondents herein respectively were jointly charged with two counts before the Chief Magistrate's Court at Kakamega.
3. The offences were drafted as follows:-

“COUNT I:

GREVIOUS HARM CONTRARY, TO SECTION 234 OF THE PENAL CODE.

(1) JOSPHAT CHWEYA MUKOYA. (2) ISAAC MUKOYA MANYONYI. On the 27th day of June 2009 at Ewamahumbi village, Matia Sub -location in Central Kakamega District within Western Province, jointly with another not before court unlawfully did grievous harm to WYCLIFFE JUMAH.

COUNT II:

ASSAULT CAUSING ACTUAL BODILY HARM, CONTRARY TO SECTION 251 OF THE PENAL CODE.

1. *JOSPHAT CHEYA MUKOYA. (2) ISAAC MUKOYA MANYONYI. On the 27th day of June 2009 at Ewamahumbi village, Matia Sub -location in Central Kakamega District within Western Province, jointly with another not before court unlawfully assaulted HENRY WERE thereby occasioning actual bodily harm.”*

4. The Respondents denied the charges and the prosecution called five (5) witnesses who testified and

whose evidence I will briefly revisit.

5. **PW1** was **WYCLIFFE JUMA**. He was the complainant in the first count. He testified that on 27/06/2009 at 08:00 p.m. while inside his house with his wife, he was called by some people from outside of his said house. He went out and found that they were three people being the Respondents herein in the company of their father one **PHILOMEN PIPIKO** who is now deceased.

6. He stated that as he was opening the door he was suddenly attacked with a panga and was cut under the armpit on his left hand. He immediately raised alarm and the first Respondent's attempt to cut him again was not fruitful since the panga instead landed on the door frame and fell down. He saw the second Respondent herein armed with a rungu (club) as well as the Respondents' father as they left. Since the first Respondent's panga had eventually fallen on the ground, he left it behind as he also fled. As the trio left the scene they left behind some items including one tyre sandal commonly known as "**Akala**", one pair of open blue ladies sandals and one black/white-checked coat.

7. PW1 was eventually rescued and taken to hospital where he was admitted for two days and thereafter had his P3 Form filled. He identified the Respondents herein, who were the Accused persons, before this trial Court as the assailants who were in the company their father.

8. **PW2** was **HENRY WERE**. He was the complainant in the second count. It was his testimony that as he was in his house at around 08:10 p.m. on 17/06/2009 someone knocked the door and on opening he saw three people whom he recognized as the Respondents herein and their father one Philomen Mukeya; who was PW2's Uncle. He further stated that it was his said Uncle who pulled him over to where his children were, the Respondents herein, where he was then beaten up. According to PW2, both the Respondents had runkus. He was hit on the left leg and chest and as he raised alarm the attackers left but not before the arrival of PW2's brother one **DAVID INGAVI**.

9. As the three ran away, PW2 heard screams from his other brother's homestead. His other brother was **ROBERT MAINA** and he immediately recognized the voice of PW1 screaming. PW2 rushed there without wasting time and found that PW1 had been cut on the hand. At his said brother's homestead, PW2 saw a panga which he alleged was used to injure PW1. He also saw a metal bar and a coat as well as Akala shoes which he identified them in Court. They took the said items to the Area Assistant Chief who in turn took them to the Police. PW2 confirmed that he was not present when PW1 was attacked neither did he see PW1's attackers.

10. PW2 informed the trial Court that he easily recognized his assailants as they were persons very well known to him being his close relatives and that he was also aided by the bright moonlight further to the fact that as he was being assaulted the three attackers kept talking to him. PW2 confirmed that there had been bad blood between him and the three assailants. He went to the hospital the next day as well as to the Police and eventually had a P3 Form issued and filled in. The P3 Form was marked for identification but instead was not produced as a exhibit.

11. Apart from the two complainants that is PW1 and PW2, there were three other witnesses in the case. One of them was **HABIL AMBOKA MAINA** who testified as **PW3**. He was PW1's nephew who responded to PW1's call for help. On reaching the scene, PW3 found the second Respondent herein whom he caught and struggled with. They then fell down and the second Respondent managed to escape into the nearby sugarcane farm but not before leaving behind his phone, his blue sandak shoes and a metal bar. He identified the items in Court. He took PW1 to the police and then to hospital.

12. PW3 however clarified that as he arrived at the scene, there was a big crowd of people who had also responded to the call of help by PW1 and that his home was about one hundred metres from PW1's home. He also stated that he had a torch as it was at night around 8:30p.m.

13. **PW4** was **ROBERT MAINA MUKUNGU** who was PW1's father. On hearing his son raising alarm he rushed to his son's house and caught one person whom he struggled to arrest but was overpowered. That person ran into the nearby sugarcane farm leaving behind his coat with PW4. He stated that he

identified the one he had struggled with as PHILOMEN BIBIKO. He also saw two other people running away but due to the darkness he could not recognize them. He then found that his son, PW1, had been cut on the left arm and took him to the Police who referred him to the hospital.

14. The last witness, **PW5**, was **ETIENA FRANCIS**, a Clinical Officer at the then Western General Provincial Hospital at Kakamega. He produced a P3 Form for PW1 whom he had attended to on 27/06/2009 when PW1 first went to the hospital for treatment.

15. On being placed on their defence, the Respondents denied the charges and stated that they were the ones who had instead been assaulted by PW1 and PW2 as they took their father who had been previously injured by PW1 and PW2 to hospital. They stated that they reported the incident to the police and were told to go to hospital. As the first Respondent went back to the hospital the following day to check on his father, he was apprehended by PW1 who took him to the Police on allegations that he was a thief. The second Respondent stated that he was also arrested by PW1, but who was then with PW2 on allegations of being a thief and led to the Police Station.

16. The trial Magistrate upon evaluating the evidence found that the prosecution had failed to establish a sound case as against the Respondents herein and acquitted them. It was the acquittal of the Respondents that prompted the prosecution to lodge this appeal.

The Appeal:

17. The prosecution in its Petition of Appeal raised five main grounds namely:-

- 1. THAT the trial court Magistrate erred in law by faulting the nature and/r evidence on identification and/or recognition, which was clear and watertight.**
- 2. THAT the trial court erred in faulting he medical evidence produced in court in the form of P3 Form.**
- 3. THAT the trial court erred in law by raising the presumptions on the nature of the evidence which were never adduced in court.**
- 4. THAT the trial court erred in by failing to ensure that the plea taken was equivocal.**
- 5. THAT the trial court erred in law by finding that the prosecution has not established a prima facie case when it had done so leading to the acquittal, now subject of intended appeal.**

18. The Petition prayed for the setting aside of the order acquitting the Respondents and that instead they be convicted and sentenced accordingly alternatively that this court orders a retrial.

19. Parties to this appeal filed their respective written submissions hence this judgment.

Analysis and Determinations:

20. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

21. In discharging the said duty, this Court will endeavour to consider the appeal under the following heads:-

1. On the identification of the attackers:

22. The Respondents contended that they did not commit the alleged offences and that they were wrongly implicated since they were actually the ones who were instead assaulted by PW1 and PW2 as they were taking their injured father to hospital whom the very PW1 and PW2 had previously injured. The Respondents argued that given that the alleged attacks were committed in darkness with no elaborate description of any lighting to favour any identification of the assailants, it was indeed hard, if not impossible for PW1 and PW2 to allege that they positively identified or recognized them. The Respondents however did not deny being related to PW1 and PW2 and that was bad blood between their families.

23. On the other hand, the prosecution contends that the Respondents were properly identified by way of recognition as the witnesses knew them very well and that they came to PW1 and PW2's respective doors hence there was no possibility of mistaken identity. It was submitted that the recognition was free from error and hence safe.

24. Before I venture into the evaluation of the evidence on this issue, it is imperative to look at some relevant guiding judicial pronouncements.

25. To that end the case of **Wamunga Vs Republic (1989) KLR 426** readily comes to my mind. In that case the Court of Appeal had the following to say on the subject: -

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

26. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

27. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

“On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-

“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or

recognized by PW1, the complainant.”

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...”

28. Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported)** had this to say on the evidence of recognition at night:-

“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.”

29. Now going back to the evaluation of the evidence, it is imperative to note that the aspect of identification in this matter is two-fold. First is by PW1 and second by PW2 since the two were not at the same place at the alleged times of attack.

30. On the part of PW1, the attack happened around 08:00 p.m. By then he was inside his house with his wife and was called outside by some people. As he was opening the door, PW1 was recorded to have said as follows:-

“I met with the panga as I was opening the door.”

31. It therefore appears that the assailants had placed themselves at such positions as not to give PW1 any time to engage them hence the swift attack. But in that state of affairs PW1 is recorded to have said that he managed to recognize three people as the attackers. This, he managed by the help of “a light.” It was however not elaborately made clear the source of light as well as the intensity thereof noting that the record has it that it was a dark night. This was an aspect which called for an elaborate discourse so as to clear any possible questions which may linger in one’s mind.

32. It is equally important to note that the attack on PW1 was very swift. There was the second attempt to again cut him but the panga missed him and landed on the door frame as it fell down. On sensing danger PW1 raised alarm and the three attackers fled. PW1 then records that some people came to his rescue.

33. In those prevailing circumstances, PW1 stated that he managed to recognize the three attackers as people who were very well known to him and he lived with them and used to operate boda boda business together. He described them as the Respondents herein who were in the company of their father, one PHILEMEN PIPIKO. However PW1 did not allege to have recognized the voice which him as he was in his house.

34. As PW1 testified that the attackers were at the door as he opened it, he did not clarify how close they were to him and since the attacker acted with such speed, how PW1 knew that the attackers were only three and not more or less given that it was dark and he was just coming out of his house.

35. This aspect of identification was further added unto by PW3 and PW4 who were very close relatives to PW1. PW3 was PW1’s nephew whereas PW4 was PW1’s father.

36. It was PW3’s testimony that when he heard screams from PW1’s house he rushed there and found one person at PW1’s compound. He caught him and a struggle ensued leading both of them to fall down

before the person overpowered him and ran into the nearby sugar farm. But most importantly PW3 was not the first one to arrive at the scene. He so states in his testimony as follows:-

“I was not the first to arrive at the scene. Robert and his family were at the scene. There was a big crowd. My house is above 100m to the scene. I met Isaac Mukoya in Robert’s compound. I did not see the first accused...”

37. From the testimony of PW3, the inevitable question is whether or not the crowd of people who had gathered ahead of him ever saw the alleged person whom PW3 attempted to arrest. If they had seen him, what did they do and if they had not seen him where could that person have been such that it was only PW3 who came later on to have found him. Did the crowd witness the struggle between PW3 and the said person? Did they offer any assistance in arresting the said person? And, was the compound lit given that it was night? How then did PW3 recognize the person he struggled with in the circumstances that prevailed that night? And the questions seem not to come to an end.

38. PW3 further stated as follows:-

“... I went into the house and found Isaac had cut my nephew Wycliffe Juma. The victim was bleeding profusely...”

The struggle, if any, seems to have been outside PW1's house presumably when PW1 was inside the house and the crowd was outside, possibly watching. PW3 entered into the house after the said person had left and found his nephew. But PW3 was conclusive in saying that he saw his nephew who had been cut by the said Isaac and was bleeding profusely. What made PW3 conclude that the attacker was one Isaac (the second Respondent) when PW1 himself alleged that the attacker was one Josephat Chweya (the 1st Respondent)?

39. The other witness who testified to have also gone to the scene was PW4, who was PW1's father. According to him, he responded to the call of help when PW1 screamed. On reaching the scene, he caught one of the people and also struggled with him but just like PW3 he was overpowered and the person ran into the sugarcane farm but not before leaving behind a coat and sandals. But PW4 also saw two other people running away but did not recognize them since it was dark. However, PW4 in his entire testimony did not state if the place was lit or not and if he met other people at the scene, but acknowledges that it was a dark night. But in a surprise turn of events as PW4 was recording his statement with the Police he gave out three names of the people he alleged were the attackers.

40. One would therefore not fail to wonder how PW4 managed to know the two people he stated were running away and did not see them as it was dark. The only plausible conclusion remain that the witness must have had a discussion possibly with the others and agreed on who the attackers were otherwise PW4 would not have known the names of those whom he did not recognize in the first instance.

41. There was also PW2 who was the complainant in the second count. It was his testimony that as he was inside his house at around 08:10 p.m he heard someone knocking and as he opened the door one person he recognized as his uncle pulled him out to where the Respondents were and they began beating him. In the process they told him that they were disciplining him and as a result he was injured on the left leg and chest. He screamed and his brother one DAVID INGAVI appeared at the scene forcing the three to ran away. PW2 was later were taken to hospital.

42. It was PW2’s further testimony that the bright moonlight enabled him to recognize his attackers as well the conversation that went on during the ordeal. During re-examination, PW3 stated as follows:-

“I was attacked by 3 people. I was confused. The incident occurred at my homestead...”

43. With the confusion on the part of PW2 and with an immediate attack by a group of people at night who were hitting him all over the body and without a detailed description of how bright the moonlight was, the possibility of an erroneous or false recognition cannot be completely ruled out.

44. In this instance however the assailants talked to PW2. They told him they wanted to discipline him. PW2 saw them and heard their voices and being his close relatives he managed to recognize them. Although PW2's brother did not testify in the case, PW1's testimony on how he was called and beaten up coupled with the conversation during the attack may have created an enabling environment for PW2 to possessively recognize his attackers as the Respondents and their father.

45. The testimony of PW2 however did not end there. He further stated that as the attackers ran away he heard screams for his brother's homestead and recognized the voice of PW1. He rushed there only to find PW1 had been injured but did not see the attackers.

46. PW2 did not however state whether he was the first one to reach PW1's house and if he was in the company of anyone noting that he had just been rescued by his brother David Ingavi. He confirmed seeing several items allegedly left behind by PW1's attackers.

47. It is of great importance to note that the main attacks took place during the same night and at the same time; around 08:00 p.m on 17/06/2009. The distance between PW1 and PW2's homesteads was not given though. However, according to PW1, PW3 and PW4 the issue of the presence of moonlight on that night did not arise. They all agreed that it was night and dark. On the other hand, PW2 said there was bright moonlight at the time of the incident. These two different versions were not reconciled.

48. There was also the evidence touching on some alleged items left behind by the attackers. All the prosecution witnesses except the Clinical Officer, PW5 touched on the items. On their part, the Respondents denied owning the items. The prosecution did not tender any evidence on the ownership of the said items which include a phone. No independent attempts were made to connect the items with the Respondents including at least evidence pointing that the items were usually seen in the use of the Respondents. Further, the allegedly panga used in the attack was not dusted for any finger prints.

49. I have endeavored to analyse and evaluate the evidence on identification with a view to satisfy myself on the actual identities of the attackers. Taking the evidence in totality and in view of the then prevailing circumstances, I find that it is unsafe to hold with certainty that the Respondents herein were the assailants who separately attacked PW1 and PW2 at the same time. Even if I was to find that PW2 managed to identify those who attacked him as he knew them so well, still several unreconciled issues including whether there was any light including moonlight at the said time, the possibility of the Respondents attacking PW1 and PW2 at the same time in two distinct places whose distance was not disclosed among others, still remains. Further PW2 admittedly stated that he was confused when three people attacked him.

50. I therefore find that the evidence on record on identification by way of recognition cannot be said to be free from error. It is therefore unsafe to hold that PW1 and PW2 attackers were the Respondents herein.

b. Proof of injuries:

51. PW2 stated that he went to hospital where he was treated and later on had a P3 Form filled. He identified both the treatments notes and the P3 Form when he was testifying but the same were not produced as exhibits.

52. There was no reason tendered as to why that happened given that a Clinical Officer (PW5) testified. The upshot is that there is no evidence of any injuries on the part of PW2 such that even if he had positively recognized his attackers, still without any proof of injury, the charge would not have been legally proved.

53. On the part of PW1, a P3 Form was produced. However the Respondents contended that there was need to also produce the testament notes as well so as to corroborate the contents of the P3 Form otherwise the P3 Form evidence remained hearsay.

54. Whereas that is the general position in law, I cannot uphold it in the circumstances of this case. That is because PW5 is the one who initially treated PW1 when he went to the hospital in the first instance. He then filled in the P3 Form only two days later and confirmed that the injuries he saw on PW1 when he first attended to him were still thereon. He then filled in the P3 Form. That contention therefore fails.

(c) Failure of crucial witnesses to testify:

41. The Respondents also contended that crucial witnesses including the Investigating Officer did not testify in the case hence the case could not stand. The Appellant was of the contrary view.

42. The liberty remains on the part of the prosecution to choose how to conduct its case. It has the option of choosing whom to call as a witness and is generally not bound to avail a specific witness (es) in a matter. That is in line with **Section 143 of the Evidence Act** Chapter 80 of the Laws of Kenya.

43. Judicial precedents have however qualified the above provision in that when the prosecution decides not to call a crucial witness without any justifiable and reasonable cause it runs the risk of the court presuming that had that evidence been produced, then it would have been adverse to the prosecution. (See the cases of ***Bukenya and others versus Uganda (1972) EA 549*** and ***Joseph Minyoki Kimatu v. Republic (2014) eKLR***).

44. In this case the Investigating Officer as well as the Arresting officers did not testify. The record remains silent on why they did so. I reiterate the fact that an Investigating Officers plays a very crucial role in a criminal case. He collects evidence in an effort to connect the accused person(s) with the commission of the offence. This said role therefore cannot be over emphasized as crucial. However that does not mean that a criminal case cannot succeed unless the Investigating Officers testifies. That cannot certainly be the position. It all depends on the circumstances of each single case.

45. It is also on record that several exhibits were not produced including the treatment notes and a P3 Form for PW2 as well as the items recovered at the scene of PW1's attack. The events leading to the arrest of the Respondents were also not brought out by the prosecution. There is also the issue that the Respondents' father who was allegedly assaulted by PW1 and PW2 and that the Respondents took their father to the Police where they made a report and were advised to take him to hospital.

46. The foregoing are some of the issues the Investigating Officer would have taken care of had he testified in the case. This Court therefore finds that the circumstances of the case demanded that the Investigating Officer testifies so as to tie up the loose ends. That however did not happen and leaves this Court with the presumption that had the Investigating Officer testified, then adverse evidence against the prosecution would have emerged.

Disposition:

55. The totality of the foregone re-evaluation and analysis of the evidence reveals that the trial Magistrate upon evaluating the evidence before him came to a safe finding that the charges were not proved beyond any reasonable doubt. I equally find that the evidence as presented before the trial Court could not have been the basis of a legally sound conviction.

56. The upshot is that the decision of the trial Magistrate is hereby affirmed and the appeal dismissed accordingly.

DATED and SIGNED at MIGORI this 13th day of October, 2015.

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at KAKAMEGA this 30th day of November, 2015.

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JUDGE