



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 45 & 46 OF 2019 (CONSOLIDATED)

YUNNIS KOLFA ANO.....1ST APPELLANT

BAGANA FUJO MARO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

(An Appeal arising from the Judgement of Hon C. Maundu, Chief Magistrate, Garissa Law Court, in Criminal Case No. 452 of 2018)

1. This is an appeal arising from the Judgement of Hon. C. Maundu, Chief Magistrate Garissa, in Criminal Case No. 452 of 2018 wherein the two appellants **Yunnis Kolfa Ano** and **Bagana Fujo Maro** were charged with the offence of causing grievous harm contrary to Section 234 of the Penal Code.

The particulars of the offence were that on the 12th of June, 2018 at about 7.00 a.m. at Mororo Trading Centre, in Madogo Division of Tana River County they caused grievous harm by hitting the victim, one **Alex Musili Mutwii** with a rung on his head.

2. After a full trial the two were found guilty, convicted and sentenced to suffer 5 years imprisonment. It is against the judgement that they preferred this appeal on grounds that;

- **The prosecution case was not safe to warrant the conviction.**
- **There were no eye witnesses and the court relied on hearsay evidence.**
- **The doctor's report was incomplete.**
- **Prosecution evidence was inconsistent and contradictory and**
- **The arresting officer framed them.**

3. Each of the appellants filed a separate appeal and on similar grounds. The two appeals No. 45 and 46 of 2019 were consolidated with Appeal No. 46 being the lead file.

4. The appeal was disposed of by way of written submissions as follows;

In their joint submissions the Appellants urged that the prosecution case was full of inconsistencies. They challenged the P3 form and the evidence by the prosecution witnesses. Further they urged that there were no documents to show that the complainant was treated at a government facility as alleged to support the information contained in the P3 form such as the discharge summary, receipts of hospital bill, or x-ray to show brain injury or details of medication administered.

5. The state opposed the appeal on grounds that there were eye witnesses who testified before the court; identification was positive as the complainant is known to the Appellant the discrepancy on dates when P3 form was issued could be typographical error and contradiction if any is too minimal to dislodge the prosecution case.

6. Like the lower court, this court is convinced that the complainant sustained injuries after an altercation. No reason manifested itself in both prosecution and defence to give an impression that the appellants were framed. Evidence before court points at the appellants being the persons who holding out as law enforcers assaulted the complainant. The evidence of PW1, PW2 and PW3 was very clear that the Appellants

assaulted the complainant. In fact the 1st appellant does admit that he is an informer and worked at the Chief's Office.

7. Having said the above the court is concerned that the weapon of crime was not produced as it would have assisted the court in appreciating the gravity of the injury. Secondly, as stated by the appellants no medical summary, hospital details etc. were not produced to support the information contained in the P3 form. The question arising is what assisted the clinical officer if there was no case summary to assess the injury? Thirdly, how did he without an x-ray report arrive at the conclusion that the assault amounted to grievous harm?

8. The evidence of injuries sustained as a result of the assault inflicted upon the complainant does not support the charge of grievous harm. And order to do justice, the court will substitute the offence of causing grievous harm with that of common assault under section 250 of the Penal Code and convict the appellants of the same. The Section attracts punishment of imprisonment for 1 year which I sentence the two appellants for.

9. The appellants have been in custody for more than the period they have been sentenced to by this court; meaning they have served their jail term.

They are accordingly released unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 28TH DAY OF OCTOBER, 2021.

ALI-ARONI

JUDGE