**IN THE COURT OF APPEAL OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL 282 OF 2007**

**JOHN MWANIKI KITUYI ……APPELLANT**

**AND**

**REPUBLIC ……..…...……RESPONDENT**

***(Appeal from a judgment of the High Court of Kenya at Kitale (Mr. Justice F. A. Ochieng') dated 3rd December, 2007***

**In**

**H.C.CR.A. NO. 83 OF 2005)**

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**JUDGMENT OF THE COURT**

The record before us shows that the appellant ***John Mwaniki Kituyi*** and ***Euliter Akodoi Musee*** (PW1) (Euliter) lived as husband and wife from the year 1990. They never had any children although Euliter had a son Boniface Kipkalel (PW3) (Boniface) born through previous union. The appellant and Boniface agree in their evidence that in February 2001 the appellant was charged with either assault or causing grievous harm to Euliter and Boniface; was found guilty and was sentenced to serve four (4) years imprisonment on 4th February 2002. He was released from prison before 20th November, 2004. He did not return home immediately on release from prison. On the night of 19th/20th November 2004, Euliter and Boniface slept in Euliter's house but in different rooms. On 20th November, 2004 as the sun was rising or at 6.00 a.m. (as Boniface puts it in his evidence), Boniface opened the door to go out for a call of nature. As he opened the door, he came face to face with the appellant who was armed with a panga and was outside the door. The appellant was three metres away from Boniface. Boniface ran away. The appellant chased him but Boniface out-sprinted the appellant into a maize plantation. As Boniface was running, he was also screaming for help and called neighbours. Euliter who was in her room was alerted by the commotion outside. She heard the footsteps running away from the house as if Boniface was chasing something and then immediately thereafter heard the footsteps return to the house. She called out to her son to ask him what was going on. She opened the door and there was the appellant in front of her. He asked for money. Before she could respond, the appellant cut her on the head seven times, once on the back, once on the shoulder and on both fingers. She fell down unconscious. Boniface returned to the house together with some of the neighbours and found Euliter in a pool of blood and unconscious. The appellant had disappeared from the scene. She was taken to Kitale District Hospital by the neighbours among them one Alice Onyango. She was admitted from 20th November 2004 to 1st

December 2004. Boniface reported the attack to the police at Kitale Police station. Sgt Peter Omosa Isaboke (PW2) (Sgt Isaboke) was detailed to investigate the case by the DCIO, Mr. Shikuku. Sgt Isaboke visited the scene after interrogating Boniface. He saw the blood drenched floor of Euliter and saw her at Kitale District Hospital. As the appellant had ran away, a search for him began. In the meantime, Euliter was discharged from the hospital on 1st December, 2004. During the period the appellant was earlier in prison in respect of the offences he committed against Euliter and Boniface in the year 2001, he met Stephen Marwa Wamukota (PW4) (Wamukota) who was also a prisoner. Wamukota was released before the appellant and as Wamukota was being released, he stated in evidence that the appellant told him to warn Peter Nyongesa (PW5) (Nyongesa) that on his release from prison, the appellant would wipe out Nyongesa) and his family. Wamukota communicated this to Nyongesa. Nyongesa who was apparently a neighbour of Euliter and had visited Euliter at the hospital said that one Brigid Masambu, his wife told him that the appellant had been spotted around his (Nyongesa's) house. Obviously Nyongesa was alert, having been warned by Wamukota of the impending threats to his life and that of his family. He assembled his brothers and they ambushed and arrested the appellant who was around Nyongesa's house. They took him to Kitale Police station where he was re-arrested. On 22nd March 2005, Dr. Meshack Liru, MOH, Kitale District Hospital (PW6) (Dr. Liru) filled P3 form in respect of the injuries suffered by the complainant which were multiple deep cut wounds on the head, back, left shoulder and both arms. She had a fracture of one of the bones of left hand -ulna bone and fracture of left clavicle and a piece of the scull was chopped off. She was disfigured and there was a possibility of deformity on the hands. The used was probably sharp and the degree of injury was grievous harm.

The appellant was charged with two counts, the first count being that of grievous harm contrary to ***section 234*** of the Penal Code and the second count was that of creating a disturbance in a manner likely to cause a breach of peace, contrary to ***section 95 (1) (b)*** of the Penal Code. He pleaded not guilty to both counts and in his defence pleaded that he was not at the scene of the crime. In short he raised an alibi in his defence and claimed he was framed on account of past events. After full hearing before the Principal Magistrate at Kitale (M.C. Chepseba), the appellant was found guilty of the offence of grievous harm, contrary to ***section 234*** of the Penal Code, convicted and sentenced to life imprisonment. He was acquitted of the offence of creating a disturbance in a manner likely to cause a breach of peace and was released on that charge. The particulars of the offence of grievous harm read as follows:-

"***On the 20th day of November, 2004 at Bidii Farm Kibomet location in Trans-Nzoia District of the Rift Valley Province unlawfully did grievous harm to Euliter Akodoi Omuse."***

The appellant was dissatisfied with the conviction and sentence imposed upon him by the Principal Magistrate. He lodged appeal in the High Court at Kitale which was dismissed and hence this appeal before us which is a second appeal and is premised on four grounds filed by the appellant in person. These are:-

"***1. That: Your Lordship's both the below (sic) courts erred in law and facts in holding that the identification by recognition of the appellant by PW1 and PW2 was free from possibility of error.***

***2. That: the below courts erred in law and facts in relying on circumstantial evidence adduced by PW1 and PW2 without observing that there was a grudge between them and the appellant.***

***3. That both the below courts misdirected themselves to rely on the testimony of PW1 and PW2 without considering that some of the mentioned witnesses were not called to clear the doubts.***

***4. That the below courts erred in law and facts in convicting the appellant without noting that my constitutional rights guaranteed under section 72 (3) of the constitution was violated by the police."***

Before us the appellant did not urge ground 4 of the memorandum of appeal and we will say no more on it as indeed he never stated the circumstances that necessitated that ground of appeal. The appellant however addressed us at length on the inconsistencies and contradictions on the evidence of the prosecution witnesses such as on the evidence as to who took the complainant to hospital; time at which the offence took place as to whether it took place at 6.30 p.m. as stated by the complainant or at 6.00 a.m.

as stated by Boniface and that Alice Onyango who allegedly took the complainant to hospital was not called as a witness. He ended his submission before us by saying the prosecution witnesses should not have been relied upon as they were all relatives and that the sentence meted out to him was excessively high. Mr. Omutelema, the learned Senior Principal State Counsel on the other hand supported the conviction maintaining that the appellant raised on the main the question of his identification at the scene as he raised an alibi. That alibi, was in Mr. Omutelema's view dislodged by the evidence of Euliter and Boniface who testified that they saw the appellant whom they knew very well previously on that fateful morning at about 6.00 a.m. when the sun was rising. As to the inconsistencies in the evidence, Mr. Omutelema's position was that the same were minor and did not go to the core of the entire case as the evidence of Dr. Liru was clear that Euliter indeed suffered serious injuries as stated by Boniface and Euliter.

As we have stated, this is a second appeal. By dint of the provisions of ***section 361*** of the Criminal Procedure Code, we are enjoined to consider only matters of law and not matters of fact.

In our considered view, the only matters of law raised in the memorandum of appeal before us are identification and whether or not Alice Onyango, who allegedly took part in taking the complainant to the hospital should have been called as a witness and the effect of her not having been called to the entire case. We state so because the learned magistrate in her considered judgment set out as one of the issues to be considered and which she duly considered the credibility of witnesses. She analysed in detail the evidence that was before her and evaluated the same. Having done so, she came to the conclusion that notwithstanding the minor discrepancies expected in every case where witnesses are honest, the case against the appellant was proved beyond reasonable doubt. Likewise, the superior court, acting in its capacity as first appellate court also revisited the evidence afresh, analysed it and evaluated it, having considered that the trial court had advantage of having seen and heard the witnesses and having given allowance for the same and came to the same conclusion. We cannot fault the two courts on their concurrent findings on matters of facts and that is the reason why we say only matters of law raised in the grounds of appeal would come for our consideration.

On identification, the learned Principal Magistrate stated inter alia:-

"***It is important to consider the credibility of prosecution witnesses. The main (sic) witnesses were PII, the complainant in count 1 and her son PW2, both who were part of the accused former (sic) family. Their evidence was credible and consistent, material facts especially as to who attacked PW1 and with what and where……..***

***The accused is raising an alibi but I am satisfied this is only an afterthought and without proof. He was clearly recognised by PW1 and PW2 at the scene of assault on 20:11:2004. As indicated above, I found her evidence credible both on recognition and identification of PW's assault and (sic)."***

The superior court, as we have stated considered the evidence in respect of identification by recognition afresh and having done so stated:-

"***Having come to the conclusion that both PW1 and PW3 had positively recognised the appellant, I find that that was the reason which prompted them to give the appellants name when they made their first respective reports. I find no basis for the appellant's contention that the two witnesses were motivated by either by (sic) revenge or by a mere judgment of their imagination."***

We see no reason to disturb those two concurrent findings. This was a matter of recognition as opposed to identification of a stranger. The time was between 6.00 a.m. and 6.30 a.m. Boniface says the sun was rising. There was ample light for proper identification even of a stranger. Boniface says the appellant whom he knew very well as his step father since 1990 was standing only three (3) metres away from him as he opened the door to go for a call of nature. When he ran away, the appellant chased him and he only escaped by running into a maize plantation. Euliter who was wife to the appellant faced the appellant that morning before she was rendered unconscious by severe cuts on her head and fingers and other parts of her body. She also had enough light to enable her see the appellant. We cannot accept the appellant's

contention that there was possibility of the two witnesses failing to identify the assailant of Euliter under those favourable conditions as to time and place. That ground of appeal cannot stand. It is dismissed.

The last ground is that some witnesses were not called. The superior court considered that complaint and stated:-

"***As regards the neighbour to PW1, who may have witnessed the incident, but who were not called as witnesses, it is true that they could possibly have further reinforced or fortified the prosecution case. But even without their evidence, I find that the evidence of recognition was already sufficient. I say so because there is no legal requirement that all persons who are eye-witness to an incident should testify in court, in order for the court to convict an accused person. The validity or soundness of a conviction is not pegged on the number of witnesses who testified for the prosecution. In deed, it is trite law that facts can be proved even by the evidence of a single witness."***

We agree. The law discourages superfluity of witnesses but states that where a witness(s) is necessary for proof of a matter, if he or they are not called then the court will take it that their evidence would have been adverse to the prosecution's case. (See case of ***Bukenya and others vs. Uganda*** (1972) EA 549 but under ***section 143*** of the evidence act, there is no set number of witnesses required to prove a criminal charge against an accused except where specifically provided in any law. In this case, the appellant specifically mentioned one Alice Onyango who allegedly took the complainant to hospital. That witness, if she had been called would have talked of the condition in which the complainant was before she took her to hospital and would have told the court that she took her to hospital. It is also possible that she would have denied having seen the complainant or having taken her to hospital. Whatever her evidence would have been, one thing is certain, and that is that the complainant was eventually at the Hospital with serious injuries. Sgt Isaboke saw her there, Wamukota said the complainant was receiving treatment for her injuries, and Nyongesa saw her at the hospital. Under those circumstances, Alice Onyango's evidence would have amounted to no more than a superfluity of evidence. It would not have added a new dimension to the case as there was enough evidence before the trial court to secure a conviction.

The sum total of the above is that, in our view, the conviction of the appellant was based on sound grounds. The superior court came to right conclusion on the first appeal and we see no reason to interfere with the decision of the two courts on conviction. On sentence, as we have stated, this is a second appeal and consideration of severity of sentence is not within our jurisdiction. The appeal has no merits. It is dismissed.

***Dated and delivered at Eldoret this 29th day of May, 2009.***

**P. N. WAKI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**