**IN THE HIGH COURT AT MIGORI**

**CRIMINAL APPEAL NO. 11 OF 2014**

**BETWEEN**

**JOHN MWITA NCHORE.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No. 276 of 2012 at Senior Resident Magistrate's Court at Kehancha, Hon. T.A. Sitati, RM dated on 19th December 2012)***

**JUDGMENT**

1. The appellant, **JOHN MWITA NCHORE**, was charged with the offence of causing grievous harm contrary to **section 234** of the ***Penal Code (Chapter 63 Laws of Kenya)***. It was alleged that on 22nd May 2012 at Kebaroti Village of Kuria East District Migori County, he did cause grievous harm to JMK.

2. The appellant was convicted and sentenced to 10 years imprisonment. He appeals against the conviction and sentence on the following grounds:

*a. That he pleaded not guilty to the charge of grievous harm*

*b. That the learned trial magistrate erred in law and in fact by assuming the importance of the evidence from the investigating officer who had gone on transfer.*

*c. The trial magistrate erred in law and in fact by failing to consider the importance of evidences from the complainant's witnesses who never testified in court.*

*d. The trial magistrate erred in law and fact by including the evidence of EK in his judgment despite the fact that she never testified before court.*

*e. The trial magistrate erred in law and fact by not putting into consideration the presentation of any panga in question before the trial court.*

*f. The learned trial magistrate erred in law and in fact by failing to consider the evidence of PC Romanika.*

*g. The learned trial magistrate pronounced a harsh and excessive sentence upon the appellant.*

3. On its part, the State supports the conviction and sentence. Ms Owenga, the learned counsel for the State, emphasized that there was sufficient evidence identifying the accused as the person who perpetrated the felonious act. She also submitted that this was a case of recognition as the complainant

knew the appellant.

4. PW1, the complainant, stated that on 22nd May 2012 at about 7.30pm, he was heading home when he was approached by three people. As they approached, a vehicle came by and shone lights. He was able to recognize the appellant who took cover of the vehicle in motion and slashed him on the shoulder with a panga. The appellant disappeared into the bushes while the complainant screamed for help. He was later taken to Kuria District Hospital and then to Ombo Mission Hospital for medical attention. He later reported the matter to the police and was issued with a P3 form. The complainant testified that he knew the appellant as a neighbor. In cross-examination, PW1 stated that the Chief and an AP Corporal Romanika was walking behind him.

5. PW2, a clinical officer from Kuria District Hospital, testified that he completed the P3 form. He noted that PW1 had suffered a deep cut wound on the right shoulder. He concluded that the injury was probably caused by a sharp object.

6. PW3, the officer in charge of Nyamutiro Police Post, stated that he did not investigate the case but took over from another officer, Corporal Farah, who had been transferred. He testified that on 23rd May 2012, he was with Corporal Farah when, EG, came to report that her son, PW1 had been assaulted by the appellant that evening. He testified that he assigned the case to Corporal Farah. On the way from another scene, he passed through Senta Market where he came across the appellant harassing a lady. He grabbed her hand bag and ran away. He was later apprehended and charged with a different offence.

7. The prosecution closed its case and the appellant was put on his defence. The thrust of his testimony was that he was being framed and that the complainant took his wife and intended to deprive him of his assets. He denied committing the offence.

8. On the date scheduled for judgment, the prosecution applied for summons to call Corporal Romanika who is alleged to have been present when the assault took place. Ultimately the summons was not served and he was not called to testify. The prosecutor confirmed that he did not record a witness statement from him.

9. The learned magistrate convicted the appellant. He found that the complainant had been assaulted by the appellant. The main issue the learned magistrate dealt with was identification of the appellant. He made the following finding, *"I am satisfied however, on the evidence of PW1 as tested by the questioning by the accused that the accused was the culprit who attacked PW1. There was sufficient light that was provided in the nick of time by a slowly moving vehicle that enabled PW1 see and identify the 3rd man as the attacker. He knew the man as a neighbor"*

10. As this is the first appeal, this court is enjoined to review the evidence, evaluate it and reach its independent conclusion having regard to the fact that it neither heard nor saw the witnesses testify (see ***Okeno v Republic*** **[1973]EA 32**). Whether the appellant was identified as the person who assaulted the complainant is the main issue in this appeal. The assault occurred at night and the court has to be satisfied that the appellant was properly identified. The evidence that led to the conviction of the appellant was that of a single witness. The evidence of PW1 also shows that he knew the appellant. In ***Wamunga v Republic*** **[1989] KLR 424**, the Court of Appeal stated that where the only evidence against 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 a conviction. The court also observed that while recognition may be more reliable than identification of a stranger, mistakes in recognition of close relatives and friends are sometimes made.

11. In this case, the nature or intensity of the vehicle light, the distance between the accused and the vehicle and the position of the vehicle vis-à-vis the appellant and the complainant was not clear and I am not convinced that the evidence of recognition was not free from error.

12. The prosecution case, in my view, is undermined by the failure to call material witnesses. PW1 stated

in cross examination that the chief and AP Romaniko, who were walking behind him witnessed the assault. It is surprising that a crime was committed in the face of two security officers who were never called as witnesses. AP Romaniko, a police officer, was not called to testify and did not even record a statement yet he was a person who would have given direct evidence of the offence. It is also surprising that a vicious attack could take place in their presence without a notable reaction from them like helping to apprehend the appellant, taking the complainant to hospital or reporting the matter to the police. In ***Bukenya & Others v Uganda*** **[1972] EA 549**, where the court held, *"that where essential witnesses are not called, the court is entitled to draw an inference that if their evidence had been called, it would have been adverse to the prosecution case."* This is a case where the court may draw an adverse inference.

13. Substantial doubt is also cast on the prosecution case as the arresting officer PW3 did not explain how he came to know the appellant and thereafter arrest him on account of another incident where he was found assaulting a woman in the market. The court's doubt, in this respect, would have been laid to rest by the testimony of Corporal Farah who was also not called to testify.

14. The evidence of the prosecution has too many loose ends which lead me to conclude that the conviction of the appellant is unsafe. I therefore allow the appeal, quash the conviction and sentence.

15. The appellant is set free unless otherwise lawfully held.

**DATED and DELIVERED at MIGORI this 8th September 2014**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Owenga, Senior Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.