**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 43 OF 2018**

**LAZARUS JUMA OKEYO..............................................................APPELLANT**

**VERSUS**

**REPUBLIC .......................................................................................RESPONDENT**

***(Being an appeal from the original conviction and sentence of Hon. M. M. Wachira, Senior Resident Magistrate in SPMC Magistrate's Court Criminal Case No. 145 of 2018 delivered on 23 /07/2018)***

**JUDGMENT**

1. **Lazarus Juma Okeyo**, the Appellant herein, was a Teacher at [Particulars Withheld] Mixed Secondary School in Suna West Sub-County upto sometimes in February 2018. Out of an incident which occured in the month of February 2018 the Appellant was charged together with his colleague one **Amos Ochieng Owino** with the offence of **Assault causing grevious harm** contrary to **Section 234** of the **Penal Code, Cap. 63** of the Laws of Kenya to one **JO**, the complainant herein.

2. They denied committing the offence and were tried. Six witnesses testified in support of the prosecution's case. The complainant who was a student in Form 3 at the said [Particulars Withheld] Mixed Secondary School testified as **PW1**. **PW2** was PW1's classmate. He was **MS**. The Principal of [Particulars Withheld] Mixed Secondary School one **Mr. Zakaka Ogola Alula** testiifed as **PW3. PW4** was a Medical Officer one **Dr. Awinda Victor Omollo. LA** was a Guardian of PW1 who testified as **PW5. PW6** was the investigating officer **No. 98056 PC. Peter Makemba** attached to Migori Police Station. The Appellant appeared in person during the trial. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court.

3. At the close of the prosecution's case, the trial court placed the accused persons on their defences where they both opted to and remained silent. Judgment was rendered on 23/07/2018 where the Appellant was found guilty as charged and convicted. He was sentenced to five years imprisonment. The co-accused was not found guilty and he was acquitted.

4. Being aggrieved by the conviction and sentence, the Appellant through Messrs. Omonde Kisera & Co. Advocates timeously filed an appeal and preferred the folowing seven grounds: -

> ***1) Learned Trial Magistrate erred in law and fact failing appreciate that the Prosecution had failed to prove its case beyond any reasonable doubt against the Appellant.***
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> ***2) Learned Trial Magistrate erred in law and fact failing to see the contradictions and inconsistencies in the Prosecution case which were fatal and rendered same unsafe for conviction for example the variance between the alleged date of admisision of PW1 at Ojele Hospital on 12th February 2018 for an incident alleged to have occurred on 13th February 2018 as per the charge sheet.***
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> ***3) Learned Trial Magistrate erred in law and fact in failing to appreciate that no tangible evidence confirming any surgery for the alleged removal of any spleen was preseneted before Court as the Treatment notes confirming that such surgery was undertaken was not availed before the Court.***
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> ***4) Learned Trial Magistrate erred in law and fact convicting the Appellant in a case where the evidence of PW1 respecting the charge was not corroborated at all by any other witness thus no other witness saw the Appellant kick PW1 and yet more than one person was mentioned.***
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> ***5) Learned Trial Mgaistrate erred in law and fact in making unsupported assumption that teh other teachers were nmot called to testifiy and did not record teir statements because they feared incriminating the Appellant contrary to the overriding legal presumption in other words how could the Court speak for characters who were unknown to Court and impute reasons for their reluctance without evidence to that effect.***

***6) Learned Trial Magistrate erred in law and fact in failing to appreciate that there were gl;aring gaps in the Prosecution case which raised reaosnable doubts.***

***7) Learned Trial Magistrate erred in law and fact in issuing a sentence which was excessive in the circumstance.***

5. The Appellant prayed that the appeal be allowed, the conviction quashed and sentences set-aside accordingly.

6 The appeal was heard by way of oral submissions. **Mr. Kisera**, Counsel for the Appellant mainly contended that there were several inconsistencies and contradictions that made the conviction unsafe. That, according to the Discharge Summary PW1 was admitted into Ojele Memorial Hospital on 12/02/2018 whereas the offence was allegedly committed on 28/02/2018 therefore PW1 was admitted long before the alleged incident. Counsel further submitted that the error went to the root of the matter that it could not be cured by the application of **Section 382** of the **Criminal Procedure Code** and made reference to the High Court decisions in **Ephantus Lotoluai vs Republic [2013]eKLR , G.K.K. vs Republic [2016]eKLR , Eliud Ouma Agwara vs Republic[2016] e KLR, John Nakai Ngavi & Another v=s Republic [2011] e KLR and Republic vs John Wainaina Kanyangu & Another [2005] e KLR.**

7. The Appellant further submitted that the trial court relied on the evidence of a single witness without corroboration. That, PW1 was the only one who talked about the incident whereas it was alleged that there were several teachers in the staff room. That, the supposition by the trial court that the other eye witnesses were not called to avoid incriminating a colleague were wild assumptions and Counsel urged this Court to find that had they been called they would have given adverse evidence. Counsel urged this Court to find that the appeal is merited and to allow it.

8. The appeal was opposed. **Mr. Kimanthi**, Learned Principal Prosecution Counsel submitted that the Discharge Summary was not taken into account in the judgment but the P3 Form. That, the sentence was indeed lenient as the maximum sentence was life imprisonment. Counsel submitted that evidence of a single witness is capable of sustaining a conviction like in this case the abscence of the other witnesses notwithstanding. In a rejoinder **Mr. Kisera** submitted that the Discahrge Summary cannot be wished away as it was among the primary treatment documents produced by the prosecution.

9. This being a first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

10. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of causing greviuos harm were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and the submissions.

11. For a conviction to stand in a charge of causing grevious harm, the prosecution must prove the following ingredients:-

***i) That the complainant sustained actual bodily harm without any legal justification;***

***ii) It was the Appellant who unlawfully assaulted the complainant and occassioned him harm.***

12. I will hereunder consider all the said ingredients together.

13. As to whether PW1 was assaulted without any legal justification a result of which he sustained bodily harm, the position is divided. Whereas the prosecution answered in the affirmative, the Appellant answered in the negative. According to the Appellant, the fact that PW1 was assaulted on 13/02/2018 was not proved in view of the contents of the Discharge Summary which formed the primary treatment documents. I have seen the Discharge Summary. It is true it indicated PW1's date of admission at Ojele Hospital as 12/02/2018 and that of discharge as 28/02/2018. It was dated 05/03/2018. There is also the Ultra Sound Report dated 13/02/2018. According to PW4 ***'The ultra sound scan was done immediately same day injury was caused (sic)'***. The Ultra sound Report revealed that PW1 had a raptured spleen.

14. The question that begs an answer is whether the arnomaly in the Discharge Summary and the rest of the evidence be reconciled, and if so, in whose favour. PW1 testified that he was injured on 13/02/2018. That was corroborated by PW2 who confirmed that Teacher Amos went into their class on 13/02/2018 and wanted to cut PW1's hair which was shaggy but PW1 refused a result of which Teacher Amos took PW1 into the Staffroom. There was as well the evidence of PW3 who was the Principal of the School which further corroborated the issue. PW3 testified that he was called on 13/02/2018 and informed that PW1 had been injured at School that day. He proceeded to Ojele Memorial Hospital where he found PW1 admitted and wriggling in pains. PW3 then enquired from the Deputy Principal and learnt that indeed PW1 had been taken to the Deputy Principal for refusing to shave his hair on 13/02/2018.

15. There is also the evidence of PW4 who was the guardian of PW1. She testified as follows: -

***....On 12/2/18 I arrived home and found JO sleeping.....He said a teacher beat him in the staffroom for failure to shave. He couldn't stand upright on his own. After taking tea it became worse...We took him to Ojele Memorial that evening ultra sound was done and spleen found raptured and he was operated.....***

16. There is therefore a variance on the date the alleged offence was committed. According to PW1, PW2 and PW3 it was on 13/02/2018. That evidence supported the particulars of the charge as contained on the charge sheet. According to PW4, who was the guardian to PW1 and who took PW1 to hospital, and the Dischargwe Summary the offence was allegedly committed on 12/02/2018.

17. The date on which an offence is allegedly committed must always be firmly settled. Any variance on the date the alleged offence was committed must never be treated lightly. That is because it renders the charge defective and goes to the root of fair trial under **Article 50(2) (j)** and **(k)** of the **Constitution** which states that: -

> **50(2) Every accused person has the right to a fair trial, which includes the right-**
>
> **(j to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;**
>
> **(k) to adduce and challenge evidence;**

18. The only time a variation is not material and does not call for the amendment of the charge sheet is when the variation is on the time at which the alleged offence was committed. That is expressly provided for under **Section 214(2)** of the **Criminal Procedure Code**. The time at which the alleged offence was committed is completely different from the date the alleged offence was committed. Whereas one can be easily excused on the time at which the alleged offence was committed that is not so when it comes to the date the alleged offence was committed simply because a date instead refers to a completely different day.

19. The prosecution is always under a duty to correct any defectivity in the charge sheet and to reconcile the charge with the evidence. That at times calls for alteration of the charge sheet by way of amendment, substitution, introduction of a new charge and/or sound explainations on any variations thereto. In this case the prosecution was under a duty to reconcile the evidence of PW4 and the contents of the Discharge Summary with the rest of the evidence. That, the prosecution failed to do. The fact that the evidence of the guardian (PW4) supported the contents in the Discharge Summary cannot be ignored. It created a reasonabe doubt as to when the alleged offence was committed. Was it on 12/02/2018 or on 13/02/2018?

20. I must say that a defective charge sheet cannot be cured by the application of **Section 382** of the **Criminal Procedure Code**. The section deals with errors, omissions and irregularities which do not go to the root of the case as to cause failure of justice to an accused person. On the other hand, defectivity of charges is covered in **Section 214** of the **Criminal Procedure Code.** From the reading of that section of the law, a defective charge has no legal leg to stand on and an accused person must not be called to participate in any trial hinged on such a defective charge. A defective charge instead goes to the root of the case and causes outright failure of justice to an accused person. A defective charge must and can only be cured by way of an alteration through either an amendment, substitution, addition of a new charge or in any other way as to meet the circumstances of the case.

21. In this case there is a variance on the date the alleged offence was committed between the charge sheet and the evidence. The charge sheet was hence defective. From the record the charge sheet was not altered in any way and neither were the discrepancies between the evidence of PW4 and the Discharge Summary reconciled with the rest of the evidence. The trial was hence a mistrial. With utmost respect to the learned trial court, the conviction cannot stand and must be interfered with.

22. Having so found, I must ascertain whether the Appellant ought to be released or be retried. My attention is drawn to several decisions of the Court of Appeal on the subject including **Samuel Wahini Ngugi v. R** **(2012) eKLR** where the Court stated as follows:

> ***The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:***
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>> *'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered………In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person'*
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> ***That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004 (unreported)when this Court stated as follows:***
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>> *"…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it."*

23. The defect in this case was squarely on the part of the prosecution. It failed to reconcile the evidence with the charge. In such a case allowing a retrial will be prejudicial to the rights of the Appellant and it will be tantamount to giving an opportunity to the prosecution to put their house in order. The circumstances of this case do not aid a retrial.

24. The upshot is that the appeal is successful. The conviction is hereby quashed and the sentence set-aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

**DELIVERED, DATED** and **SIGNED at MIGORI this 28th day of February 2019.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of: -**

**Mr. Omonde Kisera,** Counsel instructed by Messrs. Omonde Kisera & Co. Advocates for the Appellant.

**Mr. Kimanthi,** Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

**Everlyn Nyauke** – Court Assistant