REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION- MILIMANI COURT

CRIMINAL APPEAL NO. EO23 OF 2020

ZEDEKIAH OMARI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Appeal arising from the original*

Criminal Case No. 5634 of 2014 at Chief Magistrates

Court Makadara by Hon. E. Kimaiyo – SRM on 6th March2020)

JUDGEMENT

1. **Zedekihah Omari,** the Appellant, was arraigned in court and charged as follows:

> **Count 1**: Causing grievous harm contrary to **Section 234** of the Penal Code. The particulars of the offence being that on the 22nd day of November, 2014 at White House Ruai Location, Njiiru Sub County within Nairobi County, he unlawfully did grievous harm to **Walter Nyamongo**.
>
> **Count 2:** Malicious damage contrary to **Section 339 (1)** of the Penal Code. Particulars of the offence were that on the on the 22nd day of November, 2014 at White House Ruai location Njiiru Sub County, the accused willfully and unlawfully damaged the driver's side door, front light fender sunrisor of the driver's door of Motor Vehicle Registration No KAY631R the valued at Ksh.107,880/- the property of **Walter Nyamogo.**

2. Having been taken through full trial he was found guilty for the main count, convicted and sentenced to pay a fine of Ksh.500,000/= and in default of payment of the fine he was required to serve 3 years imprisonment; and he was acquitted on the charge of malicious damage after the prosecution failed to prove the offence.

3. A brief summary of the evidence adduced by the prosecution was that **PW1 Walter Nyamongo** was informed by **PW3 Isaac Bosire**, his brother, that their sister was having marital problems and her husband had been violent. The two brothers went to the residence of **PW2 Hellen Kwamboka**, their sister, situated at Ruai, to assist her. Upon arrival at about 8:30 pm, PW1 parked the vehicle at the gate and called out PW2 and her children. They came out of the house, entered the car and as PW1 tried to drive off with the car's window having been rolled down; somebody ambushed them, swung into the car and got hold of the steering wheel. PW3 managed to remove him from the car and the person they identified as the Appellant went towards the road shouting and calling them thieves. PW3 got out of the car and asked why he called them thieves; the accused picked up stones and threw at the motor vehicle hitting PW1 on the jaw while PW3 was hit on the right leg. They drove to Ruai Police Station where they reported the incident and were advised to seek medical attention. While still there the Appellant arrived and accused them of being thugs who had attacked him. PW1 sought treatment at Mater Hospital where he was admitted and treated. Subsequently he was examined by **PW4 Dr. Maundu Joseph** who classified the degree of injury sustained as grievous; Investigations were conducted that culminated into the Appellant being charged.

4. Upon being put on his defence the Appellant denied having committed the offence. He stated that he was attacked on 22/11/2019 by people he did not know at 2100hrs, within the compound while going to purchase airtime and medicine and he believed the attackers were thugs. He alluded to the material day having been peaceful. That they had gone to church that Saturday, where after his wife went to the salon at Jogoo Road; that on the fateful night when he got to the Police Station, he found his wife with her brothers who shouted and called him names. He was placed in cells and released on cash bail the following day pending arraignment in court.

5. Further, the Appellant stated that his wife sued him in ***ELC Case Number 1576 of 2014,*** Milimani Court, seeking eviction orders against

him, a case that was ongoing. That he was also issued with a P3 form that was filled. That after he reached the Police Station that is when he knew his assailants but the police declined to take action against them as another complaint had already been made.

6. DW2 Moses Shimotwo Anwala, the Appellant's witness testified to have heard screams from his neighbour calling out *'wezi'* on the material night and time, and when he went to the Appellant's place he saw people running, the Appellant who had injuries on the finger and head was at the gate and he told him that he was assaulted.

7. The trial Court court considered evidence adduced and found that the complainant suffered grievous harm and identification of the Appellant as the assailant was cogent, hence the conviction that resulted.

8. Aggrieved, the Appellant appeals on grounds that: the prosecution did not prove the case beyond doubt; the accused was not positively identified as circumstances that prevailed during the time the offence was committed could not have favoured positive identification; evidence adduced by PW1, PW2, PW3 and PW4 was contradictory; stones alleged to have been used to injure the complainant were not produced as exhibits; the trial court relied on extraneous evidence; a finding that injuries sustained by the Appellant were as a result of the struggle with the complainant, yet, as admitted they were inflicted by PW3; there was no independent eye witness; evidence adduced by the defence was not appreciated; submissions by the appellant were not considered; the sentence imposed was harsh; the judgment written was not in accordance to the law and, the trial magistrate erred by presiding over the case after recusing herself following intimidation from the Chief Justice, a cousin to the complainant, hence justice was not seen to have been done.

9. The appeal was canvassed by way of written submissions. It was urged by the Appellant that according to evidence adduced the offence took place at night therefore a question of positive identification of the assailant rises. That to justify a conviction identification/ recognition had to be watertight. On that question he cited the case of ***Shadrack Muteti Maweu Vs. Republic (2001)*** where it was stated that:

> **"…The appellant's first appeal to the superior court was dismissed, principally on the ground that the circumstances under which the alleged robbery was committed favoured a correct and unmistakeable identification of the appellant. The court therefore found no merit in his appeal. In his home made memorandum of appeal the appellant challenges that finding on the ground that had the superior court fully evaluated and analysed the evidence of identification, it would have come to the conclusion that the circumstances obtaining at the time of the said robbery were difficult and did not favour a correct identification. In Patrick Nabiswa Vs. Republic, Criminal Appeal No. 80 of 1997 (Unreported) this court had the following to say regarding visual identification: "This case reveals the problems posed by visual identification of suspects. This mode of identification is unreliable for the following reasons which are discussed in BLACKSTONE'S CRIMINAL PRACTICE 1997, section F18.**
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> > **(a) Some persons may have difficulty in distinguishing between different persons of only moderately similar appearance, and many witnesses to crimes are able to see the perpetrators only fleetingly, often in very stressful circumstances,**
> >
> > **(b) Visual memory may fade with the passage of time; and**
> >
> > **(c) As is in the process of unconscious transference, a witness may confuse a face he recognised from the scene of the crime (it may be of an innocent person) with that of the offender."**

10. That investigations carried out were wanting as the police did not visit the scene, exhibits used to inflict the injury were not adduced in evidence, and that the rights of the Appellant should be safeguarded.

11. The State through learned counsel, **Ms. Ursula Kimaru** opposed the appeal. She urged that evidence by the complainant was corroborated by PW2 and PW3.That the incident took place at 8.30pm or thereabout but the car lights helped PW1 to identify the assailant. That according to PW2, none of the neighbours went to the scene but peeped through the fence which means that the Appellant was the perpetrator of the offence.

12. On sentence, She urged that the sentence provided for by **Section 234** of the Penal Code is life imprisonment but the trial court meted out the sentence in accordance with **Section 28(2)** of the Penal Code, a section that prescribes that when a fine imposed exceeds 50,000/- the default sentence should not exceed twelve months; which makes the default sentence illegal. She called upon the court to quash the same and grant an appropriate one.

13. This being a first appellate court, it has a duty to re-evaluate the evidence and make its own conclusion. In the case of ***Okeno Vs Republic [1972] EA 32*** at 36 the East Africa Court of Appeal stated as follows on the duty of the Court on a first appeal:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala Vs. R., [1957] E.A. 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 findings and conclusions; 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 Vs. Sunday Post, [1958] E. A. 424."***

14. Based on evidence adduced, the trial court was required to find that the case was proved beyond a reasonable doubt. It was expected to weigh evidence adduced by both the prosecution and defence and be satisfied beyond a reasonable doubt that the accused person was guilty. This being a criminal case, the burden of proof lay with the prosecution, who was required to demonstrate that the accused person was guilty. According to Halsbury's Laws of England, 4th Edition, Volume 17, paragraphs 13 and 14:

"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

15. **Section 107 (2)** of the Evidence Act provides that:

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

16. **Section 4** of the Penal Code provides thus:

"Grievous harm" means 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;

17. It is not in doubt that the complainant was injured on the fateful day, reported to Ruai Police Station and was referred to hospital for treatment. Upon presenting himself at Mater Hospital he was examined by **PW6 Dr. Walter Odhiambo.** On examination, the mandible of the lower jaw could not move as the jaw was broken. The Xray and CT scan taken showed a fracture of the front jaw and the left side of the jaw. His three frontal teeth were loose hence had to be extracted. Subsequently, the complainant was examined by a police Surgeon, **PW4 Dr. Maundu Joseph**, who found him having sustained a fracture of the left mandible. He assessed the degree of injury sustained as grievous. Looking at the P3, grievous harm is stated to include any harm which amounts to maim, or what endangers life…Maim on the other hand is stated to mean a destruction or permanent disabling of any external or internal organ, member or sense. The complainant having sustained a fractured mandible and loose teeth, it was classified as a serious bodily harm that was indeed grievous harm.

18. The question begging is whether the Appellant was the perpetrator as he has raised the question of identification; his argument being that he was not correctly identified. This was a case of recognition. Courts have been cautioned to test such evidence with care lest it results in a miscarriage of justice. In ***Wamunga Vs. Republic (1989) KLR 426*** the Court of Appeal stated as follows:

"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."

It should be emphasized that chances of any mistake having been made must be ruled out. In Anjononi –vs- Republic (1980) KLR 59, a case of recognition of the perpetrator, the court stated thus: "… recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other …" But the evidence….at night must be absolutely watertight to justify conviction (See Kiarie Vs. Republic (1984) KLR 739)"

19. The Appellant herein was the complainant's brother-in-law, these were persons who knew each other very well. The incident occurred between 7.40 to 8.30pm or thereabout. PW1 stated that upon arrival, he parked the motor vehicle at the gate and PW3 went to call their sister, PW2, who told them that the Appellant had gone to purchase airtime. And prior to attacking them, the Appellant wrestled PW3 as he made noise. PW2 stated that the Appellant shouted calling her brothers robbers as he threw stones at the complainant. PW3 who tackled him stated that the Appellant shouted calling them thieves.

20. The Appellant stated that he was attacked by people he did not recognize at about 9.00pm and when he went to report the incident, he found the PW1, PW3 and his family at the Police Station who accused him of being the assailant. In his opinion the police were compromised that is why they believed them and caused him to be charged. In his defence, the Appellant did not deny having uttered words as stated by the prosecution witnesses hence it was a question of voice recognition that is as good as visual identification. All that the court was expected to do, just like the case of visual identification was to be cautious when relying on the evidence so that it does not turn out to be the voice of a different person.

21. In the case of **Choge Vs Republic (1985) KLR 1** the court held that:

"Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual recognition. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it…"

22. PW2 was in a marriage with the Appellant and they had children aged fourteen (14) and nine (9) years old, respectively, which meant that they had lived together for more than fourteen years. She was not put at risk as to her familiarity with his voice, therefore, she would not be mistaken when it came to his voice intonation, in the result, and the recognition of the Appellant's voice was free from all possibility or error. The Appellant remembers to have had an altercation with some people on the material night within his compound, the complainant should therefore be believed when he states that his assailant was the Appellant. The question to be addressed would be; if he was the aggressor?

23. Evidence adduced establishes the fact that the Appellant was infuriated by the action of the Complainant and PW3 of having gone to rescue PW3, a victim of domestic violence and her children. Evidence showed that he was the first to attack and injure PW1 who was on the

steering wheel. The person who intercepted him was PW3. DW2 found him already injured per his evidence therefore he could not tell how and when he sustained the alleged injury. Therefore, evidence adduced proves that the Appellant was the one who attacked the complainant.

24. The Appellant complains that the trial court failed to notice discrepancies in evidence adduced by the Prosecution Witnesses 1, 2, 3, and 4. However, this allegation was not expounded in submissions. In the case of ***John Njuki & 4 others –vs- R [2002] eKLR*** it was stated:

> ***"But what is important is whether the dis-crepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."***

25. Had the Appellant pointed out which specific discrepancies that he had in mind, this court could have weighed if indeed they were credible. Otherwise, as it stands, the ground of appeal cannot pass any test. Therefore, evidence adduced proves beyond reasonable doubt that the Appellant was the complainant's assailant.

26. The trial court has been faulted for reaching a decision without seeing the weapon used to inflict injuries. In the case of John ***Oketch Abongo v Republic (2000)eklr ,*** the court of Appeal stated as follows:

> ***"We are satisfied that the complainant's injury amounted to grievous harm as defined in the Penal Code. The definition contains several ingredients of what constitutes grievous harm. We are of the opinion that the presence of any one of these ingredients would suffice to disclose grievous harm. Here, we are satisfied that the complainant's injury did amount to dangerous or serious injury to health both of which are ingredients contained in the definition."***

27. To prove the offence of grievous harm, it is not a requirement for the weapon used to be produced in evidence, what is crucial is to prove ingredients of the offence.

28. The Appellant also contends that the prosecution failed to call independent witnesses to support their case. **Section 143 of Evidence Act (Cap 80)** Laws of Kenya provides that:-

> ***"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"***

29. In the case of ***Donald Majiwa Achilwa & 2 Others Vs. Republic (2009) eKLR*** the Court of Appeal held that :

> ***"The law as it presently stands is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however , the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court in an appropriate case***
>
> ***is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (Also see Bukenya& Others Vs Uganda (1972)***

30. In the case of ***Keter Vs. Republic [2007] 1 EA 135*** the court held as follows:

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses that are sufficient to establish the charge beyond any reasonable doubt."***

31. The prosecution called witnesses who were present during the act. It was stated that neighbours did not move to the scene during the incident, therefore, failure to call them was not detrimental to the prosecution's case.

32. The trial court is stated to have fallen into error by presiding over a case after recusing itself citing intimidation by the Chief Justice. The submissions of the Appellant did not delve into this fact. However, looking at the proceedings of the trial court, when the defence sought an adjournment on the grounds of the advocate having been bereaved, the prosecution had no objection to the adjournment, but, the complainant in person raised an objection arguing that the application was aimed at frustrating him. He raised the issue of delay of the matter and blamed the court for it. In the premises, the prosecuting officer sought recusal of the trial magistrate to enable the matter to be placed before a court he would be comfortable with.

33. Subsequently the matter was placed before the Chief Magistrate on 30th July, 2019, where proceedings were recorded as follows:

> ***"Complainant: I am comfortable with case proceeding in court 8 I did a letter of apology***
>
> ***Nyantika: My client does not have a problem with the court we can proceed there.***
>
> ***Court: This is a case where a complain was made to the Hon. The CJ. I am in receipt of his directions that the case proceeds in the trial court. The parties have also confirmed that they have no problem with the case proceeding there. This case is sent back to Hon. E. Suter SRM to fix it for defence hearing or give her directions…….***

Accused: I don't have problem with the court. They made the case to delay and I don't complain. I do pray the case to proceed in court No. 8. If it goes elsewhere I will delay. (sic)

Prosecution: I have perused the record I do note that you had recused yourself but the CM had directed the case be heard in court No. 8 as directed by the CJ it has proceeded. I do pray the court to make its decision.

Complainant: I don't have any issue. I have faith in the court. I don't see any issue the court had done against my case. I pray it be completed in court herein. *(Sic)*

Court: The court shall give its directions on the 16/8/2019"

34. When the case was placed before the trial court the complainant indicated that he had faith in the court. The court was forthright, it gave the party that was dissatisfied the opportunity to raise concerns, if any. On the 16th August, 2019, the court delivered itself thus:

"RULING – The court had recused itself after the complainant made a complaint and after the prosecution argueD the court recuse itself. Thereafter I was served by a letter by the Chief Justice dated 22nd July 2019 and an apology letter by the complainant. *(Sic)* ***This is a case that I am handling because I am so directed by the CJ and the Chief Magistrate in his order dated 30/7/2019. I also note that both parties have asked that I proceed with the case. Since I didn't have any interest in the case herein and since I am so directed. I have no choice but to handle the case. The parties are free at any post to raise any issue with how I handle a case. As a court its my duty to ensure that Justice is served to all parties who appear before me…"*** *(Sic)*

35. When the matter came up for further hearing, counsel for the Appellant Mr. Nyakiangana addressed the court and proceedings were captured thus:

"I am on record and have not been attending when the case came up for mention. The reasons are on record. I am informed my client what happened and also perused the court file. *(Sic)* ***The defence has confidence with the court and has no complaint against the court. The same has been considered as required by the law. However, it has been to my attention, by my client that serious complain was raised to the CJ against the court. I called my client and asked what brought the complain due to justice to be seen. I do pray to disclose some information to the court. I am informed by my client that there has been a lot of CR.5634.14 intimidation to the accused to the extent he is told he has to be convicted by all means for reasons that the complainant is a relative to the CJ. I am told that he is a cousin to the CJ. I am also informed that the accused was told that he has already complained to the CJ. It is unfortunate that it is the prosecution that has sought the adjournment and we never complained. It was only once or twice when I was bereaved that I asked for adjournment. Since the accused is in court I do apologize and we fee at this time the court is already intimidated since the issue has gone all the well to the head of Judiciary and we do believe that the court will give just finding.***

My client is ready to swear to the same facts if asked. As it stand today I am ready.(Sic)

Prosecution: I have not gone through prosecution case and I can't be able to respond to the same. I will be ready as directed by the court.

Complainant: If it is true the CJ is our cousin is not something that can be used in the case. I did not force myself to be his cousin at no time we have used the relationship to interfere with the case, since at the end of the day. My relationship can't be used in pursue of my interest. I do pray for justice that I deserve.

Nyakiangana: It is admitted by the complainant that he is a cousin to the CJ. My instruction is true. May be it is the relationship that was abused we did not see any wrong by the court.

Court: Serios factual issues has been raised today. I will take time to think through and give decision on whether I should or could proceed hearing the case. Directions on the 24/10/2019…….

Directions: The case herein is coming for directions on how the case shall proceed in light of the facts brought to the court on the 17/9/2019. The relationship of the parties to the CJ was raised before the court. The accused is apprehensive that because of that relationship his client and the court is intimidated by the complainant.

I do note and firmly believe that the law is an equalization factor. It does not matter ones status, position, wealth, religion and other affiliation. The only factor to be considered is the fact and the law. I wish to confirm to the parties that this court is above intimidation by any party and or influence. I took oath to act and defend the constitution and not an individual. I also find the case has taken long due to side shows that have no value.

The parties both prosecution, complainant and defence expressed confidence with the court. In fact the 1st person to raise complaint about the court apologized to the court, before the Chief Magistrate and in the spirit of forgiveness, the court proceeded with the case. The new facts raised have no value and will not influence the court in any way. The case shall proceed with myself as earlier directed. Hearing on the 11/12/2019…." *(Sic)*

36. The matter having been put to rest, and having not been brought up in Appellant's defence and submissions, the Appellant cannot attempt to hang on it as a ground to make him discredit the trial court.

37. This therefore brings us to the question of sentence. On this issue, the principle of interfering with sentence by an appellate court was stated by the Court of Appeal in ***Bernard Kimani Gacheru v Republic [2002] eKLR; Criminal Appeal (2000) eklr*** where it was held that:

> ***"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist."***

38. **Section 234** of the Penal code provides for a penalty of life imprisonment. However, the trial court in exercise of its discretion considered a fine as the most suitable sentence. In that regard it applied the provisions of Section 28(2) of the Penal Code that provide as follows:

> ***(2) In the absence of express provisions in any written law relating thereto, the term of imprisonment….in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale—***
>
> ***Amount…… Maximum period***
>
> **…….**
>
> ***Exceeding Sh. 50,000 .....12 months***

39. Under the stated provision of the law, the Penal Code allows a term of incarceration for twelve (12) months when the amount of fine exceeds fifty thousand (50,000/-) shillings; where the law does not expressly set the period of imprisonment in default of payment of a fine. (Also see the Judiciary Sentencing Policy Guidelines)**.** The trial court having opted to fine the Appellant should have complied with the law. It however fell into error by not adhering to the law, an error that must be corrected.

40. In meting out sentence, the court must consider mitigating and aggravating circumstances. The punishment must be proportional to the offence committed. In the instant case it is notable that injuries sustained were serious which called for a deterrent sentence.

41. The upshot of the above is that I affirm the conviction, but, set aside the sentence which I substitute with three (3) years imprisonment. The Appellant was arraigned in court on 2/12/2014 and released on bail. Upon conviction and sentence on 8/10/2020. He was released on bail pending appeal on the 17/12/2020.The two months he was incarcerated will be taken into account while computing the Sentence.

42. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 29TH DAY OF JULY, 2021.

L. N. MUTENDE

JUDGE