



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KITALE**

**CRIMINAL APPEAL NO. OF 63 of 2019**

**(Consolidated with Criminal case No. 60 of 2019)**

**(From original conviction and sentence in criminal case No. 2005 of 2016 of the Chief Magistrate's Court at Kitale delivered by Hon. C.M. Kesse – SRM)**

**BERNARD SIMIYU.....1<sup>ST</sup> APPELLANT**

**JUDITH WANJALA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGEMENT**

The Appellants, **Bernard Simiyu** (1st Appellant) and **Judith Wanjala** (2<sup>nd</sup> Appellant) were jointly charged with causing **grievous harm** contrary to **Section 234** of the **Penal Code**. The particulars of the offence were that on 20<sup>th</sup> April 2016 at Moi Farm in Trans Nzoia County, the Appellants, jointly with others not before court, unlawfully did grievous harm to James Wanyonyi, (the complainant). When the Appellants were arraigned before the trial Magistrate's court, they pleaded not guilty to the charge. After full trial, the Appellants were found guilty as charged. They were each sentenced to serve ten (10) years imprisonment. Aggrieved by their conviction and sentence, they have filed an appeal to this court.

The grounds in support of their petition of appeals can be summarized thus:

They were aggrieved that they had been convicted on the basis of evidence that did not meet the threshold to sustain their conviction to the required standard of proof. They faulted the trial court for relying on contradictory evidence to convict them. In particular, they took issue with the medical evidence that the trial court relied on to convict them. They stated the trial court did not take into consideration that there existed a grudge between them and the complainant. They were aggrieved that their respective defences had not been taken into consideration before the trial court reached its verdict. They were finally aggrieved that their respective mitigation was not taken into account before the trial court reached the impugned decision to sentence them.

In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their conviction and set aside the custodial sentence that was imposed on them.

The two separate appeals that were lodged by the appellants were consolidated and heard together as one for the purpose of the appeal. The two Appellants filed their respective written submissions in support of their petitions of appeal. In addition the 1<sup>st</sup> Appellant told the court that since his incarceration with the 2<sup>nd</sup> Appellant (his wife), their three children had been left destitute and relied on the assistance of good samaritans. In his absence, his teenage daughter had been lured by a sex predator who had made her to drop out of school. On her part, the 2nd Appellant pleaded with the court to exercise leniency on her in view of the fact that her young children were suffering due to lack of parental guidance and supervision. She was remorseful and would not be a repeat offender if given another chance at life.

Mr Omooria for the State filed written submissions in opposition to the appeals. He submitted that the prosecution had adduced sufficient cogent evidence which established to the required standard of proof that it was the appellants who jointly assaulted the complainant causing him to suffer grievous harm.

The Appellants' grounds in support of appeal were self-serving and did not dent the otherwise strong culpatory evidence that was adduced by the prosecution witnesses against them. He urged the court to dismiss the appeals and uphold the conviction and sentence.

The facts of this case as per the prosecution's witnesses were as follows:

The complainant and the Appellants are neighbours. He testified that on 26<sup>th</sup> April 2016, he met with the Appellants at about 7.00 pm. The 2<sup>nd</sup> appellant asked him what he was talking about at a funeral. The 1<sup>st</sup> Appellant had a panga. Without any notice or provocation, the 1<sup>st</sup> appellant cut him on the head with a panga. He attempted to run from the scene of assault. The 2<sup>nd</sup> Appellant who had an iron rod hit him on the right side of the forehead. He fell down unconscious. He regained his consciousness while admitted at the Kitale County Referral hospital. He was admitted for a week at the hospital before he was transferred to Cherengani Nursing Home where he was admitted for a further period. He told the court as a result of the assault, he sustained a fracture of the hand and leg. He also had injury on his head. He denied suggestion by the Appellants that he had a grudge with them. He was at a loss why they attacked him.

**PW3 Bramwel Wafula Kundu** testified that he knew both the Appellants and the Complainant. They were his neighbours. He recalled that on 26<sup>th</sup> April 2016 at about 7.00 pm, while he was closing his shop, he heard a commotion nearby. He rushed to the scene. He saw the 1<sup>st</sup> Appellant assault the complainant. The complainant was lying on the ground. He was assisted by the complainant's brothers to assist the complainant from further being assaulted by the 1<sup>st</sup> appellant. He was emphatic that it was the 1<sup>st</sup> Appellant who was assaulting the complainant on the material day because there was sufficient light which enabled him see what transpired.

**PW2 George Wafula**, the brother of the complainant, recalled that on the material evening, he was with his brother. They were walking home after attending a funeral. At the gate of the Appellants home, they were confronted by the Appellants. The 2<sup>nd</sup> Appellant asked the complainant what he said at the funeral. In a flash, the 1<sup>st</sup> Appellant who was armed with a panga, hit the complainant with it. The complainant fell down. The Appellants then started assaulting the complainant while he was lying prone of the ground. The 2<sup>nd</sup> Appellant attacked the complainant using a metallic object. He sought assistance from his brothers and rushed back to the scene. The complainant was bleeding from the injuries that he had sustained. First Aid was administered before the complainant was rushed to hospital. He later reported the incident to the police. He reiterated that it was the appellants who assaulted the complainant because he witnesses the assault.

**PW4, Geoffrey Nyongesa**, a clinical officer based at Kitale County Referral hospital produced the duly filled P3 form on behalf of Mr Gichuki, his colleague at the hospital who was unable to attend court. He was familiar with his handwriting having worked with him. From the P3 form, the complainant sustained the following injuries:-

- i) Fracture of the Right Humerus with a 8 cm cut
- ii) Compound fracture of the right tibia and tibula with a 3 cm long cut.
- iii) Deep cut wound on the scalp 10 cms long – the skull bone was visible.

The clinical officer formed the opinion that the injuries were caused by both sharp and blunt objects. The P3 form and the medical treatment notes were produced into evidence as Prosecution's exhibits. The witness observed that the complainant was admitted at the hospital, treated and later discharged.

The case was investigated by PW5 P.C. James Theuri who testified that after concluding his investigations, he established that there was sufficient evidence to have the Appellant charged with the offence that they were convicted.

When they were put to their defence, the Appellants denied committing the offence. Both accused the complainant of inappropriately seeking sexual favours from the 2<sup>nd</sup> Appellant. When the 2<sup>nd</sup> Appellant declined the approach, the complainant became aggressive and assaulted the 1<sup>st</sup> appellant. A fight ensued between them. The complainant left and reported the incident to the police. They were emphatic that it was the complainant who provoked the situation and was indeed the aggressor.

This being a first appeal, it is the duty of this court to re-consider and re-evaluate the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the conviction of the appellants. In doing so, this court is required to take into consideration that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect (**See Njoroge Vs Republic [1986] KLR 19**). In the present appeal, the issue for determination by this court is whether the prosecution established the charge of causing grievous harm contrary to **Section 234** of the **Penal Code** that was brought against the Appellants to the required standard of proof.

In the present appeal, it was clear from the evidence adduced by the prosecution witnesses that the prosecution relied on both direct and documentary evidence to urge its case. The direct evidence was in form of eye witness account by the complainant who testified as PW1, PW2 and PW3.

According to PW1 and PW2, as they were walking past the gate of the homestead of the appellants, the 2<sup>nd</sup> Appellant, seemingly unprovoked, confronted the complainant and inquired from him what he said about her at the funeral. While the 2<sup>nd</sup> Appellant was accosting the complainant, the 1<sup>st</sup> Appellant appeared while armed with a panga and hit the complainant with it on the head. The complainant fell to the ground. The Appellants then jointly attacked the complainant. The 2<sup>nd</sup> Appellant hit the complainant using a metal rod while he was lying prone on the ground. The commotion caused by the initial assault of the complainant attracted PW3 who was closing his shop, as short distance away. He rushed to the scene and found the Appellants jointly beating the complainant as he lay on the ground. PW2 rushed and called his brothers to assist him rescue the complainant. The three witnesses were empathic that it was the Appellants who jointly attacked the complainant without any provocation.

This version of events by the prosecution witnesses was disputed by the Appellant. The 2<sup>nd</sup> Appellant testified that the complainant had at the time been approaching her with a view to having an illicit sexual relationship with her. The 2<sup>nd</sup> Appellant stated that although she resisted the approach, the complainant persisted leading to the confrontation on the particular day. The 1<sup>st</sup> Appellant corroborated the 2<sup>nd</sup> Appellant's testimony in that regard. They testified that the complainant provoked the situation and then became aggressive when they

inquired from him about the issue. Although the Appellants did not specifically deny that they had assaulted the complainant, it was apparent that their defence was that of provocation.

Upon re-evaluating his evidence, it was clear to the court that the version of events as narrated by the prosecution witnesses is more likely what transpired on that day. There was a possibility that indeed the complainant made unwanted sexual advances to the 2<sup>nd</sup> Appellant, however that is no reason or justification for the beating that the Appellants administered to the complainant. The prosecution was able to establish to the required standard of proof that indeed the appellants jointly assaulted the complainant respectively using a panga and an iron rod. It was clear that that the Appellants intended to cause bodily harm to the complainant. The ensuing injury was a direct consequence of their joint assault of the complainant.

As regards the degree of injury sustained by the complainant, according to PW4 Geoffrey Nyongesa, a clinical officer based at Kitale Referral Hospital, the complainant sustained the following injuries:

- i) Deep cut on the scalp measuring 10 cm long – the skull bone was visible.
- ii) Fracture of the Right humerus with a cut wound 8 cm long
- iii) Open fracture of the right tibia and fibula with a cut wound that was 6 cm long.

From the doctor's assessment, the injuries were caused by both sharp and blunt objects. This evidence is consistent with the evidence adduced by the complainant that he was assaulted with a panga and an iron rod. The complainant testified that due to the injuries that he sustained, he was admitted in hospital for an extended period of time. He was unconscious for a considerable period of time. He only regained his consciousness after he had been admitted in hospital. The injuries that the complainant sustained were of life altering nature. They were permanent in nature. It was clear to this court that the prosecution did indeed establish to the required standard of proof that the appellants did cause grievous harm to the complainant. For the above reasons the Appellant's appeal against conviction lacks merit and is hereby dismissed.

As for the sentence, this court has considered the Appellant's mitigation. They are husband and wife. They explained that during their period of incarceration their young children have suffered. They have no one to take care of them. Indeed, they even narrated how their eldest teenage daughter had been lured by a man into a relationship and who has made her drop out of school. This court is persuaded that such circumstances are harrowing to any parent. However, the Appellants should have reflected on the folly of their joint criminal enterprise before embarking on it. This court will however give them a relief from serving the full sentence that was imposed by the trial court, which was legal. The sentence of ten (10) years imprisonment is hereby set aside and substituted by a sentence of **Seven (7) years** imprisonment. The sentence shall take effect from **6th June 2019** when the Appellants were sentenced by the trial court. It is so ordered.

**DATED AT KITALE THIS 23RD DAY OF FEBRUARY 2022.**

**L. KIMARU**

**JUDGE**