REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 30 OF 2018

STEPHEN MULWA NGALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in Mukurweini Principal Magistrates'Court

Criminal Case No. 55 of 2012 (Hon. B. M. Ochoi, Principal Magistrate delivered on 9 August 2018)

JUDGMENT

The appellant was charged with the offence of causing grievous harm contrary to section 234 of the Penal Code, cap. 63. According to the particulars of the charge, on 16 March 2018 at Karindi Trading Centre in Mukurweini Sub County within Nyeri County, he unlawfully did grievous harm to Joseph Maina.

He was initially charged, on 19 March 2018, with the offence of wounding with intent contrary to section 231(a) of the Penal Code. He pleaded guilty to the offence but before the facts were read to him, the state amended the charge sheet and charged him under section 234 of the Penal Code. He pleaded not guilty to this particular charge.

Nonetheless, the trial court found him guilty and convicted him accordingly; he was sentenced to ten (10) years imprisonment.

Being dissatisfied with the decision of the court, the appellant appealed against both the conviction and sentence; in the petition filed on 16 August 2018, he raised three grounds of appeal, namely:

1. ***The learned magistrate erred in both law and fact by convicting and sentencing the appellant by relying on uncorroborated and contradictory evidence of the 1st, 2nd and 3rd prosecution witnesses.***

2. ***The learned magistrate erred in both law and fact in convicting and sentencing the appellant without regard to the fact that the complainant accosted the appellant.***

3. ***The learned magistrate erred in both law and fact by convicting the appellant to serve ten (10) years imprisonment which sentence is harsh and excessive.***

This being the first appellate court, the obligation upon it is to analyse and evaluate afresh the evidence on record and draw its own conclusions independent of those reached by the subordinate court but bearing in mind that it is only this latter court that had the advantage of seeing and hearing the witnesses. (See **Okeno vs. Republic [1972] EA 32).**

The complainant, **Joseph Maina Mwangi (PW1),** was the first prosecution witness to testify. He recalled that on 16 March 2018 at about 7. P.M. he was at 'county bar' together with his brother Patrick and a friend called Macharia (PW2). It was his evidence that Patrick handed his phone to a waitress called "*Shiku*" for charging as they ordered their drinks. While they were drinking, the appellant, who was seated at a table nearby stood up shouting that he was going to 'bite' someone.Mwangi asked him whom he was going to bite but the appellant walked out of the pub promising to come back. About five or so minutes later, he spotted the appellant at a window aiming an arrow inside the bar. Fearing for their lives, thepatrons inthe bar at that time scampered for safety.

Mwangi ventured out, apparently to confront the appellant; the appellant shot an arrow in his direction but it did not hit him. He then pursued the appellant wanting to know why he had shot at him. When he caught up with him, the appellant drew another arrow from its quiver and

stabbed Mwangi with it; he was wounded on the face on the right side of the nose. He screamed for help; members of the public came to his rescue and apprehended the appellant. Besides the bow and arrows, theappellant was also armed with a knife with which he tried to stab those who came to rescue Mwangi. The arrow head with which Mwangi was struck was lodgedin Mwangi's face and was only removed after a surgical operation at Nyeri Provincial General Hospital where he was admitted for one week.

Apollo Macharia Makena (PW2)testified that he was in same bar as the complainant and the appellant at the material time; he was in the company of the complainant, Njeru and Wambugu. His version of the events was that as they were drinking, one of the patrons either poured or spilt beer on the floor; it is then one Mwangi, described as a motor cycle rider, hit the person who had poured the beer. The appellant intervened and asked Mwangi to stop hitting him. The appellant then shouted that he was going to bite someone. He left but soon came back armed with a bow and arrows. The complainant attempted to disarm him; he ran after the appellant and caught up with him. They scuffled and in the process the appellant stabbed the complainant.

Peter Njeru Muiruri (PW3)testified that it was his beer that was poured. The appellant was arguing with someone allegedly because he had taken his girlfriend. Like Makena (PW2), Muiruri testified that the appellant left and came back armed with a bow and arrows. He aimed the arrow in the bar. The complainant went after the appellant but when he caught up with him he heard the complainant saying that the appellant had stabbed him. Indeed, he found the complainant lying down at the scene with an arrow lodged in his face. He took the complainant to a nearby Administration Police post before they proceeded to Mukurweini sub county hospital where he was first treatedbefore he was transferred to Nyeri Provincial General Hospital.

The owner of the pub, **Gilbert Wambugu Kiiru (PW4)** told the court that he saw the complainant and other patronsin his bar at about 10 P.M. on the material date when he went to collect the proceeds of the day. He never witnessed the scuffle at his bar and that he only came to learn of the incident in which the complainant was injured the following day.

His employee at the bar**, Nancy Wanjiku Macharia (PW5)** testified that one Kariuki accidentally spilt Njeru's beer. One Musanjo, then slapped Kariuki. The appellant stood up in defence of Kariuki. It is then that the appellant started to argue with the complainant. The appellant left the bar and returned later daring the bar patronsto step out. She locked the bar and could not tell what transpired after that.

Evans G. Mwangi(PW6)a clinical officer at Mukurweini District Hospital testified that on 17 March 2018 the complainant was brought to the hospital with an arrow lodged below his right eye. The complainant was unconscious. He could not manage to retrieve it and so he referred the complainant to Nyeri Provincial Hospital for specialised treatment; it is at this hospital that the arrow was removed. He assessed the degree of the injury as 'grievous harm.'

Corporal Mwamwero Bongo (PW7)testified thathe was at Gakindu police post on 17 March 2018 at around 3 a.m., when members of the public, among them Macharia (PW2) brought the appellant to the police post on allegations that he had stabbed the complainant. The appellant was booked at the post together with a bow and arrow stick without its head and a knife; the knife had the name Allan G. Maina on its handle. The officer established that Allan G. Maina was the appellant's employee. He handed over the appellant to Mukurweini police station but after he had recorded the complainant's statement from the hospital and other witnesses. It was his evidence that the arrow head was removed from the complainant's face on 20 March 2018.

The appellant opted to give unsworn testimony when he put on his defence.

He admitted having been at county bar on 16 March 2018 from about 7. P.M. While there, he saw someone whom he described as 'a stranger' seated on a table next to his. The complainant was seated on a different table but he rose and went to the stranger's table and poured his beer on top of the table. The complainant asked the stranger to pay for the beer. He started beating the stranger. When he asked Maina to stop beating him, the complainant told him that he should not say anything because he was a Kamba. He finished his beer and left for his home. When he reached there he realised that the complainant had followed him. He asked him who he was but he did not respond. The appellant then entered his house and came out armed with his bow and arrows. As Maina approached him, he shot at him. The complainant disappeared. The appellant retreated to his house. He went to the toilet; his phone fell in the toilet. He decided to go to one Peter Njeru's house from where he wanted to call his employer and inform him what had happened. While on the way he met the complainant, Macharia (PW2) and one Wambugu Kafaria who was armed with a panga. It is then that he noted that the complainant had an arrow lodged in his face. Maina took Kafaria's panga and hit the appellant with it. The three of them beat him and took him to the police station. He was treated at Mukurweini hospital before he was charged.

At the hearing, the appellant did not appear to argue the grounds raised in his petition in any particular order; as a matter of fact, he scantily referred to them. Instead, he urged that the court ought to consider his appeal because he lost his job and that his family needed him. It was also his case that he had an advocate but he was not allowed to represent him. Again, he urged that the P3 form was not produced to prove the injuries sustained by the complainant.

Ms Ndungu for the state opposed the appeal and submitted that the appellant had been positively identified by the first three prosecution witnesses. At any rate, the appellant was arrested at the scene of crime as he attacked the complainant. Again, contrary to the appellant's contentions, the P3 form was produced.

In response to the state counsel's submissions, the appellant urged that the witnesses were from the same family and that he was attacked at his place of work.

The evidence must of necessity be weighed against the law under which the appellant was charged and, of course, taking into consideration the submissions by both the appellant and the learned state counsel. Section 234 of the Penal Code under which the appellant was charged reads as follows:

> 234. ***Grievous harm***

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

The immediate question that comes to mind is what 'grievous harm' entails as to amount to a felony. As a term of art, 'Grievous harm' is defined in section 4 of the Penal Code in the following terms:

> ***"any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense."***

It follows that in order to convict under this section, the trial court must be satisfied that the prosecution has proved, beyond all reasonable doubt, that the injury complained of amounts to 'a maim' or 'dangerous harm'or 'seriously or permanently injures health' or 'extends to permanent disfigurement or, permanent or serious injury' to any 'external or internal organ, membrane or sense'.

All these adverbs and adjectives employed to describe the nature of the injury would imply that what constitutes 'grievous harm' may be wide enough to cover any bodily injury other than what one would describe as a superficial injury. Even then, it is possible that what may appear to be a 'superficial' injury to one person may, in the eyes of another be taken to be the sort of injury contemplated in section 234 of the Penal Code. It is, I think, for this reason that the law leaves it to expert opinion to ascertain various degrees of injuries and, depending on their assessment, the appropriate charges to be preferred in any particular case. It follows that subject to the law on admissibility of expert evidence, the trial court will accept the evidence of an expert witness, in this case, the medical evidence, in reaching a conclusion that a particular injury is one which is not only recognised in law but also which, for that very reason, would form a basis for a prosecution and, eventually, a conviction. And perhaps for this reason, definitions have been given at the foot of the medical examination report form (popularly referred to as 'the P3' form) of three categories of injuries; these are 'harm', 'maim' and 'grievous harm' which the medical expert examining a victim of assault will have regard to before coming to the conclusion of whether the injury in issue is of one form or the other. His opinion on whether the degree of the injury is 'harm', 'maim'or 'grievous harm' obviously counts in the charges that may eventually be preferred against the assailant.

The point is, despite the many possibilities given in section 4 of the Act of what 'grievous harm' may amount to, it is not a question whose test is subjective and which a trial court should agonise over as if the answer depends on the circumstances of each particular case. It is a question whose answer largely depends on the opinion of an expert but which, as I have noted, is subject to the law on admissibility of expert opinion.

Turning to the appellant's case, the degree of injury which the complainant sustained was assessed as 'grievous harm'. This information is contained in a P3 form which, as earlier noted, was produced by Mwangi (PW6), a clinical officer at Mukurweini District Hospital. It was the medical officer's evidence that this injury arose out of 'quil in situ' on the right side of the complainant's face below the right eye.

The medical evidence was not controverted; rather, as far as the aspect of stabbing is concerned, it was corroborated by the evidence of the complainant (PW1) who testified that the appellant not only stabbed him with an arrow but also that the arrow itselfremained lodged in his face; the trial court noted the scar of the wounded part of the face. It also corroborated the evidence of Makena (PW2) who saw the appellant run out of the bar in which they were drinking and came back armed with a bow and a quiver of arrows. It was his evidence that the complainant was stabbed with one of the arrows when he, the complainant, scuffled with the appellant. On his part, Muirui (PW3) who was also in the same bar found the complainant at the scene of crime struggling to remove the arrow head from his face.

The appellant did not out rightly deny having shot the complainant. What I gather from his defence is that he disputed the prosecution evidence on the circumstances under which he shot him. His unsworn statement in this regard was as follows:

> ***"At around 7. PM…I entered county bar to drink. At the club I saw a stranger in the pub seated in the next table. Maina was seated on another table. I heard the stranger say that he had gotten lost and ask (sic) who had seen it. Maina woke up and went to the place the stranger was and poured the beer on top of the table. Maina then asked the stranger to pay for the beer he had poured. They started beating the stranger. I asked them to stop beating the stranger. Maina then told me that I was a Kamba and should not speak in front of them. I finished my beer and went home. When I reached home I realised Maina had followed me. When I noted someone was behind me I asked who it was but the person kept quiet. I entered the house and came out with my bow and arrows and I identified the person was Maina through (sic) the clothes he was wearing. He started approaching me and I shot an arrow at him. Maina disappeared from the place and I entered the house…I decided to go Peter Njeru's house (sic) so as to call my employer and inform him what happened. On the way I met Maina and Apollo…I noted that Maina had an arrow stuck on his face…Theytook me to the police station."***

Thus, apart from what, in my humble view, was cogent, consistent and neatly corroborated prosecution evidence, the appellant's evidence suggested that indeed he shot and injured the complainant. If it was his case that he was acting in self defence, the court would have been obliged to interrogate whether this defence was available to the appellant. However, the circumstances in which the offence was committed, even if the appellant was to be believed wouldn't present a case for such a defence. It is apparent from his own testimonythat he knew it was the complainant he was shooting at when he shot him. The complainant was neither armed nor did he pose any sort of threat and therefore it was either negligent or reckless of the appellant to shoot at him in those circumstances.

In **Gitau & Ano. Versus Republic (1967) E.A. 449** it was held one would be liable where grievous harm is caused by negligence or recklessness; the court (Rudd, J.) stated as follows:

> ***"It may most reasonably be asked whether s. 234 with its identical penalty clause (i.e. identical to the penalty of an offence created in section 231 of the Penal Code) creates an offence of a different nature or one which is made up of different elements. The answer is we think that s. 234 does embrace acts of criminal negligence and recklessness as well, clearly enough, as acts which would be punishable under s.231. It is of no great use to inquire why the legislature has chosen to enact two sections***

which overlap in this way. It is enough to say that they have, very obviously, done so. As the court of appeal in Bakrania's case (Mhanlal Nathoo Bakrania (1951) 18 EACA 248) pointed out the word "unlawfully" in a penal Act prima facie includes all unlawful acts, and when together in one part of the Penal Code we find one section dealing with the intentional causing of grievous harm and another dealing with the unlawful causing of grievous harm, we cannot suppose that the two sections were intended to have precisely the same meaning, and in the section which deals with the unlawful causing of grievous harm, it must be proper to give to the word "unlawfully", its ordinary meaning, and that meaning without any doubt covers reckless and grossly negligent acts.(Emphasis added).

This being the law as far as the offence of causing grievous harm contrary to section 234 of the Penal Code is concerned, I am satisfied that the appellant was not only properly charged but he was properly convicted as well.

With respect to the sentence, a person convicted under this section is liable to imprisonment for life. As noted, the appellant was sentenced to 10 years' imprisonment. Before sentencing the appellant, the trial court took into consideration his mitigation and also noted that he was a first offender and that he was remorseful.

There is no doubt that the trial court had a wide latitude within which it would exercise its discretion and mete out what, in its view, was a proper sentence in the circumstances. And unless it can be demonstrated that, in exercising its discretion, the court either misapprehended the law or facts or took into account matters which it ought not have taken into account and failed to consider those matters that ought to have been considered or that, in view of the circumstances of the case, the sentence was manifestly harsh or excessive, there would be no basis for this court to interfere with the sentence.

In**John Muendo Musau v Republic [2013] eKLR** the Court of Appeal discussed the circumstance under which an appeal court will interfere with the discretion of the trial court on sentencing. It stated as follows:

"On the sentence, section 26 (2) of the Penal Code provides that where the prescribed sentence is imprisonment for life or any other period, the trial court has the discretion to pass a sentence of imprisonment for a shorter period. Situations where an appellate court would interfere with the discretion of a trial court on the issue of sentence have in the past been clearly defined by this Court. An appellate court would interfere only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. Those circumstances were well illustrated in the case of Nelson vs Republic [1970] E.A. 599, following Ogalo Son of Owuora vs Republic (1954) 21 EACA 270 as follows:

> ***"The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewsity (1912) C.CA 28 T.LR 364."***

With this law in mind, I find no basis of interfering with the learned trial magistrate's decision on the sentence; he was properly sentenced. And with that I come to the conclusion that the appellant's appeal has no merits. It is dismissed.

Signed, dated and delivered on 22 January 2021

Ngaah Jairus

JUDGE