



REPUBLIC OF KENYA

High Court at Kisumu

Criminal Appeal 68 of 2011

CALEB OUMA ONDIEK .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in Criminal Case number 393 of 2009 of the Chief Magistrate's Court at Kisumu – M/s R. B. N. Maloba)

JUDGMENT

The appellant was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code.

The particulars are that on the 16th day of July 2009 at Kodiaga Prison in Kisumu East District within Nyanza Province unlawfully assaulted **Stephen Otieno Boyi** thereby occasioning him actually bodily harm.

The appellant was convicted and sentence to two years imprisonment. Being dissatisfied he has filed this appeal vide the petition of appeal dated 18<sup>th</sup> October 2010. The summary of the grounds are that the entire prosecution investigation was shoddy and that there was no sufficient light which would have enabled the complainant recognize him.

The complainant told the court that he was a convict serving a ten (10) year prison sentence at Kodiaga Prison. He said that at around 6:00 p.m. when he went to collect his food for no apparent reason he was attacked and stabbed on the chest and neck using a knife by the appellant. He said that thereafter the appellant ran away and he was rushed to the District Hospital for treatment.

**PW2 Emmanuel Oduor** also a convict confirmed that there was electricity black out on that material evening. He said that he saw the appellant take out a knife and stabbed the complainant twice on the neck and chest. He said that he was three (3) metres away from them.

He further testified that although there was blackout there was sufficient light from the sun though the window.

He said that the appellant run away but was later arrested.

**PW3 Joseph O. Agwada** also a convict testified also that he saw the appellant stab the complainant on the neck and chest twice. He took off but was later arrested.

**PW4 P. C. Fred Muinoe** was the police officer who investigated the matter and charged the

appellant with the offence. He issued the complainant with the P3 form.

**PW5 Benard Omollo** is the Clinical Officer who produced the P3 form on behalf of Peris Wawire who was away on studies. The report indicated that there were injuries on the chest of the complainant and that the type of weapon used was a sharp object.

The appellant gave unsworn statement. He said that they were watching TV when a black out occurred. Suddenly the complainant cried that somebody had beaten him. The following day he was arrested when the complainant made a report that it was him who had stabbed him.

The evidence presented before the trial court in my analysis centres on whether there was sufficient light to have enabled the complainant and his witnesses to identify the assailant. The time given was around 6:00 p.m. Ordinarily the sun is yet to set at such a time and its inconceivable that there would be no sufficient light.

Equally all the parties in the case were in mates. Clearly they must have known each other. It is very difficult therefore to buy the appellant's line of argument that it was not possible for the complainant and his witness to recognize him .

In fact PW2 said that he was three (3) metres from the scene and was able to see the appellant take the knife and stab the complainant twice.

PW3 equally saw the appellant stubbing the complainant twice. Although the knife was not recovered the evidence of the clinical officer corroborates that of the prosecution witnesses.

For the foregoing reason this appeal ought to fail. The prosecution proved their case beyond reasonable doubt. The appeal is dismissed.

**Dated, signed and delivered at Kisumu this 6<sup>th</sup> day of May 2013.**

**H.K. CHEMITEI**

**JUDGE**

In the presence of:

.....for state

.....for the appellant.

*HKC/aao*