



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(Coram: Gicheru, Omolo & Tunoi JJ A)**

**CRIMINAL APPEAL NO 88 OF 1992**

**ALEXANDER ANGILA ONGASIA**

**SUSAN ANGILA ONGASIA**

**SIMON ABILL ONGERI**

**SIMON ALEXANDER ONGASIA**

**PETER OJWANG OUMA**

**COSNIS OCHIENG OJWANDI**

**JOHN OMOLLO MALOBA**

**COSMAS WANYA OPANDO**

**ALFRED WANYAMA NAMWAY..... APPELLANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Appeal from the judgment of the High Court of Kenya at Kakamega

(Osiero J) dated 21st January, 1992 in

HC CRA Nos 208 - 216 of 1992)

**JUDGMENT**

These nine appellants were convicted by the Resident Magistrate at Bungoma on a charge of causing grievous bodily harm contrary to section 234 of the Penal Code, and upon their conviction, the 1st, 3rd, 4th, 5th, 6th, 7th, 8th and 9th appellants were sentenced to two years imprisonment with two strokes of the cane, while the 2nd appellant who is the wife of the 1st appellant was sentenced to pay a fine of Shs 800/- and in default of payment to six months' imprisonment. The 5th appellant was the son of the 1st and the 2nd appellants. All the appellants appealed to the High Court and their appeals were dismissed by that Court. They now appeal to this Court and this being a second appeal, only matters of law fall for our

consideration.

The three points of law raised before us by Mr Bogonko for the appellants were that both the trial court and the High Court failed to deal with the issue of self defence raised by the 1st, 2nd and 5th appellants, that the two courts also failed to deal with the issue of common intention and finally that the learned judge on first appeal though he stated in his judgment that he had re-evaluated the evidence before the trial court as he was required by law to do, did not in fact do so and gave no reasons for his decision. We shall deal with these issues.

On the issue of alleged failure by the lower courts to deal with the issue of self-defence raised by the 1st, 2nd and 5th appellants, it is true the two lower courts did not specifically make a finding on the question of whether the dispute was at the home of the 1st appellant as was alleged by the 1st, 2nd and 5th appellants or whether it was at the home of the complainant, Michael Sibara Kanoti Maingi (PW2), as was contended by the prosecution. The magistrate however, dealt with the issue in a somewhat indirect manner for he says in his judgment:

“On the material day the complainant has stated that he was attacked by a group comprising the accused persons who demanded that he vacates the land. The complainant was bodily injured during the incident and had to be hospitalised. The accused persons never got injured at all although some claimed that the complainant attacked them. The Court has perused the evidence adduced herein and finds that the accused persons being hostile neighbours of the complainant jointly attacked him and occasioned him the injuries complained of. They all had common intentions and did jointly assault the complainant, thereby injuring him seriously. The claim that the complainant is the one who attacked them cannot be true.-----”

The claim of the 1st, 2nd and 3rd appellants was that it was the complainant who went to their home and attacked them. It is clear from the passage we have set out above that the trial magistrate rejected that claim, and that rejection left only the version of the complainant that it was the appellants who attacked him at his home. The first appellate judge generally agreed with this finding by the magistrate. There cannot be any basis for our interfering with that finding of fact which was in any case, supported by the evidence on record.

The appellants having attacked the complainant in his home, the question of self-defence raised by the 1st, 2nd and 5th appellants was accordingly for rejection and must have been rejected by the two courts below. We can find no reason for interfering with the conviction on that basis.

Nor is there any substance on the issue of common intention. The trial magistrate accepted the evidence given by PW2 and his juvenile son, Alfred Maingi (PW3), and each of these witnesses gave evidence regarding the role played by each appellant in the attack upon PW2. Once the evidence of PW2 and PW3 was accepted, then the only conclusion was that each appellant assaulted the complainant and for whatever reason each was doing so, they had a common intention to assault the complainant and the trial magistrate specifically stated so, in his judgment. Once again we can find no reason for interfering with the convictions on the issue of common intention.

That brings us to the complaint by the appellants that the High Court failed to re-evaluate the evidence and gave no reason for its decision. It is now trite law that “it is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld” - see for example *Okeno v Republic* [1972] EA 32. The learned trial judge stated in his judgment that he had re-evaluated the evidence on the lower court record as he was “entitled to do,” but such re-evaluation is not at all apparent from the judgment. For our part, we would state that it is not enough, indeed there is no need, to loudly announce in the judgment that the evidence has been re-evaluated. Such re-evaluation must be apparent on the face of the record and if that is done, then there is no occasion to announce it. We agree with Mr Bogonko that the judge did not in fact re-evaluate the evidence before the trial court, but it is clear to us that he broadly agreed with the conclusions reached by the trial magistrate and he also found as a fact that the evidence against the appellants was overwhelming. We think he was right in his general conclusions and in the circumstances of this case, his failure to analyze in detail the evidence before the trial court did not occasion any failure

of justice to any of the appellants. In the event, all the four grounds of appeal preferred by the appellants fail and we order the appeals against the convictions dismissed.

Dated and Delivered at Kisumu this 11<sup>th</sup> day of June, 1993

**J.E. GICHERU**

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**JUDGE OF APPEAL**

**R.S.C OMOLO**

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**JUDGE OF APPEAL**

**P.K.TUNOI**

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**JUDGE OF APPEAL**