REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. E1 OF 2020

JEREMIAH OUMA ADONGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence in Siaya Principal Magistrate's Court

Criminal Case No. 31 of 2019 delivered on 9th September 2020 and sentenced

on 30th September 2020 by Hon J. Ongondo, Principal Magistrate)

JUDGMENT

Introduction

1. The Appellant **JEREMIAH OUMA ADONGO** was charged before the Principal Magistrate's Court in Siaya with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code the particulars being that on 6th day of July, 2018 at Siaya Township, Siaya County, the appellant jointly with others not before court while armed with dangerous weapon namely knife robbed Simon Peter Otieno of his mobile phone Nokia 6300, phone charger and Wallet varied at KShs.200/= and immediately before or immediately before or after such time robbery assaulted the said **SIMON PETER OTIENO.**

2. The appellant also faced a second count of Malicious Damage to Property contrary to Section 339(1) of the Penal Code the particulars being that on 6th July, 2018 at Siaya Township, the appellant willfully and unlawfully damaged assorted beer bottles and beer glasses and two wooden tables all valued at Kshs. 18,000/=, the property of Simon Peter.

3. The appellant pleaded not guilty to both charges and the matter proceeded for hearing.

4. The trial magistrate, Hon. J. Ongondo after hearing seven prosecution witnesses as well as the appellant's sworn testimony, found that the prosecution failed to prove the offence of robbery with violence but that the combination of particulars proved the offence of grievous harm contrary to section 234 of the Penal Code and on count two, that the offence of malicious damage was proved. He thus proceeded to convict and sentence the appellant to 7 years' imprisonment. It is worth noting that no sentence was pronounced in respect of count two.

5. Dissatisfied with the said conviction and sentence the appellant filed his petition of appeal based on the following grounds:

> ***a) That the Learned Magistrate Erred in Law and in fact by convicting the Appellant when the prosecution did not prove their case to the required standard thereby occasioning the Appellant a miscarriage of justice.***
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> ***b) That the Learned trial magistrate erred in Law and in fact by proceeding to convict the Appellant on wrong provisos of the Law.***
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> ***c) That the Learned trial Magistrate erred in Law and in fact by convicting the Appellant where the essential ingredients of the charge of grievous harm had not been proved by the prosecution.***
>
> ***d) That the Learned trial Magistrate erred in Law and in fact by drawing adverse inference against the Appellant thus shifting the burden of proof contrary to the Law of Evidence.***

e) That the Learned trial Magistrate erred in Law and in fact by failing to consider defence, submissions by the defence and the probation report dated 29.9.2020.

f) That the Learned trial Magistrate erred in Law and in fact by basing his judgment on inconsistent, incredible and contradictory evidence of the prosecution witnesses.

g) That the Learned trial magistrate erred in Law and in fact by basing his judgment on assumption and suspicion thus arriving at a finding which was contrary to evidence on record.

h) That the Learned trial Magistrate erred in Law when he failed to find out that suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.

i) That the evidence on record was not sufficient to sustain a conviction.

Appellant's Submissions

6. The appellant's counsel submitted that he was not clearly identified by the prosecution witnesses so as to sustain the charge of the offense of grievous harm and that mere suspicion should not have been used to convict him. The appellant relied on the cases of **Nzaro v Republic (1991) KAR 212** as quoted in the case of **Joseph Otieno Oketch v Republic [2019] eKLR** where the court held that *the evidence of identification/recognition at night must be absolutely watertight to justify conviction*. He further relied on the case of **Wamunga v Republic (1989) KLR** where the court held interalia that *where the only evidence against a defendant is of identification, the trial court must examine such evidence carefully and be satisfied that the circumstances of identification were favourable and free from possibility of error before conviction.*

7. It was further submitted that the prosecution failed to prove evidence of the injuries sustained by the complainant as no medical evidence was ever tabled before the trial court and thus his conviction for the offence of causing grievous bodily harm could not be sustained.

8. The appellant further submitted that the trial court erred in invoking the provisions of section 179 (1) of the CPC as the offence of grievous harm was a felony and thus not a minor offence as envisioned in the aforementioned section.

9. It was submitted that the prosecution evidence was littered with contradictions, discrepancies ad inconsistencies that could not sustain a conviction and instead ought to have been resolved in favour of the appellant herein as was held in the case of **Richard Munene v Republic [2018] eKLR.**

Analysis & Determination

10. In determining this Appeal, the court must fully understand its duty as the first Appellate court as stated in the case of **Okeno v Republic [1972] E.A. 32, Pandya v R (1957) EA 336** and **Ruwala v R (1957) EA 570** which is to subject- ***the evidence as a whole to a fresh and exhaustive examination and for this court to arrive at its own decision on the evidence, it must weigh evidence and draw its own conclusions and its own findings while making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses as they testified.***

11. Revisiting the evidence before the trial court, PW1 Simon Peter Otieno Odhiambo, a Lands Surveyor from Siaya testified that he had gone to watch football at Swizel Bar when he got a call from one of the people who worked for him at his Bahamas Bar who informed him that some two gentlemen had been drunk and were disturbing other revelers. He then proceeded to the premises wherein he saw the two persons.

12. It was his testimony that there was electricity light so he could clearly identify the two persons. It was his testimony that shortly again, one of the staff called to inform him that the said people had now damaged chairs, tables and broken bottles forcing PW1 to return to the hotel but found that the appellant and his friend had left. He testified that in the company of PW2, they boarded a motor cycle and followed the said people and that after about 100 metres, they caught up with the appellant and his friend. He testified that when he asked the appellant why they had damaged property in the bar, they turned against PW1 and badly injured him and also stole his phone and some money. It was his testimony that during the assault, he fell down and the appellant stepped on his leg inflicting serious injuries on him.

13. In cross-examination PW1 stated that he carried on business as a bar owner, he reiterated that he was beaten by 2 people whom he identified through their physical stature. He further stated that he became unconscious after he was beaten and only regained consciousness the following day in hospital. He testified that one of his attackers was armed with a knife. In re-examination he reiterated that he became unconscious after he was beaten.

14. **PW2 Elly Ojuok Onyango** from Siaya testified that on 6/7/2018 one Doreen called the complainant who initially came, talked to customers and left. He testified that there were customers who were disturbing others and that a lot of glasses and alcohol had been damaged. He testified that the appellant started assaulting revelers and by the time the complainant returned for a second time, the attackers had left prompting the complainant and PW2 to follow them to a place 100 metres away. He testified that the appellant and his accomplice were walking as they used a motorcycle. He testified that when they caught up with the appellant and his accomplice, the latter started assaulting PW1. He stated that neither PW1 nor him knew the attackers before.

15. In cross-examination, PW2 testified that he saw the appellant and another assault PW1 and that the appellant's accomplice had a knife. He stated that PW1 was beaten and he fell down. He stated that PW1 was beaten and injured. He admitted that he did not see any seats or broken bottles in court and further that PW1 did not see damaged items or when they were damaged.

16. **PW3 Francis Omondi from** Nairobi testified that on the 6.7.2018 he was at Bahamas at 11.00pm with his friend when one Elly called him to tell him that his friend PW1 was in danger. He stated that when he went, he found PW1 on the road clearly in pain. It was his testimony that he was able to see him as there were security lights. He testified that the complainant had injuries on the leg. He stated that there were over 5 people at the scene. PW3 testified that a red pickup came and they stopped it and they placed the complainant at the back of pick-up where they were now 4 people, the complainant, Simon, himself and 2 other men he did not know. He testified that they took the complainant to Siaya referral. It was his testimony that the complainant pointed to the appellant, who was in the pick-up, as one of the persons who had assaulted him. He further testified that the appellant jumped from the car and disappeared. PW3 stated that there were street lights**. He identified the appellant in court.**

17. In cross-examination, PW3 stated that he did not know the appellant before nor did he see him at the police station and stated that he only saw him inside the pick-up before the appellant jumped out of the pick-up. He further stated that he did not see the complainant being assaulted nor did he see damage of the items or chairs.

18. PW4 AP Kimutai Kemboi testified that on 12/9/2018, in the company of Inspector Juma, he arrested the appellant and escorted him to Siaya Police Station. In cross-examination he stated that they arrested the appellant for robbery with violence. In re-examination he stated that Inspector Juma had the arrest order.

19. PW5 Silah Omondi a clinical officer from Ruambwa testified that he used to work at Siaya county referral hospital and that he had the complainant's medical report which he had signed on 11.7/2018. It was his testimony that the complainant was first treated on 6.7.2018, thereafter admitted in same hospital after he alleged assault on 6.7.2018 at 10.00pm by 3 well known persons to him.

20. He further testified that on examination of lower limbs, he noted the patient had swelling with deformity on (r) leg (thigh) with inability to use right leg- x-ray showed patient had fracture of the femur. No injury on the head and neck. It was his testimony that the injury lasted 5 days and that a blunt object was used to cause the injuries. He stated that the patient underwent operation due to injury and plates fixed on the bone. He classified the injuries as grievous harm. In cross-examination he reiterated his testimony and further stated that the patient was specific that he was assaulted. He further stated that plates were inserted in the patient's body at Siaya Referral Hospital.

21. **PW6 Cpl. Simon Lukayi** testified that he developed and printed photos of the damage at the crime scene at Bahamas Bar that were taken by PC Mutembei. In cross-examination he confirmed that there were broken bottles captured in the photos. PW7 P.C. Alamaro was assigned the matter and he carried out investigations upon completion of which he charged the accused person. He stated that the complainant estimated that he had been robbed of a Nokia 6300 Phone, a charger, wallet and Kshs. 200 all property valued at Kshs. 15,299. In cross-examination he stated that he stated that he was not aware whether the victim denied knowing the accused and that there was no identity parade conducted.

22. Placed on his defence, the appellant gave sworn testimony wherein he denied the offence. He however admitted having been at Bahamas on the material date with his friend by the name Richard. He stated that after drinking at the bar he left the place without any fight.

DETERMINATION

23. I have considered the appellant's grounds of appeal, the evidence adduced in the lower court by prosecution witnesses and the defence proffered by the appellant. I have also considered the submissions by the appellant's counsel and the authorities cited. The Respondent did not file or make any submissions.

24. The issues for determination in this appeal are:

a) ***Whether the trial court erred in convicting the appellant for the lesser uncharged offence and if not, whether the offences of grievous harm and malicious damage to property were proved beyond reasonable doubt?***

b) ***Whether the sentence imposed on the appellant was manifestly excessive and unwarranted.***

25. On the first broad issue, the trial magistrate on count one convicted the appellant of the lesser offence of grievous harm after finding that the prosecution failed to prove the offence of robbery with violence that was the original charge and this was after invoking section 179 (1) of the Criminal Procedure Code. The appellant impugned the trial court's judgement on this ground on the basis that the offence of grievous harm was a felony and thus not a minor offence as envisioned in the aforementioned section 179 of the Criminal Procedure Code.

26. As regards the power of the Court to convict the appellant of the cognate offence without affording the appellant an opportunity to address the issue, the Court of Appeal in **Robert Mutungi Muumbi v Republic [2015] eKLR** expressed itself as hereunder:

"The third issue in this appeal relates to appellant's alleged lack of opportunity to plead before he was convicted of the offence of indecent act with a child. If we understood the appellant right, his contention is that he should not have been convicted of the offence of indecent act with a child, which he was not charged with, before he was afforded an opportunity to plead to that offence. Mr. Monda's response was that the appellant could be properly convicted under section 179 of the Criminal Procedure Code without having to plead to the offence, so long as it was a minor and cognate offence to that charged. Section 179 of the Criminal Procedure Code provides as follows:

"179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court……..The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See Robert Ndecho & Another v Rex (1950-51) EA 171 and Wachira S/O Njenga v Regina (1954) EA 398). Spry, J. explained the essence of the first consideration as follows in Ali Mohammed Hassani Mpanda v Republic [1963] EA 294, while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:

> ***"Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence."***

That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial." [Underlining mine].

27. The Court proceeded to state that:

> ***"The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See Republic v Cheya & Another [1973] EA 500). In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the Criminal Procedure Code even though he was not charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied."***

28. It is therefore clear that the learned trial magistrate was under no obligation to give either the appellant or the prosecution an opportunity of being heard before convicting the appellant of the cognate offence. However, the issue arises as to whether the offence with which the appellant was convicted was a cognate offence.

29. Section 179 of the Criminal Procedure Code provides that:

> ***179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.***
>
> ***(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.***

30. Section 191 of the Criminal Procedure Code provides that: -

> ***"The provisions of Sections 179 to 190, both inclusive, shall be construed as in addition to, and not in derogation of, the provisions of any other Act and the other provisions of this Code, and the provisions of Sections 180 to 190, both inclusive, shall be construed as being without prejudice to the generality of the provisions of Section 179."***

31. Section 179 aforesaid was dealt with by the Court of Appeal in the case of **Rashid Mwinyi Nguisa & Another v Republic [1997] eKLR** in which it was held:-

> ***"In short this means that apart from recognizing that Section 179 sets out the principle of law applicable in a trial with respect to conviction for offences other than those charged, and that this general principle shall apply as such notwithstanding that Sections 180 to 190 deal with special cases in a trial…Section 179 of the Criminal Procedure Code cannot be in derogation of the appellate powers of the High Court contained in Section 354(3) (a) of the same code."***

32. The same Court in **Kalu v Republic (2010) 1 KLR** observed as follows:-

> ***"With the greatest respect to the learned Judge there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the Criminal Procedure Code which are under the heading:-"Convictions for Offences Other than Those Charged" and beginning with Section 179 up to Section 190 deal with***

situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus it is permissible to convict a person charged with capital robbery under Section 296(2) of the Penal Code for the offence of simple robbery contrary to Section 296(1) of the Code. It is also permissible to convict a person charged with murder under Section 203 of the Penal Code with manslaughter under Section 202 as read with Section 205 of the Penal Code. That is because the offence of manslaughter, for instance, is minor and cognate to that of murder. But where there is no charge of murder at all, and the only charge available on the record is that of manslaughter, it would be courageous for a trial court to convert that charge into murder simply because the evidence on record proves murder."

33. The **Black's Law Dictionary 9th Edition page 1186** defines a cognate offence as:

"A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category."

34. In **David Mwangi Njoroge v Republic [2015] eKLR** it was held that:

"…the issue of substituting an offence with the one for which the evidence is established is not an obvious case. The offence substituted must be cognate and minor to the offence that an accused was initially charged with."

35. The offence of Robbery with violence is provided under section 296(2) of the Penal Code thus:

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

36. The offence of causing grievous harm is provided in section 234 of the Penal Code as follows:

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

37. The offence of grievous harm is in my view a lesser offence within the provisions of section 179 (2) of the Criminal Procedure Code for which the Court could convict notwithstanding that the accused had not been charged with the said offence. I do not consider that it was at all useful to charge the appellant with the offence of grievous harm in addition to the offence of robbery with violence in this case whose ingredient included the ***wounding, beating or striking*** of the complainant in addition to the other ingredient of being armed with a dangerous weapon.

38. The sentence prescribed for both offences in my considered opinion reveal the offence of grievous harm to be minor to robbery with violence. The latter attracts up to death sentence whereas the former attracts up to life sentence, although none of the sentences is mandatory, ass was held by the Supreme Court of Kenya in **Francis Karioko Muruatetu v Republic [2017] e KLR**.

39. Therefore, on whether the ingredients of the offence of grievous harm were evident from the evidence adduced by the prosecution in the robbery with violence charge, it is noteworthy that the definition of grievous harm is found in section 4 of the Penal Code Chapter 63 Laws of Kenya which reads as follows:

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

40. The question is whether the evidence on record disclosed elements of grievous harm as defined above? To answer this question, I must first attend to the issue of whether the appellant was [positively identified as the person who committed the offences as convicted.

41. It is undeniable that the offences took place at night. However, PW1 and PW2 both stated that there was electricity light inside the Bahamas bar. Further to this, the first time when PW1 was called to go and see the people who had started chaos at the bar, PW2 – Elly Ojuok Onyango who was the bar man at the bar stated that PW1 went to the bar twice when Doreen called him the first time and he went and calmed the appellant and his accomplice then returned to where he was watching football. This clearly shows that PW1 and PW2 engaged with the appellant before the incident and had the opportunity to see him well. The two witnesses therefore positively identified the appellant before PW1 was assaulted and during the assault.

42. Furthermore, the appellant was in the pickup which carried the complainant to hospital and the appellant escaped from the pickup by jumping off after the complainant identified him as the person who had injured him. The appellant in his defence admitted being at the bar and therefore there is no question of the complainant mistaking him for another person.

43. When PW1 was called the second time to go and see what the appellant and his co reveler were doing namely, damaging properties in the bar, the appellant and his accomplice had damaged the items in the bar and left. Evidence of some of the damaged bottles was produced in court by PW6 who produced photographs of damaged bottles taken at Bahamas Bar by PC Mutembei.

44. I do note that PW2 and PW1 were able to follow the appellant and his accomplice quickly on a motorcycle and caught up with the two as the two escaped from the first scene after damaging properties in the bar. PW1 confirmed that the appellant and his co reveler were the same people and he confronted them, asking them why they had damaged the items at the bar and that is when the appellant herein stepped on his right leg inflicting serious injuries which PW5, the clinical officer classified as grievous harm in the P3 form produced as Exhibit 1.

45. The Court of Appeal in the case of **Wamunga v Republic (1989) KLR** 426 stated:

> ***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

46. In **Nzaro v Republic (1991) KAR 212** and **Kiarie v Republic (1984) KLR 739** the Court of Appeal further held that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

47. In **R v Turnbull & Others (1976) 3 ALL ER 549**, which decision has been generally accepted and greatly applied in the Kenya's system, the English Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> ***"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

48. The above decision does not say that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi v Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:

> ***"On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -***
>
> ***"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."***

The Learned Judge further noted that the complainant testified that he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."

49. In **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another v Republic (unreported)** the Court of Appeal had this to say on the evidence of recognition at night:

> ***"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."***

50. Accordingly, from the evidence adduced by the prosecution and the authorities cited above, it is my humble view that the appellant's identification by the complainant was positive and free from error. As earlier stated, the appellant admitted being at the bar on the material night although he denied the offences charged. His defence in my humble view was a mere denial which was overwhelmed by the prosecution evidence against him. I therefore find that the appellant was positively identified.

51. Regarding the injuries sustained by the complainant, PW5, the clinical officer who attended to the complainant testified that the complainant was initially treated then admitted at Siaya Referral Hospital where he noted the complainant's injuries on the right leg which he was unable to use as the complainant had a fracture of the femur that needed operation and plates on the bones to fix. PW5 classified the injuries as grievous harm. I am persuaded that the injuries sustained by the complainant were grievous in nature and were caused by the appellant on the material night.

52. The appellant further alleged that there were contradictions within the statements of PW1, PW2 and PW6 the scenes of crimes officer. I have perused the evidence on record and considered the alleged contradictions. In my view, the the alleged inconsistencies are minor and not material or fatal to the prosecution's case since minor inconsistencies are common in criminal cases, and uniformity of evidence could as well mean that witnesses were couched. This position was upheld by the Court of Appeal in **Philip Nzaka Watu vs Republic [2016] eKLR** where it was stated:

> ***"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

53. This ground of inconsistencies or contradictions in the prosecution's evidence therefore fails. The upshot of the above is that I find the appeal herein against conviction on both counts devoid of merit. I dismiss it and uphold the conviction of the appellant by the trial court.

54. In the end, I find and hold that the prosecution proved its case against the appellant on the second count of malicious damage to property and on the lesser /cognate count of grievous harm as charged, beyond reasonable doubt. The conviction of the appellant was sound. I uphold it.

55. On sentence, upon conviction for grievous harm, the sentence provided in law is a maximum of life imprisonment. The appellant was given seven years imprisonment which is lawful and lenient considering the mitigation and circumstances under which the offence was committed. There was absolutely no provocation by the complainant to warrant those injuries being inflicted by the appellant. However, the probation report filed by the probation officer and mitigation given revealed that the appellant committed the offence while under intoxication albeit there was no provocation as earlier stated. The probation officer recommended non-custodial sentence which the trial court disallowed on account of supervision. Intoxication is not an absolute defence but can be taken into account as a mitigating factor.

56. In addition, I observe that the trial court only sentenced the appellant on the count for grievous harm and left out sentence for malicious damage to property. The latter position was an error. This being a first appellate court, that error can be corrected by sentencing the appellant to an appropriate sentence provided for in law. Sentence upon conviction for malicious damage to property under section 339 (1) of the Penal Code is up to five (5) years. For that reason, I hereby sentence the appellant on the second count of malicious damage to property and order that the appellant shall pay a fine of Kshs Eighteen thousand only (Kshs18,000) in default to serve 12 months imprisonment to be calculated from the date of conviction in the lower court.

57. Regarding count one of grievous harm, I observe that the complainant sustained very serious injuries. There was no evidence of a prior disagreement between the appellant and the complainant. From the evidence adduced, the appellant was no doubt drunk and was involved in damaging the complainant's property and it is only after he was followed by the complainant that the appellant attacked the complainant and injured him. The appellant was still in the drunken state when he attacked and seriously injured the complainant who is apprehensive that the appellant if released can do him more harm. However, the arm of the law will still catch up with the appellant if he reoffends. The appellant in the presentence report showed remorse and said that it was his first offence and he promised not to engage in such behaviour and promises not to drink alcohol which caused all this. He has a young family which will no doubt suffer as he was their sole breadwinner as a truck driver. He is also a first offender.

58. Having considered the above mitigation and circumstances and the pre-sentence report, Iam persuaded that this was a suitable case for non-custodial sentence to have the appellant be rehabilitated through counselling by the probation officer. Should he breach probationary terms, he shall lose the privilege of serving the non-custodial sentence and the discretion of this court as provided for in law.

59. Accordingly, I set aside the sentence of seven years imprisonment imposed on the appellant in count one and substitute it with sentence of probationary term of three years to be calculated from the date of release of the appellant from prison, upon payment of a fine of Kshs 18,000 in respect of count two.

60. I further direct that the fine of Kshs 18,000 once paid into court shall be paid to the complainant as part of compensation.

61. In the end, the appeal against conviction is dismissed. The appeal against sentence is allowed as stated above.

62. Orders accordingly.

Dated, Signed and Delivered at Siaya this 15th Day of February, 2021 virtually in the presence of Mr. Oloo counsel for appellant and Mr. Ngetich Prosecution Counsel for Respondent

R. E. ABURILI

JUDGE

CA: Modestar and Mboya