REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO.7 OF 2020

PETER MWADIME.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. E. M. Nyakundi dated 30th January 2020 at Wundanyi Principal Magistrate's Court in Cr. Case No. 627 of 2019)

JUDGMENT

1. The appellant herein was according to the amended charge sheet presented in court on 31st October 2019 charged with the offence of Grievous Harm, contrary to Section 234 of the Penal Code vide Criminal **Case No.627 of 2019** Wundanyi Senior Resident Magistrate's Court. Particulars were that, on the 15th day of August 2019 at Bura Wuci village, Bura location within Taita Taveta County unlawfully did grievous harm to Deska Mwasoghok.

2. The appellant having pleaded not guilty to the charge, trial commenced with prosecution calling five witnesses. Upon being put on his defence, accused opted to keep silent. The learned magistrate found him guilty, convicted and sentenced him to 15years imprisonment on 30th January 2020.

3. The appellant feeling aggrieved preferred an appeal before this court. through his petition of appeal dated 10th February 2020 the appellant set forth the following grounds of appeal;

a) That the learned trial magistrate erred in both law and fact in convicting and sentencing the appellant on evidence that was entirely hearsay.

b) That the learned magistrate erred in both law and fact in convicting and sentencing the appellant on evidence of recognition which could not be substantiated.

c) That the learned magistrate erred in both law and fact in finding that the prosecution had proved the essential ingredients of the charge against the appellant to the required standard.

d) That the learned magistrate erred in both law and fact in failing to take into account the appellant's behaviour which imputed the appellant's mental capacity.

e) That the learned magistrate erred in both law and fact in finding that the appellant remained silent as of right when actually he had not waived that right.

f) That the learned magistrate erred in both law and fact in finding that the appellant was guilty of the offence of causing grievous harm contrary to section 234 of the penal code.

g) That the learned magistrate erred in both law and fact by failing to grant the appellant an opportunity to cross –examine the prosecution witness.

4. The appellant urged the court to allow the appeal, quash the conviction and set aside the sentence imposed therewith and consequently set him at liberty forthwith.

5. This being a first appeal, this court is duty bound to independently re-analyse, re-evaluate, and re-asses the evidence presented before the trial court and arrive at an independent conclusion and or finding with the general caution that it did not have the advantage of seeing or

listening to the witnesses to be able to assess their general demeanor. See the case **Okeno vs Republic(1972) E.A.32**

prosecution's case

6. Brief facts of the case are that, on 15th August 2019 at 3.00pm, Deska Wanyika Mwasoghona(pw2) the complained herein was in her house when she heard someone asking her child known as Mary Wavua where she (PW2) was. Before she could go out to find out who was looking for her, accused person whom she identified as her neighbour entered while armed with a walking stick commonly known as "gongo" in local dialect. Suddenly, accused demanded for his wife. When pw2 told him that his wife was not staying there, accused threatened to beat her.

7. Fearing for her life, PW2 decided to run away while screaming with the accused in hot pursuit. After 20 metres run, she fell down. As accused caught up with her, he started beating her using the stick he had. As a consequence, she sustained serious head injuries from which she bled profusely and suffered fractures on both hands. She however managed to rise and ran to a neighbour's home for help.

8. Among the neighbours who responded in answer to her screams were pw3 and pw4 who found accused had escaped. A man hunt was then employed by members of the public in search of the accused who was eventually arrested and taken to Mwatate Police Station where P.C Anderson (PW5) booked him and preferred the charges in question.

9. Meanwhile, PW2 was taken to Mwatate Police Station where PW5 P.C Anderson also received the assault report, booked it and then referred her to Bura dispensary for first aid. From Bura, she was referred to Mwatate general hospital where x-rays were taken thus confirming that she had suffered three fractures on both hands. She was however put on plaster to support the fractures. She later recorded her statement confirming that she was assaulted by the accused a person she knew before as a neighbour and that she recognized him.

10. PW3 Morris Michael Ngora was on the material day and time on his way going home when heard screams from PW'2 home. He accompanied some people headed towards the same direction. It was then he heard that it was the accused who had assaulted PW2. He joined several people in search for the accused whom he found had already been arrested. That when they took him up to where PW2 was, he noticed that PW2 bleeding from the middle of the head and had sustained fractured on both hands. They took him to Mwatate Police Station where he was charged.

11. PW4 Richard Mghala was at the material time in her farm when she heard screams from the neighbourhood. When she responded, she found PW2 being given first aid while in a neighbour's home. She saw PW2 bleeding from the head and both arms were swollen. She was informed that it was the accused who had assaulted her. He also joined in the search looking for the accused whom they found at a neighbour's house from where they arrested him while armed with a walking stick albeit threats to beat anyone attempting to touch him. He accompanied PW3 their village elder in taking accused to Mwatate Police Station.

12. PW5 PC Anderson Muriithi stationed at Bura Police Post and the investigating officer in this case testified that on 15th August, 2019 he was at the police post when PW2 was brought by members of the public together with the accused. That PW2 had sustained injuries both on the head and hands. He confirmed that accused had been beaten and tied up with ropes. He escorted him to the hospital for treatment and then took him to Mwatate Police Station where he preferred the charges before court after conducting investigations. He also referred pw2 to the hospital for treatment.

13. Pw1 Dr. Furaha Faraji filled and produced a p3 form in respect of the complainant confirming that she had a fracture on the left arm, fracture on the right thumb and head wounds which were stitched and then given anti-biotics and painkillers. That a cast was put on both hands and subsequently the injuries were classified as grievous harm. Having found that prosecution had established a prima facie case, accused was put on his defence but opted to keep quiet.

14. The appeal was canvassed by way of written submissions. The appellant through his advocate filed written submissions dated 21st May,2021 submitting on three issues as hereunder.

Burden of proof

15. Counsel submitted that the prosecution did not discharge its burden of proof to the required standard as the evidence on record was only to the effect that the appellant had assaulted the complainant occasioning her grievous harm. That the evidence was not supported by any direct evidence of eye witness who saw the appellant assault the complainant. That there can never be proof of a charge based upon hearsay evidence which is not admissible in court. Learned counsel contended that under Section 107(d) of the evidence Act, the burden of proof always lies with the person who alleges.

Whether the essential elements attendant to the offence were proved to the required standard.

16. Counsel submitted that the offence of causing grievous harm carries with it three essential elements which include; proof that the victim sustained grievous harm; the alleged harm was caused unlawfully and that, the accused caused or participated in causing the alleged grievous harm. To buttress this proposition, counsel referred the court to Section 234 of the Penal Code and **Criminal Appeal No.88 of 2019, Pius Mutua Mbuvi v Republic [2021]eKLR.**

17. Learned Counsel further submitted that the definition of grievous harm is provided for in Section 4 of the Penal Code. That the P3 form produced as p.exb. 2 which was not controverted shows that the complainant sustained a fracture of the left arm, fracture of the thumb on the right hand and a deep cut wound on the head and urged the court to determine whether it was the appellant who caused the injuries unlawfully.

18. Counsel contended that whereas it was the testimony of PW2 that the accused hit her with a log on allegations that she had his wife, these allegations could not be substantiated making it difficult to conclude that the accused had caused the complainant grievous injury. That the child who was at the scene was never called as a witness to confirm that indeed the accused was looking for his wife and that he hit the complainant, her mother.

19. Counsel urged the court to find that failure by the prosecution to call the child who was in the compound at the time of commission of the offence and hence a key witness, rendered doubtful the prosecution's case and most importantly on whether it was the appellant who caused the complainant grievous harm. Counsel further submitted that the evidence of PW3 and PW4 was hearsay hence inadmissible.

20. It was further contended that the stick produced by PW5 as p.exh. 4 though alleged to have been found in possession of the appellant could be any stick and none of the witnesses saw it being used including PW2 who could not identify it in court. That the stick could have been collected from anywhere.

21. Counsel further contended that it was not stated anywhere that the stick had blood stains taking into account the injuries sustained by the complainant. That the stick ought to have been taken for forensic examination to confirm that the complainant's DNA was on it thereby confirming that it was the stick that was used by the appellant.

22. Counsel asserted that there are a lot of glaring contradictions which cast doubts on the prosecution's case and they cannot be regarded as minor as it is the account of how the offence was committed by prosecution witnesses that led to the conviction of the appellant. To support this position, reliance was placed in the case of **Joseph Maina Mwangi v Republic CA No.73 of 1992(Nairobi)** where Tunoi, Lakha & Bosire JJA held that, in any trial there are bound to be discrepancies which must be guided by the working of section 382 of the criminal procedure code, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.

23. Counsel further submitted that prosecution failed in its duty to prove to the required standard that it is the appellant who took part in the commission of the offence save for his stated presence at the complainant's homestead asking for his wife which in the same measure could not be proved.

Harsh sentence

24. On sentence, counsel submitted that the sentence imposed against the appellant was harsh and excessive in the circumstances of the case. That the evidence on record did not support such a harsh sentence contrary to the Judiciary Sentencing Policy Guidelines on objectives of sentencing.

25. That his mitigation was not considered as his silence was taken as a means of not being remorseful. Counsel urged the court to review the sentence downwards if it upholds lower court's conviction taking into account the circumstances of the commission of the offence and the antecedents of the appellant of being a family man.

26. In conclusion, counsel urged the court to find that the appeal herein has merit and that the conviction and sentence meted out against the appellant was not safe in the circumstances and consequently proceed to set aside the conviction and sentence and order the appellant be released forthwith.

27. The respondent did not file submissions.

28. I have considered the record of appeal, grounds of appeal and appellant's submissions on record. Issues that emerge for determination are;

a) **Whether the prosecution discharged its burden of proof.**

b) **Whether there was sufficient evidence to convict the appellant.**

c) **Whether the sentence on imposed on the appellant was harsh.**

29. It is the appellant's case that the court relied on insufficient evidence to convict the appellant. He went further to state that prosecution did not discharge its burden of proof as required in law. That the court relied on hearsay, contradictory and uncorroborated evidence to convict him. It is trite that throughout a criminal trial the burden of proof always lies with the prosecution and the same does not shift. This position was succinctly captured in the case of **Okethi Okale vs Republic(1985)EA 555.**

30. Indeed, it was the duty of the prosecution to prove beyond reasonable doubt that it was the appellant who caused the offence levelled against him. However, proof beyond reasonable doubt is not synonymous to proving a case with mathematical precision at 100%. See **Miller –VS- Minister of Pensions (1947) 2ALL ER 372-373 where** Lord Denning had this to say about proof of a case beyond reasonable doubt that;

> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, the case is proved beyond reasonable doubt, but nothing short of that will suffice."***

31. The appellant was charged with the offence of causing grievous harm under Section 234 of the penal code which provides;

> **"any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life''**

32. The onus lay with the prosecution to prove that, the complainant was attacked and sustained grievous harm; the attack was unlawful and that it was the accused who attacked him. In this case, there is no dispute that the complainant sustained injuries classified as grievous harm. From the P3 form and testimony of the Doctor (PW1) and that of the complainant (PW2), the injuries were so severe. According to PW2, the injuries were unlawfully inflicted by the appellant who attacked her at her home. Upon Pw3 and pw4 responding to the complainant's screams, they found pw2 crying while bleeding from the head. From these type of evidence, the injuries were occasioned unlawfully by somebody. The key question therefore is, who is this person.

33. According to the complainant, it was the appellant her neighbour who attacked her while demanding to know where his wife was. She knew and recognized the attacker as a neighbour. The offence was committed during the day at 3.00 pm hence conditions for recognition were favourable. In fact, when PW3 and PW4 arrived at the scene, she instantly told them it was the appellant who attacked her. They immediately proceeded and arrested him amid resistance threatening to attack them. From her evidence and the immediate arrest of the accused by villagers is a manifestation of credibility of the complainant's evidence. She had no grudge with him hence had no reason to frame him up.

34. The trial court found the complainant a credible witness and that her testimony was not challenged on cross examination. From the record, evidence of the complainant was not tested nor shaken on cross examination as accused opted not to ask any question. The fact that the alleged child whose age was not disclosed and whom accused asked whether the complainant was in the house did not testify does not on its own discredit entire prosecution evidence

35. It has time and again been stated in many judicial precedents that the prosecution reserves the right to call only witnesses it finds necessary to prove its case. Hence, there is no fixed number of witnesses required to testify in a criminal offence. This position was held in the case of **Sahali Omar v RepublicMSA CA Criminal Application No.44 of 2016(2017) e KLR** where the court of appeal held as follows''

> **''the prosecution reserves the right to decide which witness to call. Should it fail to call a witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see Keter v Republic(2007)1EA135)**

36. Similar position was held in the case of **Republic v George Onyango Anyang & another [2016] eKLR** in which the court stated that;

> **"In criminal cases the prosecution is required to avail to the court all relevant evidence to enable court make an informed decision based on evidence available. This court is alive to the fact there is no legal requirement in law on the number of witnesses to prove a fact. Section 143 of Evidence Act (Cap 80) Laws of Kenya** provides;
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> > ***"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"***

37. In view of the injuries suffered and considering that the accused was immediately arrested upon the complainant stating that she recognized him, I do not find any reason to doubt prosecution's evidence. With positive recognition of the appellant by the complainant, the absence of the alleged child's evidence is not fatal.

38. It is trite that a trial court can safely rely on the evidence of a single witness to convict as long as it cautions itself of the dangers of convicting based on such evidence or that it is satisfied with the credibility of such witness to sustain a conviction. In this case, the court stated that it found the complainant's evidence credible hence convicted

39. As concerns the question of hearsay evidence by PW3 and PW4, it is true that they did not witness the accused attack the complaint. However, they responded to the screams almost immediately after the attack and within a short time apprehended the appellant person whom the complainant had disclosed to them as the assailant. Their evidence cannot be ignored as it lends credence to PW2's testimony.

40. Regarding the question of contradictory evidence by pw3 saying that when he responded he found PW2 at her home while pw4 stated that he found her at a neighbour's home being attended to by villagers, this is a minor discrepancy which does not dislodge the fact that the complainant was attacked and suffered serious injuries.

41. In the case of **Erick Onyango Odeng vs R(2014)e KLR** the court had this to say on contradictory evidence;

> **"The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse the contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers"**

42. In a nutshell, it is clear in my mind that the prosecution evidence adduced was overwhelming and that the trial court correctly found that the prosecution had proved its case beyond reasonable doubt. Although accused has a right to keep quiet, it adds credibility to the prosecution case in that it remains unchallenged. For those reasons, I have no reason to interfere with the conviction.

43. As regards sentence being excessive, it was not one of the grounds of appeal. However, there is no harm in considering it. The appellant was sentenced to 15years imprisonment against a maximum penalty of life imprisonment. Sentencing is a discretionary power bestowed upon the trial court to which an appellate court can interfere with only if the trial court took into consideration irrelevant factors, applied wrong principles or generally the sentence is excessive.

44. In the case of **David Mwikwala Machugu v Republic [2016] eKLR** the court stated that;

> **"It is well settled that sentencing is an exercise of discretion on the part of a court and that such exercise of discretion is rarely interfered with unless in the clearest of instances. The Court in the case of Wanjema v. Republic (1971) EA 493 laid down the general principles upon which the first appellate Court may act upon in dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not take into account a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and as long as the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion"**

45. Counsel submitted that the sentence imposed against the appellant was harsh and excessive in the circumstances of the case. That his mitigation was not considered but his silence was taken as a means of not being remorseful. That the court considered extraneous matters in sentencing him hence arrived at a harsh sentence.

46. The accused in mitigation stated;

> **"I seek leniency. I have (2) children and I have a grandmother that depends on me."**

47. The court in sentencing the accused stated that;

> **"…The court does empathise with the age of the offender and will rely on the decision of Muruatetu that gave the court discretion to mandatory cases to reduction of the term."**

48. This Court is not convinced that the learned magistrate erred in handling the aspect of sentencing. The sentence is quite fair given that the complainant will have to live with the disability caused by the appellant without any legal justification for the rest of her life.

49. The upshot of the above is that the appeal lacks merit and is hereby dismissed. I do uphold the conviction and sentence of the trial court.

Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED AT VOI THIS 26TH DAY OF JANUARY 2022

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J.N. ONYIEGO

JUDGE