



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.35 OF 2015**

**PETER KAMAU NDEGWA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Criminal Case No. 4940 of 2007 delivered on 29<sup>th</sup> January, 2015 by E.K Nyutu, PM).***

**JUDGMENT**

**The Background**

The Appellant was in count I charged with threatening to murder Contrary to Section 223(1) of the Penal Code. The particulars of the offence were that on the 24<sup>th</sup> day of February, 2006 jointly with Paul Gachie Ndegwa at Embakasi Village in Embakasi Division within Nairobi Area Province, without lawful excuse caused Peter Ndirangu Ndegwa to receive threat to kill the said Peter Ndirangu Ndegwa.

In count II he was charged with attempted murder contrary to Section 220(a) of the Penal Code. The particulars were that on the 24<sup>th</sup> day of February 2006 at Embakasi Village in Embakasi Division within Nairobi Area Province, attempted unlawfully to cause the death of Monica Maina Nyamweya by hitting her with a walking stick until she lost consciousness.

In count III he was charged with grievous harm contrary to Section 234 of the Penal Code. The particulars were that on the 24<sup>th</sup> day of February, 2006 at Embakasi Village in Embakasi Division within Nairobi Area Province, unlawfully did grievous harm to Monica Maina Nyamweya.

In count IV, he was charged with assault contrary to Section 251 of the Penal Code. The particulars were that on the 24<sup>th</sup> day of February 2006 at Embakasi Village in Embakasi Division within Nairobi Area Province, unlawfully assaulted Peter Ndirangu Ndengwa thereby occasioning him actual bodily harm.

He was acquitted in count I and II but convicted in counts II and IV. He was sentenced to life imprisonment in Count III and three years imprisonment in count IV. Both sentences were to run concurrently.

He appealed against the conviction and sentence on grounds that;

1. The conviction was against the weight of evidence.
2. The learned trial magistrate disregarded his alibi defence.
3. The evidence of the defence witnesses was not considered.
4. That the sentence imposed was excessive considering his old age.
5. The case was not proved beyond reasonable doubt.

### **Submissions**

His submissions were filed by Wangui Kathryn Kimani & Co. Advocates on his behalf. They are dated 1<sup>st</sup> December, 2015. It was submitted that the evidence of the prosecution witnesses was laced with contradictions; that it was inconceivable that PW3 was in a position to identify the Appellant under moonlight; that the metal object and walking stick were never produced in court as evidence and that PW2's evidence was hearsay evidence since he was not at the scene of crime. Further, that failure to produce the Occurrence Book (OB) to verify what was actually reported to have happened on the material day was fatal to the Appellant's case; that all the prosecution witnesses were biased against the Appellant; that the medical evidence given by PW7 and PW5 on the condition of Monica Nyamweya failed to connect the injuries to the alleged attack and that the prosecution did not prove the offence of grievous harm beyond all reasonable doubt since there was no permanent injury on Monica Nyamweya. Finally, counsel submitted that the sentence against the Appellant was excessive considering that he was a first offender.

Those of the Respondent were filed by Miss Jemima Aluda. She conceded to the appeal. She submitted that PW1 who was the Appellant's brother found the Appellant holding a metal. The Appellant aimed at him but he dodged. He then rushed to the police station to report the matter. Counsel submitted that PW1 in cross examination stated that there was no light therefore there could have been a mistaken identity. Again, PW1 stated that he made report to the police but no report was entered in the Occurrence Book. In any case, PW2 did not witness the dispute as he arrived at the scene after the dispute had occurred. She submitted that PW3 witnessed the Appellant hitting the second complainant with a metal bar. Her testimony was corroborated by PW4. That the medical report showed that the complainant suffered several injuries due to assault. She submitted that PW7 produced the P3form which confirmed the injuries sustained by the complainants. PW6 confirmed that there existed a land dispute which the police had tried to reconcile but in vain. Furthermore, the Appellant raised the defence of alibi which the prosecution failed to rebut as no witnesses were called to counter the same. Therefore, she concluded that this questioned the credibility of the prosecution witnesses. She submitted that the prosecution did not adduce evidence to show that the attack led to physical impairment of the complaint. Finally, she submitted that the sentence was harsh as the law gives the maximum sentence as five years. She urged the court to evaluate the appeal objectively.

### **The evidence**

It is now the duty of this court to re-evaluate all the evidence and come up with its own independent conclusions. See **OKENO VS REPUBLIC (1972) EA, 32.**

The prosecution called 7 witnesses. **PW1**, Peter Ndirangu Ndegwa recalled that on 24<sup>th</sup> February, 2006 together with his wife Monica Nyamweya, two children and a neighbour, Jane Wangui Mwaura went to Embakasi to pick rent money from his brother in law John Chege Kangethe who he had authorized to collect on his behalf from his tenants. At about 9:00 p.m., his wife and neighbour excused themselves and went outside. Five minutes later, he heard his neighbour Jane Wangui scream and this prompted him and John to go outside. On reaching outside he flashed his torch and saw the Appellant who was at a distance of 9-10 feet walking away. The Appellant then turned back with a metal which he used to hit

him. PW1 was hit on his hip bone but he managed to run away. He ran to Embakasi Police Station and reported the incident. He returned to the plot and picked his children from the 2nd accused's house. The 2<sup>nd</sup> accused later on passed away and the case proceeded against the Appellant solely. He then went to hospital where he met his wife and Jane. He was told by Jane that she screamed after his wife was hit by the Appellant. He went back to the police station and reported this further information. He testified that his wife has since been paralyzed and has never been able to talk again. Also in his testimony he mentioned that there was a land dispute between him and the Appellant.

**PW2**, CPL David Ndegwa recalled that on 24/2/06 he was called by John Chege and informed about what had happened to PW1's wife. The latter had been taken to hospital by the time he arrived at the scene. He did not find the Appellant at the scene of crime. He testified that the cause of the assault was a land dispute which existed between the Appellant and PW1.

Jane Wangui Mwaura was called as **PW3**. She testified that on 24/2/2006 she was with PW1, his children and wife. They went to one of her plots to pick rent money from one Kagera who lived in one of her rooms. She testified that while they were in Kagera's house, she excused herself and went out for a short call. When she returned, she found Kagera and the Appellant outside the house. She sensed danger and requested to leave. PW1's wife and children followed her outside. At that time the Appellant had left but in a short while he returned and consistently hit PW1's wife with a metal bar. She screamed as she went back to the house to get help. While at the scene Paul Gachie Ndegwa (the deceased accused) arrived and she told him that it was the Appellant who had injured PW1's wife. A good Samaritan drove them to Kenyatta National Hospital where PW1's wife was admitted.

**PW4**, John Chege Kagera recalled that on 24/2/06 at around 7:30 p.m., he was joined by PW1, PW3, his children and wife. They had gone to collect rent money from their houses. He excused himself to go for a short call. On his way back, he met the Appellant who did not go into the house. A short while later PW3 left the house together with PW1's wife and children. He went outside again. There he met two men at his door step who he did not identify as they immediately ran away. He then heard PW3 screaming and when he ran towards her, he met the Appellant beating PW1's wife. He ran back to the house and alerted PW1. PW1 went outside and flashed his torch towards the Appellant who then hit him (PW1) with a metal bar causing him to fall down. PW4 ran and reported the incident to the Airport Police Unit where PW2 worked. He met PW2 and narrated the incident to him. Together they headed back to the scene where they found PW1's wife had been taken to hospital by a good Samaritan.

**PW5**, Doctor David Gitau Kinyanjui presented the medical report of PW1's wife which he prepared based on the clinical record and file of Kenyatta National Hospital. It was dated 18/12/07. His report indicated that on presentation at Kenyatta National Hospital on 24/2/06, PW1's wife had been hit with a metal bar on the head which overlay a fracture on the skull. Blood was oozing and she was unconscious. She had suffered several injuries due to assault and could not talk. According to him the process of recovery was slow.

**PW6**, Chief Inspector Stephen Okal who was then attached to Embakasi Police Station recalled that he received information that PW1 had been threatened with death by his brothers on 28/8/06. He went to record PW1's wife (Monica Nyamweya) statement at State House but could not do so because she was paralyzed and could not speak. He however testified that he knew the Appellant before as he used to report about land disputes between himself and his brothers.

**PW7**, Doctor Zephania Kamau a Police Surgeon at Nairobi County prepared and signed the P3 form of PW1's wife. He visited her on 22/09/06. At that time she was walking with the help of a tripled stand. On examination, she found that she was suffering severe head injuries with multiple scars on the head. She

also had fractures on the skull and had lost her speech. She was paralyzed on both the upper and lower right limbs. He assessed the degree of injury as grievous harm. He also examined PW1. He referred to his treatment notes issued at Kenyatta National Hospital which indicated that PW1 had sustained tenderness of the left arm and right thigh. The injury was caused by a blunt object and the degree of injury was harm. He also produced the P3 form of PW1.

After the close of the prosecution's case, the court ruled that the Appellant had a case to answer. He was thus put on his defence. Four defence witnesses were called. The Appellant who testified as **DW1** gave a sworn defence. He denied having committed the offence and that he was not at the scene of the crime at the time the offence was allegedly committed. He testified that on the material date he was at Njoro on Rusiru Farm where he had gone to cultivate his farm. He had left for Njoro on 15/12/06. On 24/12/06 his brother Gachie informed him that PW1's wife had been attacked but he could not travel to Embakasi due to lack of fare. He was arrested at Njoro by a police officer from Njoro Police Station in November, 2007. He testified that he was framed following a long standing land dispute between himself and PW1 who threatened that he would face dire consequences if he did not surrender the land. He testified that there is in fact an ongoing case in the High court between himself and PW1.

In his testimony, **DW2**, John Kamau Gachie stated that at around 9.00 p.m. he heard screams from outside the house. He went outside to find out what was going on and he learnt that someone had been assaulted. He did not however see the person who had been assaulted. He testified that on the material date, the Appellant was at his rural home in Nakuru. He testified that he was aware of a long standing land dispute between the Appellant and his brothers. He testified that the Appellant was his uncle and that PW1 was his father's younger brother.

**DW3**, Emily Nyambura Kamau also stated that on the material date the Appellant who was her father was at their home in Njoro, Nakuru. She testified that she had communicated with his father on that day. She also was aware of the long standing land dispute between the Appellant and PW1.

PW4 was recalled and he testified as **DW4**. He stated that on the material date, he saw the Appellant at the plot during the day. He saw him again at around 9pm and talked with him and even enquired whether his brother Pius was also at his house. He talked with him from outside the house and saw him under moonlight.

PW3 was also recalled. She reiterated her testimony and added that it was not true that the Appellant was at Njoro on 24/2/06.

The learned trial magistrate convicted the Appellant in counts III and IV. He was satisfied that PW1's wife had suffered grievous harm from the evidence given by PW3, 4, 5 and 7. Also, that the Appellant was properly identified and that he was the one who attacked PW1 since the injuries which PW1 suffered corresponded well with the findings of PW7. On the Appellant's alibi defence, the learned trial magistrate held that the Appellant's alibi did not create any doubt in the prosecution's case since the Appellant was properly identified. On the issue of the existing land dispute between the Appellant and PW1 he was alive to the fact that the existing grudges could as well have been a motivation for committing a crime. However, s he concluded that the evidence of the witnesses was safe and not laced with any malice or ill will towards the Appellant.

But in so holding the learned trial magistrate did not properly address her mind to the burden of proof that the prosecution was required to discharge. It is salient that in a criminal trial the same is beyond reasonable doubt and the onus is always on the prosecution to discharge the burden. It never can shift to the defence. That is to say that the accused person can never be required to prove his innocence. Any

material contradiction must be resolved in favour of the accused. In the instant case, the conviction of the Appellant was mainly based on the evidence of PW1 and 3. PW1 being a victim, the evidence of PW3 would be regarded as independent and ought to have given a vivid account of what actually transpired at the scene. Remarkably, PW3 was an eye witness. Her evidence unfortunately, totally contradicted itself. At one point, she testified that she was at the scene where she found the Appellant repeatedly hitting PW1's wife with a metal bar. In sharp contrast, she went on to state that while she was at the scene one Paul Gachie Ndegwa (the deceased accused person) arrived at the scene and told her that it was the Appellant who had injured PW1's wife. That ultimately raises eyebrows how and why if PW3 was at the scene and had witnessed the assault, required to be told by a third party as to who had assaulted PW1's wife. It is only wise to conclude that she was not at the scene but went to the scene after the incidence whereupon she found the deceased Paul Gachie Ndegwa who informed her of what had transpired. Her contradictory evidence totally shattered the consistency of the Prosecution's case in that PW1 and 4 having testified that she was at the scene was a contrast with her hearsay evidence. Her evidence in that regard cannot be taken as being credible and corroborative of PW1 and 4's evidence.

It is imperative to note that PW1 who was a victim testified that after the Appellant repeatedly hit his wife with a metal bar, he then turned on to him and hit his hip bone after which he fled to the police station to report. If what PW1 told the court were the truth, again it is doubtful why PW3 who was at the scene never saw the Appellant hitting PW1 with the metal bar yet he was allegedly hit after the assault on PW1's wife. Against the backdrop of the contradictions, I create doubt in my mind that even if the complainants sustained the injuries as confirmed by the medical evidence, there is no concrete proof that the injuries were occasioned by the Appellant.

The Appellant gave an alibi defence for which he called witnesses to support. It was the onus of the prosecution to dislodge the alibi defence. The prosecution attempted to do so by recalling their witnesses who had already testified being; John Chege Kagera, PW4 and Jane Wangui Mwaura, PW3. To the fatal blow of their case, unfortunately, it was PW3's evidence that had earlier shattered their main evidence. She did not give any new or material evidence that would have dislodged the Appellant's alibi defence. In that regard, I hold that the prosecution did not prove its case beyond all reasonable doubts and that the Appellant gave a plausible defence.

Finally, it is important that I point out that the evidence on record pointed that the parties had a land dispute which had culminated into bad blood between blood relatives. There was then the likelihood against that background that parties were emotional and would easily fabricate charges against each other. Be that as it may, as I have observed above, the prosecution's case was not proved to the required standard.

In the end, this appeal must succeed. I quash the conviction, set aside the sentence and order that the Appellant be and is hereby set free unless otherwise lawfully held.

**DATED and DELIVERD this 24<sup>TH</sup> Day of DECEMBER, 2015**

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:**

1. Wangui Kimani for the Appellant

## 2. No appearance for the Respondent



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