



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CRIMINAL APPEAL NO.1 OF 2020**

**REPUBLIC.....APPELLANT**

**VERSUS**

**NICODEMUS MUTHIANI MUNYOKI.....RESPONDENT**

*(Being an appeal against the whole judgement of Hon Kibelion (SRM) delivered on 22.5.2018 in Criminal Case 417 of 2016)*

**ARISING FROM**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**NICODEMUS MUTHIANI MUNYOKI.....ACCUSED**

**JUDGEMENT**

1. The Respondent herein was charged with Causing Grievous Harm contrary to Section 234 of the **Penal Code** the facts being that on the 12<sup>th</sup> day of November at Kyambusya village, Mbiuni location in Mwala Sub County within Machakos County, unlawfully did grievous harm to **Teresiah Kalondu**.
2. The prosecution marshalled 5 witnesses in support of their case.
3. According to PW1, **Teresiah Kalondu Wambua**, the complainant, on 12<sup>th</sup> November, 2017 at around 3.30pm, she was at home herding her cows when the respondent, her husband’s cousin, who appeared drunk entered through her gate approached her and noisily started abusing her. The respondent then grabbed and slapped her, causing her to fall down and she was only rescued by her husband **Simon Wambua** and her neighbor, **Dominic** (PW2). During the said incident, the respondent claimed that she was a witch who had bewitched his family.
4. After the incident, PW1 reported the incident at Mbiuni police post where she was issued with a P3 form and then proceeded to seek medical attention at St. Mary’s hospital and the P3 form was filled in. As a result of the assault, her tooth had to be extracted. She produced the PW form, the two teeth and a green/cream blouse she was wearing on that day.
5. According to PW1, she had never had any issues with the Respondent prior to this case and that previously they had been residing well and denied the existence of a grudge within the family. She denied that she, her husband and PW2 assaulted the Respondent and stated that at the time she was being assaulted both her husband and PW2 were not nearby.
6. PW1 stated that the land was subdivided and there was no road through her farm and that she did not know where the Respondent was going.
7. PW2, **Dominic Wambua**, testified that on the material date at about 3.00pm he had gone to visit his neighbor **Simon Wambua** and as they were sitting near the farm at the homestead, he saw the respondent coming through the gate and the Respondent inquired from PW1 why they had closed the road. When the respondent tried to open the fence PW1 stopped him and in the ensuing struggle the respondent hit PW1 on the mouth with his hand which caused her to bleed. PW2 and **Simon** then intervened since they were close to them and they advised

PW1 to report the incident at the station. It was his evidence that during the incident, the respondent was abusing and calling PW1 names such as witch. According to him, it was the Respondent who pushed PW1 and that the two did not push each other.

8. The said P3 form was filled in by PW3, **Marceline Kemunto Obiko**, a registered clinical officer at Mwala sub county hospital on 19<sup>th</sup> November, 2017. According to her, PW1 had a history of having been assaulted by a person well known to her and she had been seen at St. Mary's Mbiuni where extraction of two anterior teeth was done. Upon examining PW1, she found gaps at central and lateral lower incisions and in her opinion, the approximate age was two weeks and the probable weapon was a blunt object. She assessed the degree of injury was grievous harm produced the p3 form as an exhibit.

9. In cross examination, PW3 admitted that there had been an earlier p3 form that she had filled dated 12<sup>th</sup> November, 2017 that classified the degree of injury as harm. Though first aid was done at St. Mary's, they treated PW1 when she went and though she did not witness the extraction being done, PW1 went with the extracted teeth and the form for her treatment were attached to the p3 form.

10. In re-examination PW3 clarified that indeed she had filled two p3 forms, but that the first p3 form had been filled erroneously by indicating the degree of injury as harm instead of grievous harm. She therefore called the officer back and filled another p3 form since the injuries sustained by PW1 was permanent.

11. According to PW4, **Stephen Kamulu**, on 12<sup>th</sup> November, 2017 at about 3.30pm, he was from a meeting at Utrinity Church when he passed by PW1's shop to buy a cigarette. While he was leaving, the respondent, a neighbor who was well known to him, passed by making noise and asked PW1 why she was closing the paths saying "*Kwanini unafunga njia ng'ombe hii uchawi hii*". As PW4 was leaving he realized that there was a problem and when he saw PW1's husband in the farm, he notified him that there was something going on he proceeded towards his homestead. According to PW4, he left the two abusing each other though the two did not fight in his presence.

12. **PW5, PC Richard Saruni**, attached to Masii Police Station, Mbiuni Police Post, was on 12<sup>th</sup> November, 2017 at 5.50pm at the post when PW1 reported that she had been assaulted by the respondent and injured on her face and mouth (lower teeth). PW5 took down the report and gave her a p3 form to be filled at the hospital and instructed her that after receiving medical treatment she should take her witnesses. On 28<sup>th</sup> November, 2018 PW1 took her witnesses and PW5 gave PW1 a p3 form to go to Mwala to be filled which she returned together with two lower teeth. According to PW1, the doctor told her the teeth had been extracted

13. On 1<sup>st</sup> December, 2018 he went to visit the scene and while there, PW1 showed him the respondent's homestead. According to his investigations, it was the respondent who had assaulted PW1. He produced the two teeth and the green/cream blouse as exhibits. According to him, he charged the respondent because PW1 brought her witnesses and there was medical evidence coupled with his investigations showed the respondent was the perpetrator.

14. In cross examination, PW5 stated that he was aware that OB case No. 11/12/11/2017 was made by the respondent in which the respondent had reported a case of assault by **Simon**. He confirmed that he issued PW1 with two p3 forms as the earlier one indicated the degree of injury as harm and was later amended to grievous harm and it was later that was used to charge the respondent.

15. When placed on his defence, the Respondent gave a sworn testimony and called two witnesses.

16. According to him, on the material day a Sunday, he was from church and arrived home at around 4.00pm. After changing his clothes, he went to bring in the cows that were grazing about 300m away. On his way there, he passed by his uncle Simon's homestead where he Simon, his wife and a neighbour, PW2. Though he greeted them, PW2 did not return his greetings. He however found that the path had been closed and when he tried to remove the leaves, he was caught from behind and was assaulted on his face as a result of which he sustained injuries on his temple, hand, eye and he bled.

17. Following his screams, his brothers arrived and he reported the incident at Mbiuni police station and also sought medical attention. He produced the medical documents. Though he was the first one to report the incident, his case was withdrawn due to lack of evidence. According to him, the person who hurt him was his uncle since they had been having a boundary dispute over the land which belonged to his grandfather and is yet to be sub divided. It was his evidence that it was when he struggled with PW1, they fell. His evidence was that he was being framed. He stated that PW1 had loose teeth prior.

18. DW2, **Justus Wambua**, a clinical officer at Kathiani hospital, attended to the respondent at Mwala level 4 hospital. The respondent presented himself with a history of assault by a person well known to him on 12<sup>th</sup> November, 2017 claiming that he had been assaulted with a piece of wood on the forehead and thereby sustaining a deep cut. After examining the Respondent, he assessed the degree of injury as harm and he produced the p3 and treatment notes. He however admitted that by the time he filled in the p3 form on 29<sup>th</sup> June, 2018, 8 months later, the wounds had healed and that the injuries could have been caused by something else as he only relied on the respondents' history.

19. **Alex Mutiso Munywoki**, DW3, the Respondent's elder brother testified that on the material day he had gone home to visit his ailing father. The Respondent arrived home from church at around 4.00pm and proceeded to go and bring the cows home that were some 200m away. After about 10 or 20 minutes he heard loud voices and heard shouts that sounded like the respondent. Upon rushing to the scene, he found the respondent held on the ground by **Simon Wambua**, PW1 and a neighbour, PW2. In his evidence, he never noticed any injuries on PW1 According to him, Simon was his uncle and he knew PW1 as she grew up nearby and was aware that she had teeth problems since childhood. Because the Respondent was injured on the face and arm and was bleeding, he took him to report at Mbiuni AP post and later to Mwala level 4.

20. In her judgement, the learned trial magistrate found that since the complainant did not avail the treatment notes from St. Mary's Hospital, the circumstances under which the complainant's teeth were extracted was not proved hence a reasonable doubt was created. It was further held that since PW1 did not identify the P3 form, the same could not be relied upon by the Court. In the result, the Learned Trial Magistrate

found that the prosecution had failed to prove the case against the Respondent beyond reasonable doubt and acquitted him.

21. In this appeal it is submitted on behalf of the Appellant that the prosecution tabled overwhelming evidence that none other than the respondent herein inflicted the injuries sustained by PW1. The medical evidence produced by PW1 showed that she sustained permanent injuries that led to her teeth being extracted. The probable weapon is indicated as blunt object. The allegations by DW1 and DW3 that PW1 has had teeth problems since her tender years, can only be treated as mere hearsay as no evidence was adduced to prove that.

22. It was submitted that the finding by the Learned Trial Magistrate that PW1 failed to identify the p3 form that was produced by PW3 was incorrect since the record clearly shows that towards the conclusion of PW1's testimony, PW1 actually did identify the p3 form as PMFi 1 which was subsequently and properly produced by PW3 as P.Exh1. The contents of the p3 form were uncontroverted. It was therefore submitted that the decision to overlook that crucial piece of evidence was improper in principle.

23. On behalf of the Respondent, it was submitted that there were no treatment notes to support PW1's testimony that she lost her teeth as a result of the said assault. This omission leaves reasonable doubt in prosecution case as what led to the extraction of the teeth and when the same took place. This doubt has also been amplified by the fact that the clinical officer who filled the p3 admitted having filled an earlier P3 form which had been supplied to the defense showing the degree of injury as Harm and a later one with the degree of Injury as Grievous Harm.

24. In support of the submissions the Respondent relied on section 4 of the **Penal Code** which defines Grievous harm to mean "*any harm which amounts to maim or dangerous harm or seriously and permanently injures health, or which is likely so to injure health, or which extends to the permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.*"

25. The Respondent relied on the case of **John Oketch Abongo vs. Republic [2000] eKLR Criminal Appeal NO. 4 of 2000.**

26. According to the Responded, the prosecution case had fatal discrepancies that created doubt as to the guilt of the accused with loopholes in the medical evidence adduced, eye to eye witnessing and the investigation process as well. The said discrepancies create reasonable doubt as unless the discrepancies are addressed, they will occasion a miscarriage of justice to the accused for whoever alleges must prove. **Determination**

27. I have considered the material on record as well as the submissions made.

28. In this case, as stated at the beginning of this judgement, the Respondent was charged with the offence of Causing Grievous Harm contrary to Section 234 of the **Penal Code**. The section provides that:

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

29. Section 4 of the **Penal Code** defines the term 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;***

30. In **Stephen Maina Kiama vs. Republic Mombasa Criminal Appeal No. 215 of 1986.** the Court of Appeal held that:

***"In a criminal case, the obligation is to establish by evidence the ingredients of an offence beyond reasonable doubt."***

31. In this case, it was necessary for the prosecution to prove that the injury caused to PW1 amounted to "***grievous harm***" as defined in Section 4 of the **Penal Code**. The Learned Trial Magistrate found that this was not proved due to lack of medical evidence. According to her, it was necessary to produce the treatment documents from St. Mary's Hospital where PW1 was treated since the P3 form could not be relied upon as it was not identified by PW1.

32. I agree with the appellant that the latter finding was erroneous as it is clear from the evidence of PW1 that she indeed did identify the said P3 form. As regards the first finding, it is true that the initial treatment notes from St. Mary's Hospital were not produced. What were produced were two P3 forms dated 12<sup>th</sup> November, 2017 and 29<sup>th</sup> November, 2017 respectively. In the said P3 form, what was noted was a gap where the teeth had been extracted.

33. As correctly noted, there was no medical evidence linking the extraction of PW1's teeth with the assault on 12<sup>th</sup> November, 2017. I agree that it was necessary to produce the initial treatment notes since the person who filled in the p3 form was not the same person who extracted the teeth. By failing to produce the said treatment notes, I cannot fault the Learned Trial Magistrate in her finding that the prosecution failed to prove their case beyond reasonable doubt. I associate myself with the holding in the case of **John Oketch Abongo vs. Republic [2000] eKLR Criminal Appeal No. 4 of 2000** where it was held that:

***"Whether or not grievous harm or any other form of harm is disclosed must be a matter for the court to find from the evidence led and guided by the definition in the Penal Code. A court will be assisted by medical evidence given in coming to the conclusion on the nature and classification of the injury. In many cases the courts have accepted and gone by the findings and opinions in the medical evidence."***

34. I find that from the medical evidence presented, what is relied on to constitute the offence of grievous harm has no nexus with the act of the Respondent.

35. In the premises, I find no merit in this appeal which I hereby dismiss.

36. It is so ordered.

**Judgement read, signed and delivered in open Court at Machakos this 19<sup>th</sup> day of November, 2020.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Ngetich for the Appellant**

**Mr Munguti for the Respondent**

**CA Geoffrey**