



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT KISUMU**  
**(CORAM: OMOLO, LAKHA & BOSIRE J.J.A)**

**CRIMINAL APPEAL NO.5 OF 2000**

**BETWEEN**

**WILLIS OKEYO ONGUTO .....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(An appeal against conviction and sentence of the High  
Court of Kenya at Kisumu by Commissioner of Assize  
Hon. Mr. P.K.K.A. Birech dated 17th day of  
September,1999**

**in**

**Kisumu H.C.C.Cr.A. No.194 of 1997)**

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**JUDGMENT OF THE COURT**

The appellant, an engineer, was charged, tried and convicted of the offence of unlawfully doing grievous harm to one John Waitara Njoroge, contrary to section 234 of the Penal Code and was thereafter sentenced to pay a fine of Kshs. 20,000/= by the Chief Magistrate, at Kisumu. His first appeal was, on 17th September, 1999, dismissed by P.K.K.A. Birech, a Commissioner of Assize, and this being his second appeal we are only concerned with points of law. There is basically only one point of law raised, namely identification.

The complainant, John Waitara Njoroge, a building contractor who is a resident of Nyamasaria within Kisumu town, was, on the night of 2nd March, 1996, at about 9 p.m. attacked near his residence by a person whom he said he recognized as the appellant and the person thereupon hit him on the right rear side of his head near the ear as a result of which he fell down. He sustained a serious cut wound which Tarok Singh, a police surgeon, later classified as maim. Mrs Alice Nyambura, (PW3), who, like the complainant was a resident of Nyamasaria, witnessed the attack on the complainant, but she testified that she was not able to identify or recognize the assailant despite the fact that there was what she and the complainant described as ample light from three security lights at the scene of the attack.

The blow on the complainant was apparently so heavy that it sent him sprawling and made him

unconscious. He did not regain consciousness until the next day while being treated at Aga Khan Hospital. His wife, Mrs Teresia Nyambura, (PW5) testified that she talked to him then and inquired from him as to how he had sustained the injury. The complainant, according to her told her that "those men he used to work with and one of them is the accused" had assaulted him. IP Gabriel Mburu (PW6) visited the complainant on 5th March, 1996, but this time the latter named the appellant alone, as his assailant. PW1 went to visit the complainant on the instructions of his Officer Commanding police station, who apparently had been told that the complainant's assailants were unknown. The record of appeal is silent as to who made the report to him. The appellant was arrested on the basis of the complainant's report to PW6 and was thereafter charged as herein first stated.

The appellant's defence was an alibi. On the material date of the assault he was resident in the Milimani area of Kisumu. His evidence was that at the material time he was at his residence and at no time did he leave his house to go to any place, and that he did not learn of the assault on the complainant until 1st April, 1996.

In his evidence the complainant stated that he knew the appellant well having previously worked with him at a building site where they shared office accommodation, and that before the date of the injury the appellant had approached him with a request that he be his witness in another assault case involving the appellant, but because the complainant declined, the appellant was upset and thereafter their relationship became sour; that on the material date he saw the appellant standing near a shop at a place which was well lit by security lights wearing a black and white jacket and a hat and he was able to recognize him well. The appellant was then less than 5 metres away according to the complainant, and that facilitated a closer and better view of the appellant. Consequently, he said, he had no doubt that the appellant was his assailant. Had that been the only evidence of identification we would have had no difficulty coming to the conclusion that the appellant was properly identified. There are, however, two other versions regarding who might have assaulted the complainant.

We earlier alluded to what the complainant is recorded to have told his wife regarding who his assailants were. According to her the complainant had said some men at his place of work were responsible. If the complainant indeed had unmistakably recognized the appellant as his assailant we find it strange that he did not mention his name to his wife. Besides before PW6 visited the complainant at the Aga Khan hospital, Kisumu, he had already been told by his OCS, that the complainant's assailant or assailants were unknown. Whoever had made a report of the assault to the OCS, must have told him so.

Neither the trial Magistrate nor the first appellate court considered the other versions which tend to cast some reasonable doubt on the involvement of the appellant in this matter. They are indeed fundamental to the question of identification and we can find no evidence or plausible explanation to remove the doubt which they create as to the guilt of the appellant. The appellant was convicted of a very serious criminal charge and it was incumbent upon the prosecution to exclude any co-existing facts and circumstances on the issue of identification of the appellant, which they did not do. Besides, the complainant testified that he did not see the person who hit him. He assumed that the person he had earlier seen nearby was responsible. However, considering what we have stated, above, there is a serious doubt as to the correctness of the identification of the appellant which renders the appellant's conviction unsafe.

In the result, we allow the appeal, quash the appellant's conviction on the charge of grievous harm contrary to section 234 of the Penal Code, and set aside the sentence which was imposed on him. If the fine of Kshs.20,000/= has been paid, it should be refunded to the appellant forthwith. It is so ordered.

Dated and delivered at Kisumu this 23rd day of March, 2000.

R.S.C. OMOLO

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**JUDGE OF APPEAL**

**A.A. LAKHA**

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**JUDGE OF APPEAL**