



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 67 OF 2013

BOB ONYANGO OMONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

Introduction

1). The appellant was charged with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars are that on the 9th day of December 2011 at Kogeyo sub location in Siaya district within Nyanza province unlawfully did grievous harm to **Charles Owuoko Menja**.

The appellant was found guilty and sentenced to serve 10 years imprisonment hence this appeal.

Facts

2). The complainant told the court on the material day at around 8 p.m he was riding his bicycle heading home. When he reached a river and in the process of crossing he met two people who accosted him. They were armed with a panga and rungu. They then proceeded to assault him by hitting and cutting his head and hands. He fell down. Suddenly a motorcycle rider came. He flashed the lights to his assailant who then took off. He however succeeded in getting hold of one of them before taking off. That person was the appellant.

3). He then went to report to the appellant's father but he was prevented from doing so by the appellant whom he met at his home. He was armed with a panga. He thereafter reported to the village elder who advised him to seek medication. He was treated at Siaya district hospital and thereafter reported to Siaya police station where **PW4 P.C Timothy Muia** recorded his statements and issued him with a P3 form. It is this PW4 that carried out the investigation and charged the appellant with the said offence.

4). **PW1 Nyamwembe Simon**, the clinical officer produced the P3 form in which he stated the nature of injuries sustained by the complainant and he classified them as maim.

5). **PW3 George Ouma Odhiambo**, was cycling home that evening. At the river he heard some noises and with the help of passing motorcycle he saw people fighting one of them was being beaten. They then took off and the person who was being assaulted came to him. He advised him to go to the hospital. He further testified that as he left the scene he met the accused who was armed with a panga. He told the court that he identified the appellant as there was moonlight.

6). When put on his defence the appellant gave unsworn testimony. He told the court that he was at

home on the material day. At 8.30 p.m. the complainant came and demanded for his wife whom he claimed was in the appellant's house. He was armed with a panga and a rungu. He threw the rungu and hit him. He said that in the cause of the struggle the panga cut the complainant. He testified that **PW2 Kevin Otieno** came and saved the appellant from the complainant's attack.

7). DW2 on the other hand gave sworn testimony. His only testimony was that he found the appellant and the complainant fighting near where the appellant stayed. Otherwise he did not know much about the case.

Analysis and Determination

8). The appellant has mounted four grounds of appeal. Basically he has argued that the sentence was harsh and excessive and that the trial court heavily relied on the evidence of PW1.

9). The main issued to determine here is whether there was a fight on the material night that involved the appellant and the complainant. If this is so where was the scene.

10). There is no doubt that the appellant and the complainant are people who knew each other. They are both neighbours and non of them disputed this fact during the trial. Equally not disputed is the fact that there was a fight that night. The only difference is the scene?

11). The complainant alleged that the fight took place near the river whereas the appellant claims that it was the complaint who went to his home where he was demanding for his wife. I find that the probability of the fight being at the river is very high and true. PW3 clearly saw the fight. It was not disputed even during the trial that he was not at the scene. The appellant did not dispute the fact that PW3 met him that night.

12). DW2 did not help thing either. He was evasive. He did not explain the place where the incident took place except that it was "near where the accused stayed". I do therefore find that indeed the appellant and another accosted the complainant. The complainant I find had no difficulty recognising the appellant especially in the absence of any covering on his face. The flash light from the motorcycle I believe was sufficient to have enabled him to recognise the attacker.

13). Further, the complainant told the appellant that he was going to report to his father and indeed he went only to be repulsed by the appellant. The fact of the complainant going to the appellant father's home is not disputed.

14). The appellant has submitted that the P3 form did indicate that the injury sustained by the appellant was classified as maim. But from reading of the same it is clear that he suffered severe bodily injury which included the amputation of the left hand index finger among others.

15). This court does find that the prosecution sufficiently proved its case. The appellant did not call a crucial witness namely his mother whom he alleges was at home that time. As earlier found DW2 did not aid his case either. Infact the village elder perhaps would have been of assistance. DW2 did not confirm the appellant's testimony that he gave the village elder the complainant's cap and rungu.

The upshot of my finding is that I do not find the appeal meritorious. The sentence of 10 years is reasonable as the maximum is life imprisonment. There was no cause for the appellant and his unidentified colleague to have attacked the complainant or at all. This appeal is otherwise dismissed.

Dated, signed and delivered at Kisumu this 12th day of May, 2014.

**H.K.
JUDGE**

CHEMITEI