REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 39 AND 40 OF 2018 (CONSOLIDATED)

CATHERINE WAWIRA MWANGI.....1ST APPELLANT

MILLEDREN WANJUE NYAGA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of Hon.V.O.Nyakundi (SRM) dated 2nd October, 2018)

JUDGMENT

1. A brief outline of the case was that the appellants, **Catherine Wawira Mwangi and Milledrene Wanjue Nyaga** were charged with assault causing bodily harm contrary to Section 251 of the Penal Code; the particulars of the offence are that on the 25th January, 2017 at Kianjokoma Market in Manyatta Sub-County within Embu County jointly and unlawfully assaulted **Jane Muthanji Kiora;**

2. The prosecution called five (5) witnesses to prove its case; the trial court found the appellants guilty and they were convicted and sentenced to each serve a term of imprisonment of one (1) year; being aggrieved with the sentence, the appellants filed their respective appeals against both conviction and sentence and listed eleven (11) grounds of appeal; their appeals were consolidated and the grounds of appeal are as summarized hereunder;

(i) The trial court relied on hearsay evidence to convict the appellants; the convictions were based on lies; the trial court did not consider the evidence of an eye witness;

(ii) The prosecution did not prove the charges of assault causing bodily harm;

(iii) The trial court dismissed the doctor's report and to consider his evidence without giving reasons;

(iv) The sentences were harsh and excessive in the circumstances;

(v) The judgment did not comply with Section 169 of the Criminal Procedure Code;

3. The applicant was represented by Learned Counsel Mr.Andande whereas the respondent was represented by Prosecuting Counsel for the State Ms.Chemenjo; the appeal was canvassed by way of filing and exchanging of written submissions; hereunder are the parties' respective submissions;

1ST AND 2NDAPPELLANT'S CASE

4. The appellants contend that the prosecution did not prove its case to the desired threshold; on identification the offence took place at 7.30pm and that the conditions were not favourable for identification; case law relied on **Patrick Siala Wanakeya & Anor vs Republic [2019] eKLR**;

5. The nature of the injuries sustained by **PW1** were unclear; she stated she had injuries to the face and chest but the P3 Form showed no injuries to the chest; the P3 Form was filled after two (2) months after the incident;PW2 the doctor who examined **PW1** stated that he had relied on medical notes to fill the P3 Form yet no medical notes were produced to support the contents of the P3 Form;

6. The appellants contend that their witness **DW1** a medical expert had seen **PW1** ust a few hours after the incident and had noted that her teeth were intact and stated that PW1 had insisted that her two (2) teeth be deliberately extracted; the trial court had nevertheless dismissed this medical evidence and the contention made by the appellants and it had stated in its judgment "***that no sane person would undergo the***

pain of tooth extraction to settle scores."

7. The appellants submitted that the trial court in its judgment did not comply with the provisions of Section169 (1) of the Criminal Procedure Code; that the judgment had no issues for determination nor reasons for the decision; case law relied on **Jackson Maingi Nzioka vs Republic [2013] eKLR** where the Court of Appeal held that ***'a judgment that did not comply with Section 169 of the Criminal Procedure Code would render it a nullity.'***

8. The appellants also submitted that the sentences imposed were harsh and excessive and the trial court did not take their mitigation into consideration; that in the event this court were to uphold the convictions the appellants prayed that their sentences be reviewed.

RESPONDENT'S CASE

9. In response counsel opposed the appeal and submitted that the prosecution had proved its case to the desired threshold; on identification counsel stated that **PW1** knew the appellants before the material date; that they were neighbours and it was not the first time that they had interacted; the appellants were persons known to **PW1;**the 1st appellant admitted that she knew the complainant as they were immediate neighbours; therefore, there was proper identification by way of recognition;

10. The evidence on the injuries sustained by **PW1** was not hearsay; **PW1** had given direct evidence on what had transpired and how she had been assaulted and on how the injuries were occasioned; her evidence on the injuries was corroborated by **PW2** who testified and confirmed the actual injuries sustained which were captured in the P3Form;**PW2** confirmed that the injuries were likely to have been inflicted by kicks and blows just as **PW1** had stated; **PW3** confirmed that a report was made within thirty minutes after the incident and confirmed that **PW1** had two lower teeth missing which had been allegedly removed by the appellants; the evidence of **DW1** supported the evidence of the prosecution witnesses as he confirmed that **PW1** went to Kianjokoma Hospital for treatment;

11. The motive for the attack was the bad blood that existed between the 1st appellant and **PW1** a fact that the 1st appellant acknowledged in her defence;

12. On sentence the record reflected that the trial court had taken into consideration the mitigation made by the appellants; the trial court highlighted the prevalence and seriousness of the offence and meted out a just punishment;

13. Counsel submitted that the trial court had complied with the provisions of Section 169 of the Criminal Procedure Code as it had identified the issues, analyzed the facts and had reached a reasoned conclusion;

14. The respondent urged this court to dismiss the appeal and to uphold both the conviction and sentence.

ISSUES FOR DETERMINATION

15. After hearing the submissions of both parties this court has framed the following issues for determination;

(i) Whether the prosecution proved its case to the desired threshold;

(ii) Whether the sentence was manifestly harsh and excessive in the circumstances;

(iii) Whether the trial court's judgment complied with Section 169 of the Criminal Procedure Code;

ANALYSIS

16. This being the first appellate court its duty is to re-evaluate and subject the evidence on record to a fresh and exhaustive examination and to then arrive at its own independent conclusion; case law relied on is **Okeno vs Republic [1972] EA 32**;

Whether the prosecution proved its case to the desired threshold;

17. The main ingredients of the offence of assault causing actual bodily harm are identification, assault of the victim and the occasioning of actual bodily harm;

18. **On identification and assault;** the evidence on record is that **PW1** knew the appellants before the material date; that they were neighbours and it was not the first time that they had interacted; and the 1st appellant admitted to knowing **PW1** as they were immediate neighbours;

19. This court finds that even though it may have been 7.30pm the identification was based on recognition; **PW1** and the appellants were persons acquainted with each other by reason of being neighbours and the appellants were persons well known to **PW1;**the name "**Mama Njoro**" was used by **PW1** in identifying the 1st appellant**;** the court record reflects that the incident occurred in the vicinity of where they all resided; that the appellants waylaid the complainant outside her gate and swore to launch more attacks;

20. The trial court's finding in its judgment was that the accused persons were well known to **PW1** and that even though it was at night she was able to see them; this court is satisfied that there is no better mode of identification than by name and this lessens the danger of mistaken identity; this court finds no reason to interfere with the trial courts finding on identification; and is further satisfied that there was proper

identification of the appellants by way of recognition; and that the appellants were the ones who assaulted **PW1** on that material date;

21. **On assault**; **PW1** identified the appellants as the persons who had assaulted her;; the trial court in its judgment set out at length the reasons that led to the intention to assault; the court record reads as follows;

> ***"…….the use of a derogatory name 'Kirego' (uncircumcised)…..she normally used to refer to her….***
>
> ***…..Accused 1 claimed that the chicken of PW1 have been ruining her vegetables…***
>
> ***…..there is the matter was of PW1 digging channels and which directed water to the farm of accused one damaging her house in the process. A matter that was reported to the area administration but was unresolved because of PW1's intransigence."***

22. There was no love lost and a lot of bad blood between the 1st appellant prior to the incident; with this in mind the 1st appellant decided to resolve the issues in her own way and waylaid **PW1** at her gate with the intention of settling scores; to further the intention 1st appellant called upon the 2nd appellant for reinforcement; who also ended up joining in the attack; and **PW1** was warned of further attacks;

23. This court finds no reason to interfere with the trial court's finding on the motive **('mens rea')** for the attack which was the bad blood that existed between the 1st appellant and **PW1** a fact that the 1st appellant acknowledged in her defence;

24. **Occasioning actual bodily harm to PW1**; the appellants' contention was that the evidence on the injuries was hearsay; but upon perusal of the court record this court notes that **PW1** gave direct evidence on what had transpired and how she had been assaulted and on how the injuries were occasioned; her evidence on the injuries was corroborated by **PW2** a medical doctor who testified and confirmed the actual injuries sustained by **PW1** which had been captured in the P3 Form; **PW2** confirmed that the injuries were likely to have been inflicted by kicks and blows just as **PW1** had stated; **PW3** confirmed that a report was made within thirty minutes after the incident and confirmed that **PW1** had two lower teeth missing which had been allegedly removed by the appellants; the evidence of **DW1** supported the evidence of the prosecution witnesses as it also confirmed that **PW1** went to Kianjokoma Hospital for treatment;

25. This court is satisfied that the assault took place (**actus reus**) and the injuries occasioned as a result of the attack were corroborated by documentary medical evidence captured in the P3 Form produced by **PW2**;

26. For those reasons this court is satisfied that from the evidence on record the prosecution proved that the appellants were properly identified; that **PW1** was assaulted and that she suffered bodily harm; these three key ingredients were proved by the prosecution to the desired threshold;

27. This ground of appeal is found lacking in merit; and it is hereby disallowed.

Whether the sentence was manifestly harsh and excessive in the circumstances;

28. In this instance the trial court after conducting a full hearing found that there was overwhelming evidence that the appellants had assaulted **PW1**; the trial court also made a finding that there were injuries sustained by **PW1** and classified them as '**harm**'; the appellants were then found guilty, convicted and sentenced each to a term of one (1) year imprisonment.

29. The appellant's contention was that the sentence imposed was harsh, oppressive and excessive;

30. The scope of this court's appellate powers are to examine the evidence on record so as to satisfy itself as to the propriety and legality of the sentence and that it has been made in accordance with the law; the applicable section in this instance is found at Section 251 of the Penal Code; which section reads as follows;

> ***"251; Assault causing actual bodily harm***
>
> ***Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to a term of five (5) years imprisonment"***

31. The maximum sentence provided by the above section is five (5) years imprisonment; the record reflects that the trial court invited the appellants to mitigation and took into consideration the fact that the appellants were first offenders and this factor was confirmed by the prosecution; the trial court also considered the bad blood that existed leading to the unprovoked attack by the appellants; it is therefore evident that the trial court took into account the provisions of the law when passing sentence;

32. The court record reflects that the trial court did not overlook any material factor when passing sentence and took into consideration the circumstances of the case and the mitigating factors brought out by the appellants when invited to mitigate; also taken into consideration was the fact that the appellants were first time offenders and that they were remorseful;

33. In this instance the appellants have not demonstrated that the trial court erred in imposing the term of one (1) year imprisonment or committed any illegality, impropriety or mistake when sentencing them; the sentences are as provided by the law and are found to be legal and that there is no reason found that warrants interference as maximum prescribed by law is a five (5) year sentence;

34. This court has taken into consideration the aggravating and mitigating factors and the circumstances of the case; the aggravating factors are that the attack was unprovoked and the degree of the injuries inflicted upon the complainant which included the loss of two front teeth was indeed serious and life-long;

35. This court is satisfied that when imposing the sentences the trial court correctly exercised its discretion and meted out a very lenient and appropriate sentence to each of the appellants;

36. The sentences are found to be legal and as provided by the law and this court finds that the sentences imposed were not manifestly harsh and excessive in the circumstances; and do not warrant any interference by this court; Refer to the case of **Wanjema v Republic (1971) EA 493;**

37. For the forgoing reasons this court is satisfied that this ground of appeal is lacking in merit and it is hereby dis-allowed.

Whether the trial court's judgment complied with Section 169 of the Criminal Procedure Code;

38. Section 169 of the Criminal Procedure Code deals with the contents of a judgment; the record reflects that the trial court in its judgment drew up the issues for determination as follows;

(i) If PW1 was assaulted

(ii) If it's the accused persons who assaulted her

(iii) If the assault was justified

39. The trial court proceeded to analyze these issues and gave reasons for arriving at its decisions on all the issues; the judgment was delivered and it was signed and dated;

40. This court is satisfied that the trial court complied with the provisions of Section 169 of the Criminal Procedure Code; this ground of appeal is found lacking in merit and it is hereby disallowed;

FINDINGS AND DETERMINATION

41. For the foregoing reasons this court makes the following findings and determinations;

(i) The prosecution is found to have proved its case to the desired threshold;

(ii) The custodial term of one (1) year imprisonment is found to be legal and is found not to be manifestly harsh and excessive; and this court finds no good reason that warrants the interference with the sentences imposed; the sentences imposed are hereby affirmed;

(iii) The trial court is found to have complied with the provisions of Section 169 of the Criminal Procedure Code;

(iv) The appeals are found lacking in merit in their entirety and both are hereby dismissed.

Orders accordingly.

Dated and Signed delivered Electronically at Nyeri this 12th day of November, 2020.

HON. LADY JUSTICE A. MSHILA

JUDGE