REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL APPEAL NO. 88 OF 2019

PIUS MUTUA MBUVI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence delivered by B. J. Bartoo (SRM)

in Chief Magistrate's Court Machakos in Criminal Case No. 179 of 2017 on 15.10.2019)

ARISING FROM

REPUBLIC.....PROSECUTOR

V E R S U S

PIUS MUTUA MBUVI.....ACCUSED

JUDGEMENT

1. The Appellant was charged with the offence of grievous harm contrary section 234 of the Penal Code. It was alleged that the Appellant on the 2nd Day of April, 2017 at Kalunga Village in Kaewa Location, Kathiani Sub-County within Machakos County unlawfully assaulted **Jacob Katundu Mbuvi** by use of metal rod causing him grievous harm.

2. The prosecution marshalled five witnesses in support of its case: **Pw1** was **Jacob Katundu Mbuvi** who testified that on 2.4.2017 while at home alone tethering cows, he was suddenly hit and he fell down. He recalled that it was the appellant who hit him from behind and that he saw the appellant with a panga and a metal rod. He told the court that he was hit on the left hand and when he fell down, the appellant hit him on the right hand with a metal rod. It was his testimony that he was taken to Kathiani hospital; that the appellant was unable to escape as he screamed thereby attracting members of the public who arrived at the scene quickly and apprehended him. He told the court that his right hand had been fractured; that both hands were injured and a metal implant was later inserted in one of the arms. On cross examination, he testified that the appellant had earlier assaulted him over the land he had sold to him as the appellant wanted the land back.

3. Pw2 was **Lawrence Mutuku** who testified that the appellant is Pw1's brother and that on 2.4.2017 he was informed that his father (Pw1) had been assaulted and so he proceeded to the scene and ferried his father to Kathiani Level 4 hospital. He recounted that when he arrived at the scene his father was bleeding from both hands and one of the arms had a protruding bone; that Pw1 appeared unconscious. He testified that at Kathiani Hospital he was informed that a metal implant was to be inserted and that Pw1 was referred to Machakos Level 5 Hospital where x-rays were taken and Pw1 treated. He told the court that the appellant and the complainant were not in good terms.

4. Pw3, Philomena Munyao testified that on 2.4.2017 she was at Kalandini Market when she heard a noise that she learnt was that of a man being beaten up. She told the court that she went towards the noise and saw that Pw1 was being beaten by the appellant who was using a mattock and a panga. She reported the matter to the Assistant Chief who rushed to the scene.

5. Pw4 was **Michael Musyimi** who told the court that on 2.4.2017 he was taking tea at the market when he was alerted by screams. He told the court that he went to the scene and saw the appellant holding a metal rod and panga and was assaulting Pw1 on the hand. He testified that Pw1's hands were injured. He reiterated in cross examination that he saw the appellant assaulting Pw1 with a metal rod and panga. He told the court that when Pw1 left hospital, he had a plaster on his hand and that his hand had been fractured because of being hit.

6. Pw5 was **Shadrack Kioko**, a clinical officer attached to Kathiani Level 4 Hospital. He testified that his colleague Sarah Muthoka attended to Pw1 and that he was familiar with her handwriting and signatures and hence the P3 form she filled was produced in court. It was his testimony that on 27.4.2017, Pw1 was attended to and who had a history of assault by a person known to him that was done on 2.4.2017. It was his testimony that the examination conducted on Pw1 revealed that his hands were fractured; that a blunt object could have been used to inflict the harm; that the injuries were classified as harm. It was his testimony in cross examination that the injuries were consistent with assault.

7. The prosecution closed its case and the court found that the appellant had a case to answer and who opted to give unsworn evidence on his defence without calling any witness.

8. The appellant denied assaulting the complainant and denied the injuries that the complainant sustained; he lamented how the complainant did not refund his money that had been used to build a shop on the land that they shared. He testified that the complainant cut trees on his land and he had made a report to the police vide several reports *OB 23/1/3/2001, OB 44/29/9/2004, OB 3/9/12/11, OB 9/16/11/14, OB 16/9/11/13 and OB 5/25/2/16* but nothing had been done. He admitted using a stick to assault the complainant because he saw his tree being cut and he also saw the complainant using a panga to remove his cassava. He told the court that the complainant had threatened him with a panga and hence he hit him in defence and had he not done so the complainant would have killed him.

9. The trial magistrate in her judgement identified the elements to be proven in respect of the felony described under section 234 of the Penal Code. The elements were grievous harm and liability of the appellant. The trial magistrate relied on the definition of grievous harm under section 4 of the Penal Code and considered the evidence of Pw1 and Pw4 as well as the P3 form, and formed the opinion that grievous harm was proven. On the issue of participation of the appellant she found that the appellant was identified by Pw3 and Pw5. The court also found that the appellant tendered no evidence to prove that he was acting in self defence and that there was no evidence that the appellant was provoked and resultantly found him guilty of the offence he was charged with. After considering the mitigation, the appellant was sentenced to two years' imprisonment.

10. The appellant was dissatisfied with the decision and appealed to this court where he challenged his conviction based on contradictory and doubtful evidence; challenged the failure to consider his defence; challenged the prosecution for failing to prove his case and challenged the custodial sentence as well as the failure of the investigating officer to testify.

11. The appellant vide his submissions urged the court to find merit in his appeal. Vide further submissions, he indicated to court that no exhibits were tendered; that the P3 form was filled 22 days after the occurrence; that the prosecution failed to call the investigating officer to testify. In placing reliance on the case of **Kimani Ndungu v R (1979) 1 KLR,** it was submitted that the evidence was not sufficient to convict the appellant and surprisingly it was submitted that penetration of the complainant's genital organs was not proven.

12. Learned counsel for the state submitted that the complainant was injured as evidenced by the P3 form; that the same was occasioned by the appellant as witnessed by Pw3 and Pw4 and that the sentence was proper as the appellant was aged 71 years and the complainant aged 95 years. It was his submission that the court uphold the conviction and enhance the sentence of the trial court.

13. This being a first appeal, this court is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact so as to come to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see **Pandya v Republic [1957] EA. 336**) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see **Shantilal M. Ruwala v R. [1957] EA. 570**). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see **Peters v Sunday Post [1958] E.A 424**).

14. I note that the appellant was charged under section 234 of the Penal code and that the same is the punishment section; the charge sheet ought to have indicated section 231 as read with section 234 of the Penal Code. For the appellant to be convicted of the offence of doing grievous harm c/s 231 as read with section 234 of *The Penal Code*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

a. The victim sustained grievous harm.

b. The harm was caused unlawfully.

c. The accused caused or participated in causing the grievous harm.

15. Concerning the first element, bodily "*harm*" means any bodily hurt, disease or disorder whether permanent or temporary. The nature of grievous harm is defined by section 4 of *The Penal Code* as 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 a permanent or serious injury to any external or internal organ, membrane or sense.

16. The specificities of "*grievous harm*" therefore are; (1) in the case of grievous harm, the injury to health must be permanent or likely to be permanent, whereas, to amount to bodily harm, the injury to health need not be permanent (2) a mental injury may amount to grievous harm but not to bodily harm (3) the injury must be "of such a nature as to cause or be likely to cause" permanent injury to health.

17. In the instant case, it was the testimony of Pw5 that examination of Pw1 by Susan Muthoka revealed that Pw1 had a deformed and fractured hands. These findings were all reflected in the P3 form by which the injury was classified as "grievous harm." This evidence was

not impeached in cross-examination nor controverted by the defence. I note that the complainant was reported to have been examined at Kathiani level 4 Hospital and Machakos Level 5 Hospital and that x-rays were conducted on him; I have not seen the treatment notes or the x-rays being tendered in evidence. The appellant had taken issue with the filling out of the P3 form about 22 days after the incident. In order for this court to be convinced that indeed the injuries that Pw1 had suffered as indicated on the P3 form were the same as those noted by the medical personnel who attended to Pw1 hours within when the injury was occasioned, I would have expected to see the treatment notes from Machakos Level 5 Hospital, Kathiani Hospital and the x-ray reports. If indeed metal implants were placed in the hands of Pw1, I expected to see medical evidence to that effect and in my view the exclusion of some medical reports could be by design and point towards deliberate untruth with a view to concealing what exactly happened on the material day of the offence. I am not convinced that there is sufficient evidence to prove that the assault occasioned on Pw1 resulted in grievous bodily harm within the meaning of section 4 of *The Penal code.*

18. The second element required proof that the injury sustained by the complainant was caused unlawfully. This means that the same was without legal justification or excuse. I find that the evidence of the appellant seemed to raise the defence of self defence and it is trite law that an accused person bears no obligation of proving his innocence but the prosecution bears the burden of proving the guilt of the accused. I have also come to that conclusion that the prosecution failed to prove beyond reasonable doubt that the injury sustained by the complainant was caused unlawfully, because what was seemingly an act in self defence raised doubt in the prosecution case.

19. On the aspect of participation of the appellant, there is credible direct evidence of Pw1 as well as the appellant placing the appellant at the scene of the crime as an active participant in the commission of the offence. In addition, the appellant's evidence did not controvert the evidence that he was seen at the scene. He told court that Pw1 was armed with a panga and who had threatened to attack him hence the appellant hit Pw1 with a stick in self defence. The truth of the matter cannot be elicited from the evidence of the prosecution as the evidence is too weak to enable this court tell who exactly was telling the truth. Whereas I see no reason to doubt the evidence of Pw1 where he identified the appellant as the person who attacked him and I agree with the satisfaction of the trial court with the evidence on identification of the appellant, I disagree with the trial court that the conviction of the appellant was safe.

20. The appellant had taken issue with the failure of the investigating officer to testify. In the case of **Republic v Cliff Macharia Njeri [2017] eKLR** it was stated that

> "The other witness not called was the Investigating Officer. No doubt this witness was important as he could have shed more light as to investigations carried out and would have explained on what basis the accused was charged.
>
> ***33.*** Having considered the issue at hand I find that the prosecution failed to avail crucial witnesses in their case. I find that the prosecution failed to make available all witnesses necessary to establish the truth. The evidence adduced was barely adequate to establish the truth in this case. Consequently I find that this court is justified to make an adverse inference that the evidence of the uncalled witnesses would have tended to be adverse to the prosecution and that was the reason it was not called."

21. In the case of **S C v Republic [2018] eKLR,** the court observed that:-

> "34. In my view, the statement of the investigating officer had no probative value. PW3 could not be cross-examined on that statement and neither could he answer questions relating to the actions taken by the investigating officer during the investigations. In this case, it is like the investigating officer never testified. However, failure to call the investigating officer is not fatal to the prosecution case in all situations. In cases where the evidence of the investigating officer is key in linking the accused to the crime, failure to call the investigating officer will cause irreparable damage to the prosecution's case. However, where evidence of other witnesses is sufficient to secure a conviction, failure to avail the investigating officer will do no harm to the prosecution case. It is however important that the prosecution avails investigating officers during trials. An investigating officer is the person who forms an opinion that a crime has been committed. He is the person to interlink the evidence of the witnesses and explain why the defence offered by an accused is not plausible. The role of the investigating officer in a criminal trial is crucial and the prosecution should always ensure that the investigating officer testifies. Having said so, I however do not think that the evidence of the investigating officer could have made any difference in this matter."

22. I am of the view that whereas it is a welcome move for the evidence of a Police Investigating Officer to be given so as to inform the court the circumstances of arrest of an accused person by the Police, in matters where other evidence is available and the same proves the prosecution case to the required standard, the absence of the evidence of the investigating officer would not weaken the prosecution case. The call would have to be made on whether the Police evidence is essential to prove the charges that the appellant was facing. In view of my conclusion as to the proof of the prosecution case, I find no merit in the ground that was raised by the appellant.

23. The offence of grievous harm c/s 231 of *the Penal Code* is a felony attracting a maximum punishment of life imprisonment. The appellant earned a 2-year sentence that was by all standards lenient. Though there is no victim impact statement on record, from the evidence of the appellant and of the prosecution, it seems that at the root of the assault case is a land dispute between two brothers and i would recommend that the parties settle the same by mediation so as to avert a calamity. The state sought an upward review of the sentence in his submissions. Under section 382 of the Criminal Procedure Code, this court has no power to alter the sentence of the trial court unless the same was illegal. I see no illegality or error of principle in the sentence that was passed by the trial court. Had the appeal been unsuccessful, the court would have maintained the sentence of the trial court.

24. For the aforestated reasons, the appeal has merit and is allowed. The conviction is quashed and the sentence is set aside. The Appellant is set at liberty unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Machakos this 21st day of January, 2021.

D. K. Kemei

Judge