



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 141 OF 2019

(CORAM: F. GIKONYO J.)

HUSSEIN SAID.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in Isiolo CMCCRC No. 430 of 2016 by HON. E. NGIGI P.M ON 21/8/2019)

JUDGMENT

1. The appellant was charged with causing grievous harm contrary to **Section 234 of the Penal Code**.
2. The particulars of the offence are that on 27/07/2016 at Pepo la Tumaini area in Isiolo County within Eastern region unlawfully did grievous harm to ABDIWAHAB AHMED.
3. The trial court convicted and sentenced the accused to serve four (4) years imprisonment for causing grievous harm to ABDIWAHAB AHMED.
4. The appellant was aggrieved by his conviction and sentence and filed this appeal. In the petition of appeal, he cited six (6) grounds. The overarching ground of appeal was that the prosecution did not prove its case beyond reasonable doubt. Other strands of arguments also presented are **that the learned magistrate erred in law and fact in; (1) relying on inconsistent and contradictory evidence; and (2) conducting the trial irregularly.**

Submissions

5. The appeal was canvassed by way of written submissions. The appellant submitted that the charge was not proven beyond reasonable doubt. According to the appellant, the complainant's evidence was not corroborated since the witness who was called found the complainant already bleeding. To him, there was need for the prosecution to call at least one eye-witness to the events that led to the complainant's injury. Furthermore, the appellant urged that the injury complained of as grievous harm was not proved. He pointed out that the P3 form classified the injury as maim. Thus, the injury was very minor.
6. In addition, the appellant submitted that the trial court failed to take into consideration his defence that the entire case was made up because of differences arising from a land dispute. He relied on **John Angolo & 2 others v Republic [2016] eKLR** and **Patrick Amutsa Ikoha v Republic [2018] eKLR** to support his appeal.
7. The respondent submitted that they proved the ingredients of grievous harm beyond reasonable doubt. First, based on the definition of grievous harm under **Section 4 of the Penal Code** the injuries sustained by the complainant were grievous harm. Secondly, the appellant was positively identified as the assailant by the complainant which was corroborated by **PW3** and **PW4**. Therefore, his identification was free from error.
8. Moreover, the prosecution argued that the trial magistrate considered the appellant's defence and dismissed it for not being substantiated. Therefore, they urged the court to dismiss the appeal.

ANALYSIS AND DETERMINATION

Duty of court

9. The duty of first appellate court is to re-evaluate the evidence tendered before the trial court a fresh and make own findings, but bearing in mind that it did not have the advantage of hearing and observing the demeanor of witnesses. See Okeno vs. Republic [1972] E.A 32.

Elements of the crime

10. According to **Section 243 of the Penal Code:**

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

11. Accordingly, for a conviction to ensue for the offence of causing grievous bodily harm, the prosecution must prove two things beyond reasonable doubt: (1) that the complainant suffered grievous harm; (2) which was unlawfully occasioned by the appellant. Positive identification of the assailant is therefore essential element.

Grievous harm

12. **Section 4 of the Penal Code** defines grievous harm as follows:

“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.

13. The evidence of the complainant was that the accused allegedly jumped on him and hit him twice with a panga. **PW3** stated that when he arrived at the scene he found the complainant bleeding. **PW4** who was at the station when the complainant came to report the matter stated that the complainant had an injury on the head. Of pointed significance is the medical evidence by **PW2** who examined him and filled in a P3 Form; that upon examination, the complainant had been injured by a sharp object and he classified the injury sustained as ‘‘maim’’. In the definition provided above: -

“grievous harm” means any harm which amounts to a maim... [underling mine]

14. Therefore, I find that the complainant sustained injuries amounting to a maim, thus, grievous harm.

Was the grievous harm caused by the appellant?

15. **PW1 Abdiwahab Ahmed** stated that on 27/07/2016 when he was informed that some people had invaded a plot belonging to the youth he proceeded to Pepo la Tumaini area. He found many people gathered there in groups. When an enforcement officer with the county government arrived **PW1** gathered the youths so that the officer could address them. Upon reaching where the youths were- i.e. on the upper side- he asked who had built a timber house on the plot and he said that it would be demolished. No sooner had he finished his statement than the accused jumped on him and hit him on the head twice. He was injured and began bleeding. The people assisted him, took him to the police station and thereafter the hospital.

16. **PW2 Daudi Dabaso** sub – county medical officer working at Isiolo Referral Hospital told the court that on 27/7/2016 **PW1** came to hospital with blood on his t-shirt and jacket. He examined him and found that he had a deep cut on the forehead which was bleeding profusely. He had been cut with a sharp object. He was stitched and put on medication. The extent of the injury was classified as maim.

17. **PW3 Patrick Muriuki** stated that on 27/07/2017 at 1200 hrs he was at Pepo la Tumaini when he heard a loud commotion. He went to see what was happening and saw **PW1** bleeding from the top of the right eye. **PW1** was saying “*Wahuki umenikata na panga*” while pointing at the assailant who is the accused. He then took **PW1** to the police station and thereafter the hospital.

18. **PW4 No. 100519 PC Said Kassim** attached to Isiolo Police Station performing general duties stated that on 27/07/2016 he was on duty when **PW1** came and reported to have been assaulted by the accused using a panga. At the time of reporting the complainant had an injury on the forehead. He booked the report and referred him to the hospital. He then recorded his statement and that of the witnesses. On 11/08/2016 he arrested the accused who brought himself to the station.

19. At the close of the prosecution’s case the accused gave a sworn testimony and called one witness. **DW1 Hussein Said Hassan** stated that they had been allocated land by the former district commissioner. In 2015, their Member of Parliament offered to have the land surveyed and all of them to mark their boundaries and put up structures. The complainant’s brother approached him with an offer to buy the land at KShs. 50,000/-. He declined but the complainant’s brother added KShs. 5,000/- to the offer of which he also declined. As a result, **PW1’s** brother told him to accept the money or he would send him to jail. On the 8th day from when he was threatened he heard screams and noises while he was herding. He rushed to the scene and found a group of young men running away to Bula Pesa where there was destruction of their houses including his. They reported the matter but was later arrested at 2.00AM. – did not report about the threats and the options given to him. He only reported after the houses had been demolished.

20. **DW2 Fatuma Kananu** testified that the land was given to a group of 57 women which she is part of where they have built small houses on the plots. Later, a group of young men who were claiming the land and sent by the chief came and demolished their structures and in the process the structures fell on one of them. She affirmed that **PW1** was not injured by the accused for he was not at the scene.

21. **PW1** was categorical that he approached the group of youth on the upper side. He asked who had built a timber house on the plot and then said to them that the structure would be demolished. He stated that after making this statement, the accused jumped on him and hit him

on the head twice. He identified the accused as the assailant. He knew him well prior to the incident. PW2 found him bleeding; he did not see the appellant assaulting the complainant. There was, therefore, no other witnesses who saw the appellant attack the complainant.

22. I am aware that a court may convict on the evidence of a single identifying witness. The complainant stated that it is the appellant who injured him. This is a person he knew, and therefore the identification was one of recognition. However, even in cases of identification on recognition, care should be taken and examine the circumstances of the identification in order to eliminate any danger of mistaken identity or delusion or malice on the part of the witness. In the case of **PAUL ETOLE AND ANOTHER v REPUBLIC C.A. NO 24 OF 2000 (UR)** the court stated as follows:

“The prosecution case against the second Appellant was presented as one of recognition or visual identification. The appeal of the second Appellant raise problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.”

23. In light thereof, what does the evidence on identification portend? It bears repeating that **PW1** was the only person who identified the appellant as the assailant. **PW3** who was ten (10) meters away from the scene stated that when he heard noises he went to the scene and found the complainant bleeding. He however stated that **PW1** was saying “*Wahuki umenikata na panga*” while pointing at the accused. **PW1** stated that the accused was referred to as ‘*Wahuki*’. This was not neither confirmed nor verified by any of the prosecution witnesses or the appellant. It bears repeating that, notably, **PW3** did not witness the complainant cut the complainant. The evidence shows that there were many people at the scene who would have witnessed the incident but none was called as a witness to support that the appellant cut the complainant. To this mix add what **PW4** stated; that he had looked at the statements which formed the basis of his charging the appellant. But, during cross-examination he stated that **PW3’s** statement was neither in the said statements nor his investigation diary. This raises doubt. On whose statements did **PW4** rely in preferring charges against the appellant?

24. I am prepared to state that this is a case where evidence was barely sufficient yet crucial witnesses were not called. On this subject I will be guided by the case of **BUKENYA & OTHERS VS. UGANDA (1972) EA 549**, where the former East Africa Court of Appeal held that:

“The prosecution must make available all the witnesses necessary to establish the truth, even if their evidence may be inconsistent. That the court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case; and where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

25. In the case before me, it is surprising that the prosecution did not call any of the many youths who were at the scene and who saw the appellant cutting the complainant with a panga. Notably, the crime is said to have taken place in the presence of a crowd of youths and specific proof of the person who caused the injury is important. Accordingly, I find this omission to be ominous as well as insidious especially when looked at in light of the defence herein which I will discuss at length; a justification is made out for drawing an inference that had witnesses who were present at the scene been called, they would have adduced evidence that would have prejudiced the prosecution's case.

26. I will repay my debt; in his defence the appellant stated that he has been framed because he refused to accept the complainant’s brother offer to buy his plot even after he offered an improved price. He stated that he was not at the scene **DW2** affirmed that the appellant was not at the scene. She stated that when the group of young men whom the complainant was part of was demolishing the structures they fell on him and he got injured. From the judgment the trial magistrate inclined to her testimony that the land was given to a group of 57 women of which she is part where they have built small houses at the plots. By believing that she was telling the truth on the land issue, it becomes obscure that her averments that the appellant was not at the scene were ignored. The trial magistrate relied solely on the complainant’s evidence without due regard to the defence in the overall impression of the case.

27. From the foregoing, although the complainant sustained injuries, it is not established that it was the appellant who inflicted the injuries. There was no positive identification of the appellant as the assailant. The complainant’s evidence has gaps which required to be filled up. However, the evidence submitted by his witnesses tends to cast more doubt and raise more questions in the court’s mind rather than answers as to whether the appellant injured the complainant. The prosecution did not therefore prove beyond reasonable doubt that the appellant unlawfully occasioned grievous harm upon the complainant contrary to **Section 234 of the Penal Code**.

28. Consequently, I find the appeal to be meritorious. I allow it. As a result, I quash the conviction and sentence of the appellant. The appellant is acquitted of the offence of causing grievous harm. He shall be set free forthwith unless otherwise lawfully held in custody.

Dated, signed and delivered at Meru this 29th day of July 2020

F. GIKONYO

JUDGE