



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYERI**

**CRIMINAL APPEAL NO 83 OF 1990**

**GICHOI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(From the Original Conviction and Sentence of the District Magistrate's Court at Othaya, Gothongo DM 1, in Criminal Case No 472 of 1989)

**JUDGMENT**

The appellant was after trial convicted on two counts of assault causing actual bodily harm contrary to section 251 of the Penal Code and sentenced to concurrent prison terms of one year on each count.

Mr Mindo, for him, has submitted in this appeal that the learned trial magistrate misdirected himself in law on the question of the identification of the appellant as the assailant in that the prevailing circumstances did not favour easy identification.

It was proved beyond doubt that the two complainants were attacked with a knife at 11 pm within Kagicha shops when the two of them were leaving the bar for home.

The evidence of George Kaburu (PW 1) was that he saw the appellant standing by the side of the footpath and passed him without salutation. Immediately thereafter he was stabbed on the left hip. There was feeble moonlight. He was drunk. Julius Giteru (PW 2) saw PW 1 lying across the road. Nearby were 4 to 5 people who vanished on seeing him. He was, too, stabbed with a knife. The scene of the attack was about 70 feet from the bar. The electric lights were cast upon the scene. This witness admitted he was moderately drunk.

The appellant in his sworn testimony vehemently denied carrying out the attacks on the complainants.

The learned trial magistrate gave the summary of the evidence for the prosecution and the appellant and then stated that the appellant had been properly identified and convicted him.

The case against the appellant depended wholly or substantially on the correctness of the identification of him. In my view it is possible that the two complainants, though convincing, were mistaken due to admitted intoxication. Further, there was not sufficient light at the scene to aid easy and faultless identification.

Though recognition might be more reliable than identification of a stranger, the court should nevertheless remind itself that mistakes in recognition of close relatives and friends, have been made.

In the instant case it cannot be said that the appellant was properly identified by the complainants. There is clear doubt which should be construed in his favour. The convictions are unsafe.

I allow the appeal. I quash the convictions and set aside the sentences.

The appellant may be released forthwith unless otherwise lawfully held. Appeal allowed.

Convictions quashed. Sentences set aside. Appellant may be released forthwith.

Dated and Delivered at Nyeri this 7<sup>th</sup> Day of June, 1990

**P.K. TUNOI**

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**JUDGE**