REPUBLIC OF KENYA

IN THE HIGH COURT

AT VOI

CRIMINAL APPEAL NO. 34 OF 2018

B E T W E E N:

ABEL MWAKIO KIFOTO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Decision of Hon N. N. Njagi SPM in the PM's Court in Wundanyi delivered on 31st May 2018 in Criminal Case No 177 of 2018)

J U D G M E N T

1. The Appellant before the Court was convicted and sentenced on 31st May 2018 of grievous harm. The sentence handed down was 30 years. The Appellant filed his Petition of Appeal on 17th August 2018. At the same time the Appellant filed an application for leave to appeal out of time. Leave was granted by this Court on the 20th of September 2018. The Appeal was admitted for hearing on 2nd October 2018.

2. The Grounds of Appeal contained in the Petition are:

> "1. I pleaded not guilty charges
>
> 2. The prosecution did not provide me with witness statements thus my constitutional rights were violated
>
> 3. That the appellant was not caught at the scene of the crime.
>
> 4. That there was no exhibit brought before court to prove that I committed the offence
>
> 5. That the investigating officer did a shoddy job as far as the alleged matter of grevious harm is concerned he never visited the scene of the crime
>
> 6. Supplementary grounds of appeal to follow when and if furnished with a certified true copy of the proceedings of this case.
>
> 7. In the view of circumstances of this case, the custodial sentence of 35 years is harsh, severe and manifest excessive punishment,
>
> 8. Your honour I beg your honorable court to reduce the conviction, give option of fine, quash conviction or order re-trial or whichever your honorable may deem fit.
>
> 9. That in the event of my humble appeal may find merits. I would wish to be allowed to be present during the hearing of my appeal.

3. After receiving a copy of the Certified Proceedings the Appellant, filed Amended Grounds of Appeal. These are:

"(1) That the Law Learned trial magistrate erred in both law and fact fail to note that there was none disclosure of all the evidentiary materials by the prosecution in disregard of the application for the same by the appeallant

(2) That the Law Learned trial magistrate erred in both Law and fact fail to note that the appeallant was not assisgned an advocate during my trial.

(3) That the Law Learned trial magistrate erred in both Law and fact fail to noted that the burden of proof was not discharged beyond reasonable doubt.

(4) That the Law Learned trial magistrate erred in both Law and fact to note that the appeallant was a first Offender hence deserved an alternative sentence."

4. The Parties were directed to file their written submissions. The Appellant's Submissions were handed up in Court on 27th November 2018 and a copy provided to the Respondent. The Respondent's Submissions were filed on 29th January 2020. The Appellant then filed further submissions on 5th February 2020.

5. The Appellant was charged with the Offence of "GRIEVOUS HARM CONTRARY TO SECTION 234 OF THE PENAL CODE.". The Particulars of the Offence are "ABEL MWAKIO KIFOTO: On the 17TH day of March 2018, at around 11.30pm at Wundanyi Township, Wundanyi location within Taita Taveta County jointly with others not before Court Wilfully and unlawfully did grievous harm to LIWEL MWENDWA SIMON.". On 24th May 2018 the Appellant appeared before the Trial Court. He pleaded not guilty and was given a Bond of Kshs.20,000 with a surety of a like sum. The Court also ordered that the Accused be supplied with the statements of the witnesses.

6. As this is a first appeal, this Court is charged with the duty of re-analysing and re-assessing the evidence before the Lower Court. The Learned Trial Magistrate heard from four witnesses for the prosecution and for the defence the Appellant gave an unsworn statement where he denied the offence. He did not call any witnesses. The Investigating Officer gave evidence as PW-4 He was PC Simon Ndoloi. He says he began his investigations at 8.00 am on 18th March 2018. What he put before the Court is that the Accused had assaulted the Complainant on 17th March 2018 at 11.30 pm. His investigations informed him that the assault took place at 11.30 pm. The Complainant had come out of Tsavo Hotel in Wundanyi. The Accused assaulted the Complainant on the lower jaw and mouth. A P-3 was issued and completed. The P-3 assessed the degree of injury as "Grievous Harm". There were witnesses whose statements were taken and the Complainant identified the Accused. He confirmed that the Accused before the Court was the alleged perpetrator.

7. The particulars of the assault come from the Complainant, Liwel Mwenda Simon (PW-2). He said that on 17th March 2018 he was at an establishment called "Tsavo Hotel" in Wundanyi. He says he left at about 11.30 pm and was on his way to bed. He came across a man in Khaki trousers and blue slippers. The assailant came up to the Complainant and he told him that he would know that he was is a Taita. He then grabbed him by the neck and hit him in the mouth. The Complainant said he had a clear view of the Accused because they were close to a security light. He did not know the Accused before but he was able to identify him and confirm that identification before the Court. The Accused did not counter that evidence. As for his injuries he said he was bleeding from the mouth and lost one tooth. He said he reported the matter to the Police in Mwatate and also went to the County Hospital. In cross-examination of the Complainant the Accused attempted to put forward a defence of provocation by asking questions about food being dropped.

8. The Complainant confirmed that he did not know the Accused and that he was able to see him clearly because of the security light. The Complainant's evidence was corroborated by PW-3, Godfrey Crispus Mzungu. He said that on the day in question he was on duty as the Cook at Tsavo Hotel. At 11.30pm he was closing the business and heading to the bus stage. He told the court he saw the Accused beat the Complainant with his hands. He confirmed the injuries and he confirmed that the scene was well lit. Under cross-examination he confirmed that the Accused was on that day wearing the same clothes he had on at the time of the attack. PW-3 said that he knew both the Complainant and the Accused. He said that when the Complainant met with the Accused the Accused beat the Complainant using his hands. He was unable to discern any reason for the assault. The evidence of the two witnesses was further corroborated by the medical evidence. The Prosecution called as PW-1 Dr. Mohammed Machi from Wesu Hospital. Introduced into evidence the Treatment Notes and P3 Form for the Complainant. The Complainant named on the form was Liwell Mwenda Simon. The Complainant informed the Doctor that he knew his assailant, which the doctor translated into "well known to him". His injuries were listed as (1) pain in the jaw, (2) cut in the lower lip and (3) the loss of a canine. The date of the injuries was said to be 4 days earlier. The Form was signed and dated on 21st March 2018. The degree of injury was assessed as grievous harm.

9. The Record shows that the Appellant pleaded not guilty thereby making it necessary for the Trial Court to go through the process of finding him guilty. The evidence before this Court and the Learned Trial Magistrate is the corroborated evidence of the Complainant for each particular of the offence. The Appellant did not put forward any defence to the Trial Court. He gave an unsworn statement. In cross-examination he suggested at provocation, however he did not given evidence on that himself, nor did he call any witnesses. The Learned Trial Magistrate found him guilty.

10. In his Grounds and Written Submissions, the Appellant says that he did not have a fair trial (in accordance with ***Article 50 CoK 2010***), in particular he was not provided with the Prosecution evidence, nor was he assigned an advocate and that the evidence before the Trial Court did not prove the case beyond reasonable doubt. He argues that the Prosecution did not bring to Court the assault weapon, the blunt object used. That argument is disingenuous because the evidence before the Court clearly state that the blunt object used was the Accused's fists or hands.

11. As to whether the Appellant had a fair trial, he relies on the fact that he was not provided with witness statements. The record shows that the Learned Trial Magistrate directed that Witness Statements be provided. Witness statements were not given to the Accused and when he complained the direction was given again. On 3rd May 2018 the matter came before the Court for mention and was given a trial date of 10th May 2018. At no time after 24th April and throughout the Trial process did the Appellant raise that issue again. Therefore, the Trial Court

accepted that its directions were followed. He says he was denied access to the evidence and the particular piece of evidence he identifies is the blunt object that caused the injuries, namely his hands. The Appellant also states that he was denied the provision of legal services, in particular an Advocate. The Appellant has not put forward any argument to show that he has suffered an injustice as a result. He states that he did not know the consequences of committing a crime. Ignorance of the law is not defence. At present the provision of an advocate at public expense is provided only for capital offences. Therefore the Appellant was not entitled to an advocate as of right because he did not commit a capital offence. The record shows that the Appellant did not request the Trial Court to provide one. In the circumstances, that can only be considered an afterthought. Therefore. this Court is satisfied that the Appellant had a fair trial.

12. The Appellant now challenges the Prosecution evidence although he did not do so at trial. He says that the identification was unsafe. He argues that where there are inconsistencies in the evidence the Court must disbelieve the evidence, however he did not identify the inconsistencies neither in the Court below, nor in his Written Submissions. However, it is clear from the record that where material, the evidence of the assault, time and place, the assailant and the injuries is consistent and corroborated. In the circumstances, the Appeal against conviction must fail.

13. On the issue of sentence, the Appellant argues that the sentence handed down was a harsh sentence. He relies on his ignorance of the law to support that assessment. He argues that the intervention of the Appellate Court is justified because "the sentence meted upon him by the trial court was severe harsh and manifestly excessive in the circumstances of the case and replaces the same with a sentence of five (5) years of imprisonment (***Jackson Nashera v Republic CA No 21 of 2017)***. Nevertheless, the State concedes that the sentence of 30 years was excessive.

14. In ***Macharia V Republic [2003] 2 EA 559*** the Court of Appeal said; "The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evidence that the judge acted upon some wrong principles or overlooked some material factors… The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence.".

Here the Respondent is conceding that the sentence was excessive but does not go as far as to say it was wrong in principle.

15. The Learned Trial Magistrate heard the Appellant's mitigation. The Appellant said that he was a breadwinner and pleaded for leniency. In his Appeal he says 5 years is an appropriate sentence.

16. This Court must consider whether a custodial sentence is appropriate. Neither the Appellant nor the Respondent argue cogently for a non-custodial sentence. Before the Court is an assailant who attacked a stranger in a public place late at night. The attack was completely unprovoked according to the evidence. The Appellant shows no remorse whatsoever at the time, nor does he do so now. In the circumstances, a custodial sentence is appropriate. The Appellant was a boda boda rider, his conduct in a public place therefore has consequences. However the argument that 30 years is manifestly excessive is justified. In the circumstances, the sentence of 30 years is set aside and replaced with a term of 10 years imprisonment.

Order accordingly,

Farah S. M. Amin

JUDGE

Dated: 20th April 2020

Signed and Delivered in Voi this the 27th day of April 2020

In the Presence of

Court Assistant: Josephat Mavu

Appellant: In person by Skype Video Link to Manyani GK Prison

Respondent: Ms Mukangu by Skype Video Link to ODPP Voi.