



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO.15 OF 2019

ATON GREEN ORWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in criminal case No.375 of 2018

of the Principal Magistrate's Court at Mbita dated 11/7/2019 – Hon. J.A.Owiti, SPM)

JUDGMENT

[1] The appellant, **Aton Green Orwa**, appeared before the Senior Principal Magistrate's court at Mbita facing a charge of **grievous harm**, contrary to **Section 234** of the **Penal Code**, in that on the 8th July 2018 at Koyani Village, Ruri-Lambwe West Mbita, within Homa Bay county, unlawfully and willfully did grievous harm to Walter Odhiambo Bor.

[2] After full trial, the appellant was convicted and sentenced to imprisonment for twenty five(25) years. He was however, dissatisfied with the conviction and sentence and preferred this appeal on the basis of the grounds, contained in the petition of appeal filed herein on 24th July 2019 by **Ochillo & Co. Advocates** in which he mainly complains about the insufficiency and contradictory nature of the prosecution evidence relied upon by the trial court to convict him.

[3] The hearing of the appeal proceeded by way of written submissions. In that regard, the appellants submissions were filed herein on 12th November, 2020, by **Nyauke & co. Advocates**, while those of the State/Respondent were filed on 8th July 2020, by the learned prosecution counsel, **Mr. A. O. Oluoch (S/ADDP)**. Having considered the appeal and the rival submissions in support and opposition thereto, the duty of this court was to revisit the evidence and draw its own convictions bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses.

[4] Briefly, the prosecution case was that on the material date at about 6.00pm, the complainant **Walter Odhiambo (PW2)** left his home with a battery for charging and set off to Koyani center to perform a manual job. Thereafter, he was given a lift home by his employer but was again sent to the center to buy meat for his mother. He first proceeded to a shop where he had earlier taken his mother's battery for charging. He met the appellant at the shop. The appellant took a look at the battery, packed and left with it.

[5] The complainant then left for his home without the battery, but at around 10.00pm he decided to go for it at the appellant's home. A motor cycle rider took him there. The appellant initially refused to open his house for them but eventually did so. He(appellant) then grabbed the complainant and the rider. The rider broke loose and went away. The complainant put up a struggle but was dragged towards a ditch by the appellant. He(complainant) persisted with his struggle for freedom and managed to exit the appellant's home.

[6] The appellant followed and held him (complainant) by the neck and in the process cut his left side of the head with a machete(panga). The complainant fell down. Villagers arrived at the scene and while being held by the appellant, the complainant was seriously assaulted by the villagers to the extent that they amputated his left leg before carrying him to the road at Koyani trading center. He later found himself in hospital.

[7] The complainant's sister **Irene Akoth Bor(PW1)**, was at her home when she was informed of the incident. She rushed to the scene and found that the complainant's leg had been cut at the ankle. She also noticed that the complainant also had a cut on his neck. He could not talk. Later on the way to Homa Bay hospital, she (PW1) met the appellant who informed her that the complainant had been assaulted alongside the road by some motor cyclists. She much later heard from the complainant that the appellant was one of the assailants.

[8] **Stephen Omondi(PW3)** a clinical officer at Homa Bay county Referral Hospital indicated that the complainant was admitted at the

hospital with traumatic amputation of the left leg and a scalp wound on the head. A complete amputation of the leg was done in the hospital theatre during treatment. The complainant was discharged from hospital after seven(7) days. A medical examination report (P3 form) was compiled in the process. It was produced in court(PEX1) showing that the complainant suffered grievous harm as a result of the assault against him.

[9] P.C Viola Chepchirchir (PW4) was on duty at Mbita police station when the appellant arrived there and reported in a suspicious manner that his friend's leg had been chopped off on the previous night, shortly thereafter, a sister of the complainant arrived at the station and implicated the appellant and others as those responsible for assaulting and causing grievous harm to the complainant. She(PW4) later visited the complainant at his home and learnt from him further that he had been assaulted and seriously injured by the appellant and others. The appellant was later arrested and charged with the present offence.

[10] The defence case was a denial of the appellant's alleged involvement in the offence. He indicated that he was in the company of the complainant when they undertook some casual jobs and thereafter went drinking alcohol such that at one point they were joined by the complainant's sister Irene(PW1). That, the complainant expressed concern that his life was in danger for failing to deliver a battery to its owner one Omondi. That, the two (appellant and complainant) were together when a group of people arrived with machetes and a toy gun arrived at the scene and together with the complainant, they assaulted the appellant such that he sought safety in a maize plantation.

[11] The appellant in denying that he assaulted and injured the complainant contended that the complainant was assaulted and injured by Omondi and others for failing to deliver Omondi's battery. After having considered the foregoing evidence in its totality, the trial court concluded that the prosecution proved its case against the appellant beyond reasonable doubt.

[12] In the opinion of this court, there was no real dispute that the complainant(**PW2**) was indeed assaulted and injured by a group of people. The attack was vicious and seemed to have been orchestrated by people known to the complainant for reasons attributed to a motorcycle battery which was allegedly taken away from the complainant and which he went to retrieve when he was assaulted and maimed.

[13] The issue which clearly presented itself for determination was whether the appellant was identified as having been part of the offending assailants. In that regard, the sole evidence was that of the complainant (PW2). His sister(PW1) did not witness the offence and merely relied on what he told her with regard to the appellant's culpability. Other persons who could have shed more light with regard to the circumstances leading to the offence and the appellant's alleged culpability in the offence were not called to testify for the prosecution though they were vital witnesses and easily traceable. Nonetheless, a criminal offence may still be proved with the evidence of one witness rather than a multitude of witnesses. What matters is the quality and credibility of the evidence rather than the quantity of the evidence.

[14] Herein, the evidence strongly suggested that the appellant was present when the offence was committed and that he aided and abetted its commission. He was a person very well known to the complainant. Therefore, the question of mistaken identity did not arise. Besides, the appellant in his defence clearly indicated that he was with the complainant when the offence occurred. So, in saying and/or mentioning the appellant as one of his assailants, the complainant was not mistaken neither was he malicious. His evidence was found by the trial court to be believable for a safe finding that he was actually assaulted and injured by the appellant and others. This court would have no basis to interfere with the trial courts findings bound on credibility of witnesses.

[15] Apparently, the appellant may not have been the person or persons who actually amputated the complainant, but there was no doubt that he aided and abated the act and therefore made him also a principle offender.

As a matter of fact, the evidence against him indicted that he was the person who actually set up conducive circumstances for the offence to be carried out by his comrades in the entire criminal transaction.

[16] From all the foregoing, this court would also find that the prosecution case was proved against the appellant beyond any reasonable doubt. His conviction by the trial court was proper and is hereby affirmed to the extent that the appeal on conviction as highlighted in grounds one, two, three, four and five of the petition of appeal is denied of merit.

Grounds six was inapplicable as it was based on an appeal error on the record showing that the appellant was convicted on two counts yet he was only charged with a single count of causing grievous harm contrary to Section 234 of the Penal code.

[17] Ground seven was essentially on sentence. The appellant contended that the sentence imposed upon him by the trial court was harsh and excessive. However, under Section 234 of the penal code, any person who willfully does grievous harm to another is guilty of felony and liable to imprisonment for life.

Therefore, the sentence of twenty five(25) years imprisonment inferred on the appellant by the trial court was lawful but rather excessive for a first offender who was exposed to the risk of being sued in a civil court for damages arising from personal injuries occasioned to the complainant by his unlawful and reckless behavior.

[18] Accordingly, the appeal on sentence succeeds to the extent that the sentence of twenty five(25) years is hereby set aside and substituted for a sentence of five(5) years imprisonment.

Ordered accordingly.

(Delivered and signed this 19th day of November, 2020)

J.R. KARANJAH

JUDGE OF THE HIGH COURT