REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J

CRIMINAL APPEAL NO 69 OF 2019

BARONGO SIANYO ATEBE.......APPELLANT

VERSUS

REPUBLIC................................RESPONDENT

(Being an appeal against judgment, conviction and sentence in Kisii CM Cr. Case No 2451 of 2018 dated 5th July 2019 before Hon S.N.Makila, SRM)

JUDGMENT

1. BARONGO SIANYO ATEBE, the appellant herein, was charged with the offence of grievous harm contrary to **section 234 of the Penal Code**. The particulars of the offence were that on the 22ndOctober 2018 at Riana location in Kisii South Sub-county within Kisii County unlawfully did grievous harm to Christine Gechembe Migosi. The appellant denied the charge and the prosecution called 3 witnesses to establish their case against the appellant. The appellant gave sworn testimony denying the offence.

2. The brief facts of the case was that Christine Gichembe Migosi (Pw1) testified that on 22nd September around 3:00 p.m. she was attacked by the appellant on her way to fetch water. The appellant cut her middle finger, head and right hand. Agnes Moraa Barongo(Pw2) told court that while she was in the toilet when she heard the appellant tell the accused '*si nilikukataza usiwe unanitukana?*' She then heard screams and found Pw1 cut on the head, left middle finger and right hand. The appellant then ran away. Daniel Nyameino (Pw3) working as a clinical officer at Kisii Teaching and Referral Hospital assessed Pw1's injuries as grievous harm.

3. The trial magistrate found the appellant guilty of the offence as charged, convicted him and sentenced him to serve 10 years imprisonment.

4. Being aggrieved by the above verdict the Appellant lodged the instant appeal and set out the following Grounds of Appeal namely:

> 1. The Learned Trial magistrate erred in law and misdirected herself when taking plea to unsound mind person thus occasioning miscarriage of justice.
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> 2. The learned Trial Magistrate erred in law as the proceedings were irregular and un-procedural.
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> 3. The trial learned magistrate sentenced imposed was harsh depending on the circumstances of the alleged offence.
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> 4. The trial learned magistrate was never impartial at all in handling this matter.
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> 5. Any other ground that may be adduced at the hearing of the appeal.

5. The appellant filed written submissions while Mr. Otieno, state counsel, made oral submissions.

6. In their submissions the appellant contend that Pw2 was related to the appellant. They argue that Pw2 was in the toilet when the incident occurred and did not witness the appellant assault the complainant. They submitted that the appellant suffered mental disability and was not aware of his actions when the incident happened. They cited the case of **George Ngugi Mungai v Republic [2000] eKLR** in support of his case.

7. Mr. Otieno conceded the appeal. He submitted that there were only 2 witnesses who identified the appellant and one of whom was the

appellant's wife. He further submitted that the wife of an accused person is not a compellable witness. He relied on **section 127 (3) of the Evidence Act** which provides instances when a wife can testify.

ANALYSIS AND DETERMINATION

8. This being the first appellate court, it is my duty to evaluate and reconsider afresh the evidence on record so as to arrive at my own conclusion while taking cognizance of the fact that I did not have the opportunity to see the demeanor of the witnesses (see: **Okeno v Republic [1972] EA 32**).

9. I am also aware that this court is not obligation to allow an appeal simply because the state is not opposed to the appeal. In **Odhiambo vs. Republic (2008) KLR 565** the Court held that:-

> "the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."

10. Having carefully looked at the record before me, the appellant raised the defence of insanity when he was arraigned in court after the particulars of the charge was read to him. The trial court directed that a mental assessment be done. A medical report from Kisii Teaching and Referral Hospital found the accused to be mentally stable. **Section 12 of the Penal Code** which states a follows;

> "12. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission, but a person may be criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or more of the effects above mentioned in reference to the act or omission."

11. The appellant when placed on his defence admitted that there was a confrontation between him and Pw1. He denied assaulting her but testified that she was assaulted by other people. The argument by the appellant that the trial magistrate failed entered plea of a person of unsound mind therefore fails. The appellant was assessed and found to be mentally stable to stand trial and thus cannot claim that at the time of taking plea he was unfit to stand trial.

12. I now turn to whether Pw2 was a compellable witness. **Section 127 (2) (ii) of the Evidence Act**, provides that " *save as provided in subsection 3 of this section the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged.*"**Section 127(3)(c)** of the said Act which states as follows:-

> "In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person, in any case where such person is charged –
>
> (c) In respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them, and not otherwise."

13. Mr. Otieno, while conceding to the appeal cited the case of **Julius Mwita Range v Republic [2003] eKLR** where the court found as follows;

> "We are certain in our minds that the marriage between the appellant and Elizabeth Nyaitoto was a marriage covered under **Section 127 (4)** and thus Elizabeth Nyaitoto was in law still the wife of the appellant notwithstanding that they were living separately. She was a competent witness but could only be called as a witness upon the application of the appellant who was the person charged. She was called by the prosecution and this was not proper as that was making her a compellable witness.

The defence did not apply for her to be called nor did the defence apply for her to proceed with her evidence now that she had been called and was thus made available. We do feel the learned judge was plainly right in not allowing her to testify for the prosecution and we cannot fault the judge in his well-considered decision on that aspect."

14. In the instant case, Pw2 testified that she is the appellant's wife, similarly the probation report also reveal that she is the appellant's wife and having found that she is the appellant's wife, Pw2 was prohibited by the provisions of **section 127 the Evidence Act** from testifying against the appellant.

15. The next question for determination is whether the prosecution, based on the evidence of Pw1 and Pw3, proved their case to the required standard. **Section 4 of the Penal Code** defines grievous harm as '…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'.

16. Pw1 gave clear testimony that she was attacked and cut with a *panga* on the head, right hand and left middle finger. On cross examination she testified that she did not know why the appellant assaulted her.

17. Pw1 testified that the appellant was well known to her as he was her father in law and identified him as the perpetrator of the crime. In **Anjononi & Others vs the Republic [1980] KLR 59** it was held that:-

> "The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; 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."[Emphasis added]

The court in **Wamunga v. Republic (1989) KLR 424 at 426** had this to say:

> "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 a conviction."

18. Pw1 testified that the incident took place at 3:00 p.m. in broad day light and identified the appellant as the assailant. Having considered the circumstance under which the offence was committed I find that the appellant was positively identified by Pw1.

19. Pw3 produced a P3 form and the testified that Pw1 had injuries on the head hand and the middle finger on the left hand was cut. Pw3 having corroborated the injuries sustained by the complainant, I am satisfied that the prosecution proved the ingredients of the offence of grievous harm beyond reasonable doubt. The appellant's defence that the complainant was beaten by other persons whom he could not name, could not displace the evidence mounted against him.

20. The appellant's defence of insanity also fails as there was no evidence before the trial court indicating that the appellant was suffering from mental disorder at the time the offence was committed. For the appellant to rely on the defence of insanity, he ought to have proved on balance of probabilities that he was suffering mental illness at the time the crime was committed. The Court of Appeal in **Leonard Mwangemi Munyasia v Republic MLD CA Criminal Appeal No. 112 of 2014 [2015]eKLR**, held that;

> We are of the view that a court cannot, as the trial Judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person. There is also medical history of the accused person to be considered as the backdrop.

21. I now turn to the issue of sentence as the appellant contend that the sentence meted by the trial court was harsh and excessive. The Court of Appeal in **Margaret Licha Yogo v Republic [2020] eKLR** held as follows:

> "Comparatively, the general principles that an appellate court adopts in an appeal relating to sentence were authoritatively stated by **Nicholas J** in the South African case of ***R - v - Rabie*** **{1975} (4) SA 855 (A) at 857D-F** as follows:
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> 1. "In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal-
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> (a) should be guided by the principle that punishment is "pre- eminently a matter for the discretion of the trial Court"; and
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> (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised
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> 2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."
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> Further, in the case of **Aliste Anthony Pareira – v - State of Maharashtra, {2012}2 S.C.C 648 para 69**, the Indian Supreme Court held that:
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> "Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances""

22. Section 234 of the Penal Code provides that anyone convicted of the offence of grievous harm is liable to life imprisonment. The trial court considered the appellant's mitigation and the probation report before sentencing the appellant.

23. I find that the 10 year sentence meted by the subordinate court was lenient as the complainant suffered serious cut injuries and also lost her left middle finger.

24. Having considered the evidence presented before the trial in its entirety, it is my view that the appellant was properly convicted on the offence of grievous harm and I have no reason to interfere with both the conviction and the sentence.

25. Accordingly, the appeal fails and is dismissed.

DATED and DELIVERED at KISII this 30th day of JULY 2020.

A.K NDUNG'U

JUDGE