REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOS.30 & 33 OF 2020

STEPHEN KIMANI KINYIHIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. M.A. Opondo PM delivered on 22nd January 2020 in Makadara CM Cr. Case (S/O) No.5312 of 2014)

JUDGMENT

The Appellant, Stephen Kimani Kinuthia was charged with the offence of causing grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that on 10th October 2014 at Uhuru Estate within Nairobi County, the Appellant unlawfully caused grievous harm to Duncan Mwangi Wambugu. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged and sentenced to serve one (1) year imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved by his conviction stating that the evidence on record failed to conclusively establish that the complainant suffered grievous harm. He asserted that the evidence by the prosecution witnesses that the complainant suffered grievous harm was not corroborated by any documentary medical evidence. He faulted the trial court for failing to acknowledge that the prosecution witnesses gave contradictory evidence with regard to the type of weapon that was alleged to have been used to assault the complainant. He took issue with the fact that the trial magistrate improperly admitted into evidence a P3 form which was produced by the investigating officer as opposed to the medical doctor who authored the same. He was of the view that the investigating officer failed to conduct proper investigations in the matter. He was aggrieved by the failure of the trial court to properly evaluate his defence before arriving at its decision. He opined that the prosecution failed to establish its case against him to the required standard of proof beyond any reasonable doubt. In the premises, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral rival submission made by Ms. Matasi for the Appellant and Ms. Ndombi for the State. Counsel for the Appellant submitted that the prosecution failed to establish the elements of the offence of grievous harm as provided under Section 234 of the Penal Code to the required standard of proof beyond any reasonable doubt. She averred that the trial court, in convicting the Appellant, relied on a P3 form that was improperly produced into evidence by the investigating officer. She submitted that the same was tendered in contravention of Sections 48 and 33 of the Evidence Act which require a medical report to be produced by an expert in the said field. She stated that the Appellant failed to object to the same since he was acting in person. This fact should not be determined adverse to his appeal.

Ms. Matasi further submitted that the evidence by the prosecution witnesses was inconsistent. PW1 stated that the Appellant hit him on the jaw with a stone. On the other hand, PW2 stated that the Appellant punched PW1 while PW3 told the court that the Appellant struck the Appellant on his jaw using a metal rod. Counsel for the Appellant averred that the trial court ought to have considered the Appellant's defence in arriving at its decision. She stated that the Appellant denied hitting the complainant. She was of the view that the sentence meted by the trial court was harsh and excessive in the circumstances, and that the trial court ought to have given a non-custodial sentence in form of a fine. In the premises, she urged this court to allow the Appellant's appeal.

Ms. Akunja for the State opposed the appeal. She submitted that the P3 form was properly admitted into evidence in accordance with Section 33 of the Evidence Act. She averred that the trial court relied on eye witness accounts of the assault that was occasioned on the complainant. She stated that the complainant's evidence was corroborated by PW2 and PW3's testimony. She was of the view that the inconsistencies in the prosecution's case were minor, and that the Appellant's guilt was established to the required standard of proof beyond any reasonable doubt. With regard to sentence, Learned State Counsel submitted that the same was lenient as Section 234 of the Penal Code provided for a

sentence of life imprisonment. She therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, Duncan Mwangi is the complainant. He stated that he was a mechanic and a secondhand car dealer. On 10th October 2014, he was at his place of work. At about 9.00 a.m., the Appellant came and demanded that he moves one of his vehicles from the parking yard. The Appellant informed him that he had been allocated the said spot by the area counsellor to set up a carwash business. When PW1 refused to move the vehicle, the Appellant struck him on his left jaw using a stone. He stated that he sustained a fracture on the left jaw. He reported the matter at Buruburu Police Station. He also sought medical treatment from John Lee International Hospital where they referred him to Jamaa Hospital. PW1 stated that he was not able to take any solid foods for about 57 days. Upon cross-examination, PW1 stated that he had known the Appellant since their childhood.

PW2, Boniface Gachuru was PW1's business partner. It was his testimony that on the material day of 10th October 2014, he was at the garage with PW1. The Appellant came to the garage accompanied by his brother. They demanded that PW1 and PW2 remove their vehicles which they claimed had been parked within their compound. They refused to move the vehicles. The Appellant and his brother attacked them. The Appellant punched PW1 while his brother attacked PW2. PW2 stated that he sustained a cut injury on his face. They reported the incident at Buruburu Police Station and thereafter sought medical treatment.

PW3, Julius Wambua worked with the Appellant as a mechanic. He was at the garage on the material day. He corroborated the version of events as narrated by PW1 and PW2. He stated that he witnessed the Appellant hit PW1 on his jaw with something that looked like a metal rod, while his brother attacked PW2. PW4, Sgt. Naboth Emasa was the investigating officer in this case. He took over the case from PC Caroline Wanjiru who had originally been assigned to investigate the case. He produced the complainant's P3 form into evidence. He stated that Dr. Shako who authored the same was unable to attend court.

The Appellant was put on his defence. He gave a sworn statement. He stated that he was at his house with his brother in Uhuru Estate on the material day. The complainant had parked his vehicles outside their house. He went outside accompanied by his brother and asked the complainant to move his vehicles from their compound. His brother got into a fight with PW2. He sustained injuries and was bleeding from his head. The Appellant and his brother reported the incident to the police. His brother also sought medical treatment. The Appellant testified that he was arrested a few weeks later. He was not informed the reason for his arrest. He denied assaulting the complainant. DW2, Peter Odhiambo stated that he was at his house on the material day. He had some noise from a scuffle that was occurring outside his house. He went outside to investigate. He found a group of boys who worked at a garage that was located outside his house. He inquired what was happening and was informed that PW1 and PW2 had refused to move their vehicles which they had parked outside someone's gate. Luckily three elders came to the scene and diffused the situation.

This being a first appeal, this Court is mandated to re-evaluate the evidence afresh. The Court of Appeal in the case of **Gabriel Kamau Njoroge vs Republic [1987] eKLR** stated this on the duty of the 1st Appellate court;

> **"It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this."**

In the present appeal, the issue for determination is whether the prosecution established the charge of causing grievous harm contrary to Section 234 of the Penal Code brought against the Appellant, to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case as well as rival submission made by parties to this appeal. The prosecution was required to establish that the Appellant assaulted the complainant and caused him to sustain grievous harm.

It was the complainant's case that on 10th October 2014, at about 9.00 a.m., the Appellant came to his garage and demanded that he move his vehicles which the Appellant claimed were parked within his compound. When the complainant resisted, the Appellant hit him on his left jaw with a stone. The complainant stated that he sustained a fracture on his left jaw and was not able to intake solid foodstuff for a period of about 57 days. PW2 and PW3 who were at the scene where the alleged assault occurred corroborated the complainant's testimony. They both testified that they saw the Appellant punch the complainant on his cheek.

The Appellant in his defence does not deny being at the scene of crime. He however told the court that he only confronted the complainant and asked him to remove his vehicles. He denied assaulting him. His defence is however displaced by the evidence of PW2 and PW3 who were at the scene, and witnessed the Appellant hit the complainant on his jaw. The assault took place in broad daylight. The Appellant was known to the complainant. There was clear, cogent and consistent evidence before the Court with respect to the assault occasioned on the complainant by the Appellant.

The Appellant submitted that the evidence by the prosecution was contradictory as to the nature of the weapon used to assault the complainant. He stated that PW1 told the court that the Appellant hit him on his jaw with a stone, while PW2 stated that the Appellant punched the complainant, while PW3 testified that the Appellant hit the complainant on his jaw with something that looked like a metal rod. While it is true that the said evidence appeared contradictory, the evidence by the prosecution witnesses still pointed to an assault occasioned on the complainant on his jaw by the Appellant. This court is of the view that the contradictions was minor and was not material to the essential fact established by the evidence on record that the Appellant assaulted the complainant and injured him on his left jaw. This court therefore holds that the prosecution proved to the required standard of proof beyond any reasonable doubt that the Appellant assaulted the complainant thereby causing him to sustain the particular injury.

The second issue for determination is whether the degree of the injury sustained by the complainant was grievous harm. According to the complainant, he fractured his left jaw as a result of the assault. **Section 4** of the **Penal Code** defines 'grievous harm' as:-

> **"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."**

In the present appeal, the P3 form produced in evidence classified the degree of injury sustained by the complainant as grievous. The Appellant in his grounds of appeal contended that the P3 form was improperly admitted into evidence contrary to provisions of **Sections 33** and **48** of the **Evidence Act**. This court notes that the P3 form was produced in evidence by the investigation officer (PW4) as opposed to the medical doctor who prepared the same. PW4 told the court that the prosecution was unable to avail Dr. Shako to adduce evidence as she no longer attended court proceedings to give expert medical evidence.

The provisions of **Section 33** as read with **Section 77** of the **Evidence Act** allow for the production of medical documents in instances where the makers cannot be found or whose attendance cannot be procured without an amount of delay or expense which in the circumstance appears unreasonable. However, **Section 48** of the **Evidence Act** which deals with expert opinions provides thus;

> **"When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions."**

This court is therefore of the view that based on the above provision, evidence based on the opinion of an expert ought to be produced in evidence by the said expert; and in situations where such experts cannot be procured without unreasonable delay or expense, other experts working in a similar filed of expertise and who are familiar with handwritings of the unavailable experts can be called upon to tender such evidence in line with the provisions of **Sections 33** and **77** of the **Evidence Act.**

In the present appeal, the doctor who prepared the P3 form was not availed to adduce evidence. Instead, the investigating officer was the one who tendered the P3 form in evidence. In the absence of the evidence of the expert, the trial court was not in a position to establish whether the evidence that the person on whose opinion the charges against the Appellant were based, was competent and specially skilled in that area. In addition, without the evidence of the medical expert, the court is not informed as to the criteria upon which the medical opinion was based, and hence cannot test the accuracy of the said opinion and form its own independent opinion. The investigating officer (PW4) who purported to produce the P3 form was ill-equipped to do the same as he was not a medical expert and could therefore not adduce evidence of facts which he could not ascertained. In the premises, this court therefore holds that the P3 form was improperly admitted in evidence by dint of the provisions of **Sections 33, 48** and **77** of the **Evidence Act**.

That being said, even in the absence of medical evidence, the fact that the complainant was assaulted by the Appellant was proved by the testimony of the prosecution witnesses as stated earlier in this judgment. The lack of medical evidence only deprives the court the opportunity of judging the extent of the injuries occasioned upon the complainant. The Court of Appeal in the case of **John Oketch Abongo v Republic [2000] eKLR** held thus;

> **"Whether or not grievous harm or any other form of harm is disclosed must be a matter for the court to find from the evidence led and guided by the definition in the Penal Code. A court will be assisted by medical evidence given in coming to the conclusion on the nature and classification of the injury. In many cases the courts have accepted and gone by the findings and opinions in the medical evidence. But, in appropriate circumstances, the court is at liberty to form its own opinion, having regard to the evidence before it as to the nature and classification of the injury."**

In the present appeal, the complainant stated that he fractured his jaw as a result of the assault occasioned by the Appellant, and was not able to eat solid foods for about one month and a half. PW2 and PW3 did not describe in detail the nature of the injuries suffered by the complainant. PW2 stated that they sought first aid and went to Buruburu Police Station where they reported the incident. At the police station, they were issued with P3 forms and instructed to seek medical attention. This court is of the view that injuries occasioned on the complainant were not severe as he was able to go to the police station to report the assault himself before seeking medical attention at the hospital. It was not clear from his evidence if he was admitted in hospital or the treatment of the fracture required surgical intervention. This court therefore classifies the injuries sustained by the complainant as '*harm*' which is defined by **Section 4** of the **Penal Code** as "*any bodily hurt, disease or disorder whether permanent or temporary*".

In the premises, this court substitutes the charge of **grievous harm**, and the Appellant is hereby convicted of a lesser charge of **assault causing actual bodily harm** contrary to **Section 251** of the **Penal Code**. With regard to sentence, **Section 251** of the **Penal Code** provides for a maximum custodial sentence of five (5) years. This court is of the considered view that an appropriate sentence would be a fine instead of a custodial sentence. The custodial sentence imposed on the Appellant therefore is set aside and substituted by a sentence of this court. The Appellant is sentenced to pay a fine of Kshs.50,000/- or in default he shall serve one (1) year imprisonment. If the fine shall not be paid, the default custodial sentence shall be served with effect from 22nd January 2020. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF APRIL 2020

L. KIMARU

JUDGE