REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 49 OF 2012

NICASIO KITHUMBU WAMBUGU.....…….....APPELLANT

VERSUS

REPUBLIC…….....…….....…..……..…PROSECUTION

(Being an Appeal from the Conviction and Sentence by L.K. MUTAI Senior Principal Magistrate Embu in Criminal Case No. 166 of 2011 on 29th February 2012)

J U D G M E N T

NICASIO KITHUMBU WAMBUGU the appellant herein was charged with the offence of **Grievous Harm contrary to Section 234 of the Penal Code.** The particulars as stated in the charge sheet were as follows:-

> ***On the 8th day of January 2012 at Muthatari stage, Muthatari Sub-location, Mbeti North location in Embu District within Embu County, unlawfully did grievous harm to SAMUEL MWANGI KIHARA.***

1. The appellant pleaded not guilty and the matter proceeded to full hearing. Thereafter the appellant was convicted and sentenced to seven (7) years imprisonment. He was dissatisfied with the judgment and filed this appeal against both conviction and sentence.

2. He raised the following grounds of appeal which were filed by Mr. Okwaro.

1. ***The Learned Magistrate erred in law and facts in convicting him on the basis insufficient, incredible4 and contradictory evidence.***
2. ***The Learned Magistrate erred in law and facts in not arriving at findings that were against the weight of evidence.***
3. ***The Learned Magistrate erred in law and facts in not finding that the prosecution did not prove the case against him beyond reasonable doubt as by law required.***
4. ***The Learned Magistrate erred in law in not finding that he was not the assailant and that there was no connection between him and alleged crime at all.***
5. ***The Learned Magistrate erred in law and facts in not finding that PW1 (the complainant) did not identify and/or properly identify the person who allegedly stabbed him as it was at night and there were several people at the scene and further PLW1 did not know him previously and he could not therefore have been able to identify him as alleged.***
6. ***The ingredients of the offence of grievous harm contrary to Section 234 of the Penal Code were never proven and/or demonstrated by the prosecution to warrant him being convicted of the said***

offence.

7. ***The Learned Magistrate erred in law and facts as in her judgment she failed to state the points for determination and the reasons for her decision on each point as by law required and the judgment in Criminal Case Number 166 of 2011 is therefore unlawful.***
8. ***The Learned Magistrate erred in law and facts in not finding his defence was credible and consistent and it raised serious doubts as to whether he was guilty of the offence charged, which doubts ought to have been treated in his favour.***
9. ***The Learned Magistrate erred in law and facts in not finding that there were no investigations carried out into the alleged crime and that there were contradictions as to who mad the report of the said crime and against whom and it was therefore unclear how he ended up being charged with the said offence.***
10. ***There was no identification parade conducted forPLW1 to identify and confirm if at all he was the assailant.***

3. The prosecution case was that PW1 (Samuel Mwangi Kihara) was on 8/1/2011 aboard a matatu Registration No. KAW 937 P. He was traveling to Muthatari. Twice on the way at different stages he was accused of pushing back the door of the matatu.

4.He sat next to his friend Dickson (PW2) in the said matatu. At the 2nd stage somebody punched him through the window. As a 2nd punch came, PW2 intercepted and in the process dropped his phone outside. He alighted to pick it and the matatu took off leaving him behind.

5. When PW1 reached his stage the conductor and the appellant accosted him.The appellant referred to him as uncircumcised. The appellant set on him with punches and kicks. PW2 and PW3 rescued him from the appellant who later came and stabbed him on the left side of the ribs.

6. PW1 was taken to Embu Provincial General Hospital where he was admitted for 9 days. The doctor who examined PW1 testified as PW5. She confirmed that PW1 had a surgical scar on the abdomen. He had undergone a major operation after it was established that his small intestines were torn. She produced the P3 form as EXB.1.

7. PW3 (Isaac Ndwiga Kihara) stated that he saw the appellant rush to PW1 and pierce him on his left side. He did this as PW3 tried to find out from him why he had beaten up PW1. PW4 (Samuel Mwangi Kamau) was aboard the matatu in question. He too said he saw the appellant stab PW1.

All these witnesses PW1 – PW4 explained that there was sufficient light from shops near the stage and this enabled them to identify the appellant. The appellant was well known by PW2.

8. PW7 (Sgt. Elizabeth Nyaga) received a report of the assault on 9/1/2011 1 a.m. The suspect was named.

9. In his sworn defence the appellant said he was on 8/1/2011 9 p.m at Muthatari – Embu stage. He boarded a matatu registration No. KAM 937D. He sat next to the driver. On the way were some people seated at the rear part of the vehicle and were making unnecessary noise. The conductor complained about them. The conductor, the driver and the passengers exchanged fists at one point.

10. At the 3rd stop the driver and conductor grabbed one of the rear passengers and wanted to beat him but the appellant prevailed over them not to beat him.

11. As he walked away the passenger who had been held by the conductor and driver grabbed him. He was pulled away after they hit each other. He noticed PW2 whom he had known prior to this date. This passenger who had hit him was drunk.

Two days later he learnt that police officers were looking for him. He presented himself at to the police station.

12. DW2 (David Maina Njagi) who escorted the appellant home after the fight stated that he was aboard the matatu in question. At the Siakago road stage the matatu stopped. The driver and conductor went for the passenger who sat at the rear. The appellant then stopped the driver and conductor from attacking this passenger as he appeared drunk. As he walked home with the appellant and three others some people caught up with them. One punched the appellant. Another grabbed the appellant saying he had called him a drunk. A police officer came by and the appellant took off. They met later.

13. In cross-examination by the prosecution this witness admitted that there was quite a bit of punching by several people the appellant included. He confirmed that PW2 (Dickson) was at the scene. He also admitted he was drunk that night and he could not see clearly what was going on.

14. When the appeal came for hearing the appellant presented the Court with written submissions in which he expounded on his grounds of appeal. He submitted that he was not properly identified by the witnesses.

15. Mr. Wanyonyi the learned State Counsel opposed the appeal. He submitted that PW1 identified the appellant and that PW1's evidence was corroborated by that of PW2 – PW4. He further submitted that PW5 confirmed the injuries suffered by the complainant (PW1).

16. There was no need for an identification parade in the circumstances of this case and the scene was visited, submitted Mr. Wanyonyi.

17. He finally submitted that the judgment was signed and dated and it complied with the provisions of Section 169 of the Criminal Procedure Code.

18. This is a first appeal and this court is enjoined to re- evaluate the evidence on record and come to its own conclusion. I am alive to the fact that I did not have the advantage of seeing or hearing the witnesses. In the case of ***MWANGI VS REPUBLIC [2004] 2 KLR 28*** the Court of Appeal stated thus on the duty of a first appeal Court

(a) An appellant on a fist appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.

(b) The first appellate court must itself weigh the conflicting evidence and draw its own conclusion.

(c) It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witness.

19. Having been so guided, I have considered the submissions by both the appellant and the State. I have equally considered the grounds of appeal and theevidence that was adduced by the trial.
20. I will merge all the grounds of appeal and deal with two issues viz;

    (i) Whether PW1 was injured.

    (ii) If (i) is yes then was it the appellant who injured him? This brings me to the broad issue of identification.

21. In her analysis the learned trial Magistrate answered the above two issues in her judgment, even if she did not set them out. Her original judgment is signed and dated and cannot therefore be said to be unlawful.
22. PW1-PW7 all confirm that PW1 was injured. The medical doctor (PW5) who examined PW1 explained the kind of injury suffered by the complainant (PW1). The same was assessed as grievous harm. A sharp object had been used to inflict the injury. There is therefore no doubt

that PW1 was injured and he suffered grievous harm.

23. The next issue is whether the appellant is the person who caused the injury. This incident occurred at night. The first question is whether there was sufficient light to enable the witnesses see what they say they saw.

PW1, PW2 & PW4, DW2 and the appellant were in this matatu right from town. PW3 just came to the final stage upon the prompting of PW2 and PW4.

24. How was this stage lit?

PW1 at page 8 lines 16 says

"I saw accused well since there were lights from nearby shops".

- PW2 says nothing about the lights.

- PW3 at page 11 line 12 say ***"I saw the accused well from lights coming from nearby shops at the stage."***

- PW4 at page 15 line 3 says ***"The scene at Muthatari was well lit with lights from a nearby shop".***

- The appellant did not mention anything about the lights.

- DW2 at page 38 at lines 2 and 10 said ***"it was at night and it was very dark and he could not see what was going on"***. This goes to the root of the identification of the appellant.

25. The Court of Appeal in the case of ***KARANJA & ANOTHER VS REPUBLIC [2004] 2 KLR 140*** stated thus.

(i) Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.

(ii) Whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification.

(iii) Recognition may be more reliable than identification of a stranger but even when a witness is purporting to recognize someone he knows, it should be borne in mind that the mistakes of recognition of close relatives and friends are sometimes made.

(iv) In this case, while two witnesses claimed to have recognized the first appellant, the sources of light available at the time were torches and moonlight, and no evidence was given as to the strength of the light emanating from those sources. The trial court and the High Court of first appeal did not analyze on the strength and position of the torches.

(v) As for the second appellant, his conviction was unsafe as it was based on identification by torch light and moonlight the brightness of which was not ascertained by the trial and first Appellate Courts.

26. And in ***SIMIYU & ANOTHER VS REPUBLIC [2005] 1 KLR 192*** the Court of Appeal further stated:-

(i) In the present case, neither of the two courts below demonstrated any caution. Further,

there was no inquiry as to the nature of the alleged moonlight or is brightness or otherwise or whether it was a full moon or not or its intensity. In the absence of any inquiry, evidence of recognition may not be held to be free from error.

In the instant case all that PW1, PW3 & PW4 stated was that there was light from the shop/shops near the stage. There was no evidence to confirm the type of lights these were; what their strength was and how far they were from the scene.

27. Secondly the only police officer who testified herein as PW7 did not tell the Court whether she carried out any investigations besides receiving the report and visiting PW1 in hospital. She did not arrest the appellant and she did not record the statements. And she did not also visit the scene. Had she visited the scene she could have told the Court more about the lights at the scene.

28. It is correct to say that the appellant was not arrested at the scene nor on the same day of the offence. The offence was committed on 8th of January 2011 and he was arrested on 22/1/2011. The only witness who stated that he knew the appellant was PW2 ((Dickson). PW1, PW3 & PW4 did not know the appellant. The latter are not the ones who led to the arrest of the appellant. If indeed PW2 led to the appellant's arrest then PW1, PW3 & PW4 ought to have attended identification parades to identify him. That would have been the best way to test their evidence of identification. It is therefore not correct for the learned State Counsel to say there was no need for identification parades in the circumstances. Which circumstances?

29. Evidence of visual identification especially in circumstances which are not favourable for a positive identification must be examined with the greatest care to avoid any injustice to an accused person.

30. The problems in this matatu started inside the matatu right from the 1st stage to the 3rd stage. In this matatu was a driver and a conductor. These two persons were not called to testify on what they witnessed. Why did the investigating officer (if at all there was any) not find it necessary to call them as witnesses for the prosecution?

31. In the case of ***JUMA NGODIA VS REPUBLIC [1982-88] 1 KAR 454*** the Court of Appeal stated this:-

"The Prosecution has, in general, a discretion whether to call or not to call someone as a witness. If he did not call a vital reliable witness without a satisfactory explanation he runs the risk of the Court presuming that his evidence which could be and is not produced would if produced, have been unfavourable to the Prosecution".

32. Failure to call these two independent witnesses without any explanation left a lot to be desired of the prosecution case.

Secondly the failure to establish the kind of light from the shops, its strength and distance from the scene makes me conclude that the identification may not have been free from error. Since there was a scuffle between several persons it cannot be clearly stated without fear of contradictions that it was the appellant who injured PW1.

33. The appellant gave sworn evidence and called a witness PW2 who was in the same matatu. They said PW1 and others who were seated at the rear of the matatu were making so much noise using bad language. In particular PW1 was said to be drunk. And PW1 and his group followed the appellant and even punched him. This was a strong defence on oath.

34. In the face of the loopholes in the prosecution case which I have pointed out, I do find that the defence raises a doubt in this Court's mind which doubt should be resolved in favour of the appellant.

35. I therefore find merit in the appeal which I allow. The conviction is quashed and the sentence set aside. The appellant to be released unless otherwise lawfully held under a separate warrant.

It is ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 2ND DAY OF MAY 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Ms. Mbae for State

Appellant

Mutero/Kirong CC