



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 9 OF 2020

ANTHONY OMONDI MUREMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the judgment, conviction and sentence in Siaya Principal Magistrate's Court criminal Case No. 644 of 2014 delivered on the 4th day of May 2020 by the Honourable J. O. Ongondo, Principal Magistrate)

JUDGMENT

1. The Appellant herein **Anthony Omondi Murema** was charged with the offence of Assault causing actual bodily harm contrary to section 251 of the penal code, Laws of Kenya. The particulars are that on the 26th day of November 2013 at Nyajuok sub location in Siaya District within Siaya County the appellant unlawfully assaulted **GRAVIN ODUOR OLULA** thereby causing him actual bodily harm.

2. The appellant pleaded not guilty to the charge and after a full trial which from the trial court history took too long owing to application after application being filed both in the lower court and High Court, the trial court found the appellant guilty of the charge and convicted him accordingly. He also sentenced the appellant to one year suspended sentence on condition that he keeps the peace.

3. Aggrieved by the judgment, conviction and sentence, the appellant filed this appeal which he later amended on 2nd September, 2020, with leave of court, setting out the following grounds of appeal:

1. **THAT** the Learned Magistrate erred in law and in fact in finding the Accused person guilty of the offence when the evidence produced by the prosecution was not sufficient to convict the accused person.
2. **THAT** the Learned magistrate erred in law and in fact when he disregarded the physical evidence which contradicted the testimony of the witnesses.
3. **THAT** the learned magistrate erred in law and in fact when he relied on the contradictory evidence of the prosecution witnesses.
4. **THAT** the learned magistrate erred in law and in fact when he found the accused person guilty yet there was insufficiency of physical evidence.
5. **THAT** the learned trial magistrate was biased against the appellant
6. **THAT** the learned Magistrate erred in law and in fact when he dismissed the Appellants Application dated 17th June 2017 when he failed to consider the merits of the application.

4. The appellant urged this court to allow the appeal, set aside the conviction and sentence imposed.

5. This being the first Appeal, the court is required to re-analyze, re-assess and re-evaluate the evidence adduced before the trial court and reach its own independent conclusion giving an allowance to the fact that it neither heard nor saw witnesses as they testified. See **Okeno v Republic [1972] EA 32** as restated in various decisions including **Alex Kinyua Murakaru vs Republic [2015] e KLR HCCRA 211 of 2011 High Court in Nyeri**).

6. In **Okeno vs. Republic (supra)** the Court of Appeal for Eastern Africa set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

7. Revisiting the evidence as adduced before the trial court, PW1 Gravin Oduol Olula who is the complainant testified that he was lawfully grazing cattle he had been assigned by his employer in a field that was not occupied. He stated that he had taken the livestock at about 11am to graze and that at about 2.30pm, he went for a call of nature and when he returned to the grazing field, he found the accused person chasing the livestock from the grazing field. PW1 further stated that when the accused person saw him, the accused person asked him if he was the owner of the animals and PW1 answered in the affirmative. PW1 accordingly started driving the herd away from the field.
8. PW1 further testified that the accused person hit him without any provocation with a stick. He stated that the accused person after hitting him told him that he (the accused) was a soldier. He added that it was after the accused had hit him that **PW 2**, Oluoch who had accompanied PW 1 to graze the herd told PW1 that they should go home.
9. According to PW1, when they reached home, they found their grandmother who advised them to go to hospital. PW1 was treated at Tingwangi hospital and he was stitched after which went and reported at Siaya police station. He had his P3 form filled at Siaya District Hospital. He further stated that he got injured behind the head.
10. On being cross examined, PW 1 stated that he never left the herd unattended. He admitted that the herd went into a field that had some **young trees growing** and that he assisted the accused drive the herd from the field and then the accused hit him with a **club**. PW1 stated that after being hit by the accused person, Oluoch – PW 2 then told him that they go home and seek medication. He further stated that he sought treatment at about 2.00pm before reporting to the police station at about 3pm where he was issued with a P3 form. He further stated that the weapon used was not sharp.
11. On being reexamined, PW1 stated that he got a cut where the accused hit him and that PW 2 saw the injury.
12. **PW 2 Charles Oluoch Juma** testified that on the material date, he left with PW 1 to go and herd the cattle and that at about 2pm, PW 1 went to answer a call of nature. That it was while PW 1 was answering a call of nature that PW2 saw the accused come and start chasing away the animals from the accused person’s shamba. That when PW 1 returned, he heard PW 1 tell the accused person that the animals were PW1’s and at that point, the accused without any provocation hit PW 1 with a rungu and PW 1 fell down. PW 2 then took PW 1 and the herd away. PW 1 went for treatment at Tingwangi and later went to report to the police station and they recorded their statements.
13. On cross examination, PW 2 stated that he recorded and signed his statement two days after the incident. He further stated that they never left the herd of cattle unattended. He stated that he heard the accused ask who the owner of the cattle was as he chased the animals away from the farm. He said that he also heard the accused tell PW 1 that he (the accused) was a soldier and then proceeded to hit PW1. He stated that the rungu had a sharp edge and that is what caused the cut.
14. **PW3 Agutu Firirika** from Nyajuok testified that on 26/11/2013, the complainant who was her grandson who had gone to herd cattle returned home while bleeding. She then advised him to call his employer and they escorted him to Ting Wangi hospital where he was treated and he recorded his statement at Siaya police station. She stated that the complainant told her that it was the soldier who had beaten him. On cross examination, PW3 stated that PW1 took the cattle to graze at 11am and returned home at 2pm while bleeding. On being asked about the time difference between her evidence and her statement she stated that that was what she recorded with the police.
15. **PW4 Nyamwembe Simon Onderi** a Clinical Officer attached to Siaya County Referral Hospital and who attended to PW1 testified that he saw PW1 a day after the assault. He stated that PW1 was in a fair condition and had a cut on the left side of the head. He assessed the injury as harm, filled the P3 form on 27/11/2013 which he produced as exhibit 1. On being cross examined by Mr. Wanyanga, he stated that the injury was caused by a sharp object.
16. **PW5 PC Peter Koshen** of Siaya Police Station and the Investigating Officer testified that he received an assault report from PW1 on the material day of 26/11/2013 at about 17.36 hours (5.36pm) to the effect that the complainant had been assaulted by the appellant herein Antony Murema alia Soldier. He stated that PW1 had a head injury and he issued PW1 with a P3 form which was returned on the 18th day of August 2014.
17. On cross examination, PW5 stated that the incident happened at 11am and that the grandmother to the complainant stated that the complainant returned home at 11am. He stated that no signal was sent to his place of work. He further stated that a sharp object was used. He stated that according to PW1, the accused/appellant approached him with a rungu. He confirmed that a rungu is not a sharp object.
18. Placed on his defence, the appellant gave evidence as DW1 and stated that on the material day as he was leaving his house on a bicycle to go to Bondo in the morning at 11am, he saw some animals grazing in his plot where he had planted some eucalyptus tree seedlings that were still young at the time as they were taking root. That he chased the animals away then went on his errands. Upon return at about 2pm or thereabouts, he saw the same animals in his garden again and on asking who was with the animals, he had no answer and he proceeded to chase them away again as the animals were not accompanied by anyone. He stated that as he was chasing the animals away, PW1 appeared and stated that the animals were his and they assisted each other to drive them away from the shamba.
19. According to the appellant, without any warning he felt a sharp pain on his back as if he had been hit with a stick and when he recovered from the shock, he turned around and saw PW1 with a stick, wanting to hit the appellant again. That as a reflex reaction, being a military

officer trained in self defence, he hit PW1 in the groin area and then gave him a kick on the head and PW1 escaped and that the appellant then proceeded to drive the animals to the homestead of PW3 as he knew that they were hers and explained to her what had happened, before leaving for his home and heard nothing of the incident.

20. According to the appellant, while he was on his official duties, he heard that the police were looking for him on the issue of assaulting PW1. He stated that he did not go back to Siaya as he was waiting for a warrant of arrest through his employer. He then went to see the Legal Officer of his employer Lt. Col. (Rtd.) Moses Sande who called PW5 and requested PW5 to dispatch the warrants of arrest to Lt Colonel Moses Sande so that the latter could present the appellant to stand trial. According to the appellant, the warrants have never been received to date. He stated that on the 18th day of August 2014, the above mentioned legal officer of the Kenya Defence Forces surrendered the appellant to court where he took his plea.

21. The appellant testified that it was not his intention to hit the complainant but that he was interested in driving the animals from his shamba and that he hit the complainant in self defence. On cross examination he stated that he never reported the encroachment by the animals on to his shamba to the village elder.

22. **Daniel Ochieng** a witness for the appellant testified as DW2 and stated that on the material day as he was repairing a motor cycle, at about 1.30pm or thereabouts, he saw the Complainant enter into his gate and he was offered a seat and they made small talk for a few minutes and the Complainant left. He stated that the Complainant was alone and he never saw any other person with the herd apart from the Complainant. He stated that he knew the Complainant as a herdsboy as he had seen him severally. That after about 30 minutes or thereabouts the Complainant returned to DW2's homestead running and told DW2 that a certain boy had beaten him and taken away his cattle.

23. **DW2 further stated that** when asked to explain himself, the Complainant described how the said 'boy' looked like and DW 2 told the complainant that the said 'boy' was the owner of the plot where his animals were and that the 'boy' was a soldier, and that the Complainant then left. DW2 stated that the Complainant had no injury and that there were no blood stains on the clothing of the Complainant.

24. **The appellant also called DW3** one Stephen Oduor Waga who testified that on the material day of 26/11/2013, at about 1.30pm or thereabouts, he was with **DW2** who is his brother at their compound when the Complainant went into their compound uninvited, was offered a seat and they talked for a few minutes then the Complainant left. He stated that the complainant was alone and was not accompanied by any other person. DW3 further stated that after 30 or so minutes, they saw the Complainant return to their homestead running and told them that a certain 'boy' had taken his animals. That when the complainant explained himself, DW2 and DW 3 told him that that was not a 'boy' but the owner of the plot where the animals were grazing and that the said 'boy' was a soldier, upon which the Complainant then left. He further stated that when the Complainant returned the second time, DW3 did not see any injury or blood on the clothing of the Complainant.

25. **DW 4** Charles Omollo Onyango testified for the appellant and stated that on the material day, there was a funeral and he saw the Complainant for the first time that night after the burial. He stated that at about 1 am in the night, there was a commotion and the Complainant was being beaten by a mob apparently because of a lady and that he intervened to save the Complainant by taking the complainant into DW4's house and locked him inside the house. He stated that since the crowd was baying for the blood of the Complainant and they wanted to break the door to the house where the complainant was hiding, DW4 rushed the Complainant out of the house and that was the first time and last time that DW4 saw the Complainant. He stated that by the time he was taking the complainant in to his house for safety, the latter had been given a thorough beating.

Appellant's Submissions

26. The appeal was canvassed by way of written submissions. According to the appellant through his counsel Mr. Wanyanga, the prosecution evidence adduced against the appellant fell short of the required standard of beyond reasonable doubt to find the accused guilty of both offences. Counsel submitted that the exculpatory evidence overwhelms the inculpatory evidence as produced by the prosecution.

27. That the field where the animals were grazing belonged to the appellant herein and that PW1 admitted that indeed there were young trees growing there and thus the Appellant had the right to remove the herd of animals from his field.

28. It was further submitted that the evidence as adduced by the prosecution is contradictory and inadequate and thus incapable of convicting the appellant. According to Mr. Wanyanga, PW5 testified that the incident happened at about 11am and that whereas PW3 in her statement stated that the incident happened at 11am and she saw her grandson come back to her compound at about 11am, in her examination-in chief, PW3 changed her testimony and stated that the incident happened at about 2 pm, while PW1 in his statement stated that he alone left home at around 11.00am to graze the animals and that according to PW 2 they left together. It was submitted that the statement of the Complainant is in first person and not in plural so it is evident that he was alone when he went to graze the animals.

29. It was further submitted that it is not clear from the statement of PW3 on the person that she first saw at about 2pm.

30. Further, that regarding the weapon used to hit PW1, PW1 stated in his statement that the accused hit him with a rungu and in his evidence in chief he stated that he was hit with a big stick, while on being cross examined, he stated that he was hit with a club and that he stated that the weapon used was not sharp. On the other hand, it was submitted that PW2 stated in his statement that a rungu was used and that the said rungu had a sharp edge, and that W 4 state that a sharp object was used to inflict the injury to the head of the Complainant.

31. The appellant's counsel further submitted that PW5 stated that there was provocation but did not state from whom. That PW5 further stated that a sharp object was used to inflict the injury and that he concluded by saying that a rungu is not a sharp object. According to the appellant's counsel, the appellant being a person employed in the armed forces has been trained on observations and that he clearly stated what had happened and his evidence was not challenged by the prosecution and that furthermore, his witnesses were never cross examined by the prosecution.

32. It was further submitted that the P3 Form shows that the injury was on the left side of the head and not behind the head as stated in evidence. Counsel further submitted that there was some alteration on page 2 item 2 of the P3 Form on the approximate age of injuries, from 2 days to 1 day.

33. According to Mr. Wanyanga, the main contradiction in the evidence is between the evidence given by PW 1 and PW 2 and the evidence given by PW 4 and PW 5. He submitted that whereas PW 1 and PW 2 stated that the weapon used was a rungu and PW 2 went further stated that the rungu had a sharp edge and this is what caused the injury. PW4 in his statement stated that the injury was caused by a sharp object, whereas PW5 the investigating officer stated that a rungu is not a sharp object and that he had stated that a sharp object was used to inflict the injury to the Complainant.

34. In counsel's view, both the Complainant and the accused person stated that a sharp object was never used during the altercation hence the appellant could not be convicted for the offence as the object used has not been identified nor has it been produced. He also submitted that there are no bloody clothing produced to show that clearly the Complainant bleed after the assault.

35. On each of the grounds of appeal, the appellant's counsel combined the 1st, 2nd and 4th Grounds of Appeal and argued them together as one. He maintained that the Prosecution never adduced any physical evidence to prove that indeed the accused person suffered physical harm. That the item used to visit harm on the accused person was not produced nor the bloody clothe if any to prove that the complainant suffered physical harm. Further, it was submitted that no treatment notes were produced to confirm how the Complainant was treated, and that the bloody clothes and treatment notes could have been conclusive proof that the Complainant suffered harm.

36. On ground number 3 of the Grounds of Appeal which attacks the appellant's conviction on the basis that the learned magistrate erred in law and in fact when he relied on the contradictory evidence of the prosecution witnesses, it was submitted that the prosecution witnesses presented contradictory evidence in that:

i. PW1 stated that the Appellant hit him with a stick without any provocation. A stick means a thin piece of wood that has fallen or been cut off a tree

ii. PW 1 stated that they went home together with PW 2.

iii. PW 2 stated that the Appellant hit the Complainant with a rungu – Rungu means a wooden throwing club or baton bearing special symbolism and significance in certain East African tribal cultures. It is especially associated with Maasai morans (male warriors) who have traditionally used it in warfare and for hunting.

iv. PW 2 stated that he ran home after the incident alone.

v. PW 3 stated that the Complainant came home bleeding at 11.00am and she never mentioned seeing PW 2 as per her witness statement but she changed this time to 2 pm

vi. PW1 stated that he sought treatment at 2pm yet the incident is supposed to have happened at 2pm

vii. PW 4 stated that he received the complaint from PW 1 at 17.36hrs yet PW 1 stated that he reported to the police at 3pm.

viii. PW1 stated that the weapon used was not sharp yet PW 3 stated in evidence that the weapon used was a sharp object.

37. It was submitted that these contradictions are enough to acquit the Appellant as they do not prove beyond a reasonable doubt that the appellant committed the offence as charged. Reliance was placed on **Halkano Mata Bagaja vs Republic [2015] e KLR, HCCRA 2 OF 2015 High Court at Meru** where the court stated that:

“The other complaint raised by the appellant is that there were inconsistencies in the evidence of PW1 and PW3 in that while PW1 said he was injured on the head and abdomen, PW3 found that he was injured on the knee, shoulder and abdomen. May be the evidence of another independent witness would have resolved these discrepancies. The prosecution did not bother to clarify the said inconsistencies. PW1 must have known where he was injured. I find the prosecution evidence to be barely sufficient to prove the charge and there was need for other independent corroborative evidence. Having considered the evidence in its totality, it is my view that the omission to call any independent witness in this case leaves the court wondering whether the prosecution was holding back some evidence that may have been adverse to its case. A doubt is raised in the prosecution case and I resolve the one in favour of the appellant.

The conviction is unsafe and I hereby, allow the appeal, quash the conviction and set aside sentence.

The applicant is set at liberty forthwith unless otherwise lawfully held.”

38. On the 5th Ground of Appeal, the appellant's counsel submitted that a look at the judgment clearly shows that the Honourable Magistrate did not consider the evidence of the Appellant's witnesses, yet the said evidence was not challenged in any way the prosecution. According to the appellant's counsel, the only question asked by the prosecution was if the Appellant reported the assault to the police.

39. Regarding ground of appeal number 6, it was submitted that the court never considered the exculpatory evidence of the Appellant in that PW1 and PW2 clearly stated that there were young trees growing in the shamba they took the herd to graze, and that the Appellant by driving the herd from the shamba, was trying to protect the young trees that were growing.

40. The appellant's counsel further lamented that the trial court also never considered the element of self defence as put forth by the Appellant. It was submitted that from the evidence of PW1 and PW2, the Appellant first started chasing away the herd from his shamba when he tried to call out the person who was handling the herd. That PW2 stated that the herd was never left unattended which means that when PW1 went for the long call, PW2 was with the herd and thus he never answered the Appellant when the Appellant called out on the person who was handling the herd.

41. According to Mr. Wanyanga, it clearly calls into question if PW2 was there at all as he never answered when the appellant called out and that there is no evidence on where the Appellant got the stick or ring from by both PW1 and PW2.

42. In respect of ground number 8 of the grounds of appeal, it was submitted that the sentence was too harsh under the circumstances since the Appellant did not instigate the violence; he was clearly protecting the young trees that were in his shamba and that he removed the herders twice from the shamba. It was therefore submitted that the sentence was too harsh as the evidence herein is contradictory and the court never considered the exculpatory evidence that the herd was destroying the appellant's young trees.

43. On ground 7, the appellant's counsel submitted that the prosecution never disproved the Appellant's defence of self defence as the Appellant was never questioned on this part of his evidence. Reliance was placed on **MARTIN IKINDI NZIOKA vs REPUBLIC (2020) e KLR HCCRA 76 OF 2014 MACHAKOS HIGH COURT** where the court stated:

“The defence of self defence derives from section 17 of The Penal Code. Lawful self -defence exists when (1) the accused reasonably believes that he or she is in imminent danger of an attack which causes reasonable apprehension of death or grievous hurt; (2) the accused reasonably believes that the immediate use of force is necessary to defend against that danger, and (3) the accused uses no more force than is reasonably necessary to defend against that danger. In no case does it justify the inflicting of more harm than it is necessary to inflict for the purpose of defence. An accused person raising this defence is not expected to prove, beyond reasonable doubt, the facts alleged to constitute the defence. Once some evidence is adduced as to make the defence available to the accused, it is up to the prosecution to disprove it. The defence succeeds if it raises some reasonable doubt in the mind of the court as to whether there is a right of self defence. (see Selemani v. Republic [1963] E.A., at p. 446).”

44. Attacking grounds 9 and 10 of the grounds of appeal, the appellant's counsel submitted that the Honourable Magistrate was biased against the Appellant in that despite the court having knowledge that the Appellant was an army officer, the court never took in regard that the warrants of arrest were to have been sent to his employer; and Section 58(f) of the National Police Service Act which provides that:

“Subject to Article 49 of the Constitution, a police officer may without a warrant, arrest a person(f) whom the police officer suspects upon reasonable grounds of being a deserter from the armed forces or any other disciplined service.”

45. According to the appellant's counsel, the section means that for any other offence, the police must send a warrant of arrest to the army for the arrest of a disciplined officer, which was not done and the net effect is that the army was not **OFFICIALLY** aware that the Appellant had a criminal case in a civilian court and thus he was put on active duty and whenever duty called he was considered and the appellant had to miss court on several occasions due to the call of duty, leading to his being remanded in custody on 7th day of October 2019 after missing court on the 2nd day of September 2019 with the court refusing to hear his plea of his whereabouts as he could not produce any official documents of his whereabouts.

46. It was submitted that the court refused to take judicial notice of the omission and failure of the Investigating Officer to send the warrants of arrest to the employer of the Appellant who could have ensured that the Appellant attends court.

47. It was further submitted in reiteration that despite the prosecution witnesses giving contradictory evidence and not providing the necessary documentary evidence of a bloody shirt and treatment notes, the court went on to convict the Appellant, without considering the evidence of the Appellants witnesses who were never cross examined by the prosecution. It was therefore submitted that the court was biased against the Appellant herein and did not properly consider the evidence before it.

48. Further lamentation was that the trial court failed to consider that the intention (***mens rea***) to cause violence and harm on the complainant did not exist. In addition, it was submitted that the court's failure to allow the Appellant application dated 17th June 2017 where the Appellant requested to be furnished with the mpesa records of PW 4 and others was as a result of bias against the Appellant herein as the Article 159(2)(d) of the constitution states, “justice shall be administered without undue regard to procedural technicalities.

49. The appellant's counsel urged this court to quash the appellant's conviction and set aside the sentence imposed on him and set him at liberty.”

50. Opposing the appeal, the prosecution counsel Mr. Okachi made oral submissions and contended that the prosecution proved its case against the appellant beyond reasonable doubt to warrant the conviction reached by the trial court. On sentence it was submitted that the trial court gave the appellant the opportunity to mitigate and that sentence was lawful and lenient.

51. On sufficiency of evidence that convicted the appellant, it was submitted that PW1 conversed with the appellant in broad daylight at 11.00am before the appellant followed PW1 and hit him with a stick after a small exchange between the two on the issue of cattle that the victim was grazing on the appellant's land. It was submitted that PW1 was treated in Hospital and a P3 form filled and produced in evidence by PW4 whose evidence was that the injuries sustained by the victim were consistent with what PW1 stated. It was submitted that the evidence by the prosecution witnesses was un rebutted.

52. In a rejoinder, Mr. Wanyanga submitted that although there was a conversation on grazing in the appellant's land, but that there were contradictions in the evidence of PW1, 2 and 4 on what weapon was used to assault the victim. Further, that the trial court never considered

the defence of self defence by the appellant and the evidence of DW2 and DW3 which was never challenged through cross examination. He maintained that there was no *mens rea* and *actus reus* hence it was unsafe to convict the appellant.

DETERMINATION

53. I have considered the evidence adduced in the trial court by both the prosecution and the defence. I have also considered the grounds of appeal and the rival submissions by both parties' counsel. In my humble view, the main issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt and therefore whether the conviction of the appellant for assaulting the complainant was safe in the circumstances. Secondly, whether this court should interfere with the sentence imposed on the appellant.

54. On whether the conviction of the appellant was safe in the circumstances, the appellant's counsel submitted that it is doubtful that PW1 and PW2 were at the scene and that there was contradiction in their evidence and that of PW3 on the time the offence allegedly took place. PW1 Gravin Oduol Olula testified that he took out livestock of his employer for grazing at about 11.00am and at about 2.00pm he went for a call of nature and when he returned, he found the appellant chasing the animals from the field and asking who the owner thereof was and the complainant admitted that he was the owner. PW1 then started driving away the animals from the fields and that is when the appellant hit him with a stick on the head and told the complainant that he, the appellant was a soldier. PW2 who had accompanied PW1 told PW1 that they go home and they went home where they met PW3 their grandmother and told her what had happened and she advised PW1 to go to hospital which he obliged, he was stitched and reported to Siaya Police Station and was issued with a P3 form which was filled and produced by PW4 as an exhibit. He identified the appellant as the person who hit him and was known to him in the locality as a soldier. In cross-examination he used the term club' which the appellant allegedly used to hit him.

55. PW2 testified that he was with PW1 when they went to the field to graze cattle and that at 2pm PW1 went for a call of nature. He saw the appellant emerge. Some animals had strayed into the appellant's shamba where he had planted trees so he started chasing them away and when PW1 returned and told the appellant that the animals were for PW1, the appellant used a rungu to hit the complainant who fell down and they went home and reported to their grandmother then went to hospital and reported to Siaya Police Station.

56. From the above evidence of PW1 and PW2 this court finds that the incident took place at about 2.00pm which was in broad daylight and both witnesses were consistent in their testimonies on what transpired. The fact that PW1 used the words stick, club and PW2 used the word rungu in my humble view is not a contradiction or at all as alleged by the appellant's counsel who went to the level of defining what a rungu is and what a stick is. I do not find any material contradiction that would vitiate the evidence of these two witnesses on the type of weapon used to hit PW1 and on the identity of the appellant offender.

57. In addition, albeit the appellant claims that there was contradiction on the time when the offence took place, I am satisfied that PW1 and PW2 were consistent in that they stated that the offence took place at about 2pm. PW1 was clear that he took out cattle to graze at about 11am and the incident took place at about 2pm. PW3 who received the victim after the injury stated that the victim took out cattle for grazing at about 11am and that he returned at about 2pm, all by estimations, which I find consistent. Contrary to what the appellant's counsel submitted on, there was no suggestion to PW3 as to whether PW1 left to graze in the company of PW2, or whether PW1 returned alone or in the company of PW2, for this court to make a finding that either of the witnesses could have been lying to court.

58. On the allegation that PW5 stated that the incident took place at 11am, it is worth noting that the appellant himself in his defence admitted that he met the animals grazing in his shamba at 11am he removed them and that left for Bondo and upon his return at 2pm he again found the animals grazing in his shamba that is when he sought to know the owner and an altercation arose when the complainant appeared as the appellant was removing the animals and questioned why the appellant was doing what he was doing. Further, PW5 was an investigating officer while PW1 and 2 were eye witnesses who were at the scene on the material day and time while PW3 was present when the victim took away the animals for grazing to the field. Furthermore, PW5 stated that he received the assault report from the complainant on 26th November 2013 at 17.36 hours and that the victim reported that he left home to graze at 11am up to 2pm which again is consistent with what the three witnesses PW1, PW2 and PW3 said in evidence. PW5 not being an eye witness could have stated differently that he was told the incident happened at 11am by the victim's grandmother which inconsistency in my view is not material as the grandmother's evidence was consistent with that of PW1, 2 and 3 that the victim left to graze at 11am. The P3 form also shows that the victim reported to have been injured at about 2.30pm which time was still in the range of 2pm, there is therefore no material contradiction on the timings.

59. On whether the weapon used to injure the complainant was sharp or blunt and whether failure to produce it in evidence or to produce evidence of clothing which were blood stained was fatal to the prosecution's case, PW1 and PW2 were clear that the appellant used a stick/club/rungu to hit the victim on the head and that when PW1 went to hospital he was stitched, reported to Siaya Police station, was issued with a P3 form which was filled and produced in evidence by PW4.

60. Although the appellant's counsel lamented that page 2 of the P3 form was altered to read 1 day from 2 days, the evidence of PW4 and the Original P3 form produced by PW4 as Exhibit 1 is clear that the complainant was seen by PW4 on 27th November 2013 which was one (1) day after the assault which took place on 26/11/2013. I have perused the original p3 form filled on 27/11/2013 and I find that there is no alteration on the original P3 form in the trial court file and therefore the appellant must have used a different p3 form which he placed in the record of appeal for purposes of this appeal.

61. According to PW4, the probable weapon used to hit PW1 was a sharp object. The appellant claims that there was contradiction on what type of weapon was used to hit him. In my humble view, recovery of a weapon used to commit an offence is not a mandatory requirement especially where it is apparent that the offender had time and opportunity to dispose of the weapon. Secondly, the fact that PW1 and PW2 stated that the victim was hit using a stick/ rungu or club and PW4 stated that the weapon used was sharp is in itself a contradiction as it was not stated that the rungu or club or stick was so blunt that it could not inflict a cut on the victim's head. Contrary to what the appellant's counsel submitted, PW1 and PW2 did not state that PW1 was assaulted using a sharp or blunt object. They did not describe whether the rungu or stick or club was blunt or sharp. It therefore does not matter, in my humble view, that PW5 stated that a rungu is not a sharp object as he did not recover the specific rungu that was used to assault the victim. There was no evidence that the object used to hit the victim had no sharp edge to inflict a cut injury necessitating stitching. In addition, the fact that no treatment notes or blood stained clothing were

produced does not mean that the victim was not injured or treated as a P3 form being a public document was produced in evidence by the maker thereof who saw the victim a day after the injury and he testified on oath that he saw a cut on the left side of the victim's head.

62. Further, although the appellant's counsel took issue with the evidence of PW1 that he was injured at the back of the head while PW4 stated that the injury was on the left side of the head, it is worth noting that the witnesses were never asked on whether the back part of the head that was injured was back left or back right, as back of the head is broad and could fall on the left or right side of the head.

63. In addition, what the appellant's counsel has focused on as being the sources of contradictions is what he got from statements of witnesses recorded with the police, which he never had marked for identification or production as exhibits to enable this court determine whether there were material contradictions that could be fatal to the prosecution case. What the appellant's counsel has done in this appeal is to prepare a record of appeal containing witness statements recorded with the police which statements were not produced as exhibits. The said statements were annexed to the appellant's written submissions in the lower court, dated 13/December 2014 and filed in court on 15th December 2014. Such conduct on the part of an advocate officer of this court sneaking in the record of appeal at pages 67,68,69 and 70 or through submissions additional evidence, which evidence never formed part of the evidence in the trial court record is unacceptable.

64. I hasten to add that the said documents are hereby struck out of the record of appeal. This is because there are established modes of adduction of additional evidence on appeal and sneaking in such evidence through a record of appeal is not one of those modes. The exhibits list shows that the appellant's only 'exhibit' which was only marked for identification (MFID1) and the trial magistrate noted that it was not produced as it is not even in the trial court record or record of appeal was a photograph of land. (See page 35 of record of appeal-in felt pen).

65. Accordingly, I find that the appellant's lamentations hold no water, as there was sufficient evidence of physical injury and the person who inflicted the same was positively identified by PW1 and PW2 as the appellant herein. I find no reason why the complainant and PW2 would lie to the court as there is no evidence of bad blood between them or their families and the appellant herein.

66. On whether the trial court did not consider the defence of self defence and evidence by the appellant and his witnesses who were not cross examined by the prosecution, page 42 of the record of appeal prepared by the appellant's counsel is clearly titled at the top: "DEFENCE CASE" and the trial magistrate went on to summarize the evidence adduced by the appellant on oath and the evidence of DW2, DW3 and DW4 which he found contradictory to that of the appellant. The trial magistrate delved into the defence case of self defence and how the appellant claimed that he kicked the complainant in the scrotum and cheek after the latter hit the appellant with a stick when the appellant questioned the complainant why the latter was grazing in and damaging the appellant's tree seedlings.

67. The appellant's evidence denying having any sharp object and asserting that he only had a twig which he used to drive the animals away and how the defence witnesses testified on events which allegedly took place at 1.00pm at a different location contrary to what the appellant himself stated that he was at the scene at 2pm when he found the complainant grazing in the land, was properly considered by the trial court before dismissing the evidence for the defence as DW4 even went overboard claiming that the complainant was injured at some funeral vigil at 1.00am.

68. Furthermore, I have reevaluated the said evidence by the appellant and his witnesses and I find none of the defence witnesses was at the material scene when the complainant was assaulted. I also find the evidence by the defence witnesses contradictory and materially inconsistent with the testimony of the appellant hence whether they defence witnesses were cross examined or not is immaterial.

69. On alleged defence of self defence, the appellant did not prove that he assaulted the victim in self defence as he denied assaulting him at the place where he was found with the injury, claiming that he only kicked the victim in the scrotum and hit him on the cheek with a twig. That is not a defence of self defence as the injuries sustained by the victim are inconsistent with the alleged self defence maneuver by the appellant. Furthermore, there was no evidence that the complainant assaulted the appellant with a stick and if he did so, the appellant being a soldier should have reported the matter to the police for action or by arresting the complainant and handing him over to the police for action. Even if the complainant deliberately or through complacency grazed into the appellant's land without consent which amounts to trespass and or malicious damage to property, the appellant should not have taken the law into his own hands to assault the complainant. There is not even a police or OB report of such assault or damage to the property or trees hence the defence was, in my humble view, an afterthought.

70. On allegations of bias by the trial court, the appellant claims that the trial court refused to allow warrants of arrest to be sent to his employer KDF so that they could give him permission to attend to the case. He lamented that as a result he was remanded for failure to attend court. He cited section 58 of the National Police Service Act which is irrelevant as there is no material placed before the court to suggest that the appellant was suspected of having deserted from the KDF or any other disciplined service. Furthermore, the matter of warrant of arrest was settled via Siaya High Court Constitutional Petition No. 3 of 2017 decided by this court on 22nd January, 2019 on whether the appellant should appear under a warrant send to his employer.

71. The other claim of bias on the part of the trial magistrate is predicated on the allegation that he declined to issue orders for production of call data on sms and mpsa transactions for the complainant's employer's telephone and the telephone for the investigating officer to demonstrate that the investigating officer had been compromised. The trial court record shows that the matter was subject of a substantive application which was dismissed and the appellant never filed any appeal to challenge that order nor sought revision from the High Court hence the claim is not justified as the appellant has not in this appeal, not even sought leave of court to adduce additional evidence. The ground of appeal is therefore devoid of merit and is dismissed.

72. On the severity of sentence, the appellant was convicted of the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. The maximum penalty provided for under section 251 of the Penal Code is five years. Common assault is a misdemeanor. The trial court sentenced the appellant to one year suspended sentence which was lawful and extremely lenient. Sentencing is a matter of discretion for the trial court. The trial court exercised discretion in sentencing the appellant. However, considering the mitigations and the fact that the case took an extremely lengthy period of time from 2013 to be concluded in 2020, and as the complainant and appellant are neighbours, ***I exercise discretion and review the sentence imposed on the appellant by the trial court and set it aside. I substitute the 12 months suspended sentence with an unconditional discharge of the appellant.***

73. *In the end, this appeal against conviction is found to be devoid of merit and is dismissed.* The appeal against sentence is allowed in terms stated above.

74. File closed

Orders accordingly.

Dated, signed and Delivered at Siaya this 30th Day of November, 2020

R.E. ABURILI

JUDGE

In the presence of:

Appellant

Mr. Kubebea Prosecution Counsel for the Respondent State

CA: Brenda