REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 8 OF 2018

ROBERT MWIKWABE MAITARIA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the original convictions and sentences of Hon. P. N. Maina, Senior Principal Magistrate in Kehancha Principal Magistrate's Court Criminal Case No. 207 of 2016 delivered on 05/04/2018)

JUDGMENT

1. The Appellant herein, **Robert Mwikwabe Maitaria,** was charged with the offence of **Assault causing greviuos harm** contrary to **Section 234** of the **Penal Code, Cap. 63** of the Laws of Kenya to one **Simeon Chacha Mwita**, the complainant herein.

2. He denied committing the offence and he was tried, found guilty and convicted accordingly. He was sentenced to 20 years imprisonment.

3. The complainant testified as **PW1**. **PW2** (**Tabitha Robi Chacha**) was the wife of the complainant and **PW3** (**Esther Ghati Chacha**) was the complainant's daughter. A Clinical Officer from at Kehancha District Hospital testified as **PW4** and **PW5** was the Assistant Chief of Gwikonge Sub-Location one **Saul Mwita Tegera**. The investigating officer **No. 787061 Corp. Mike Kiptum** attached to Kehancha Police Station testified as **PW6**. The complaianant and the Appellant were brothers and neighbours. 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 save for PW1 whom I will refer to as '*the complainant*'.

4. At the close of the prosecution's case, the trial court placed the Appellant on his defence where the Appellant opted to and gave unsworn defence without calling any witnesses. Judgment was rendered on 05/04/2018.

5. Being aggrieved by the conviction and sentence, the Appellant timeously filed an appeal and preferred the folowing grounds: -

> ***a) That I pleaded not guilty to ther charge herein.***
>
> ***b) That the trial court erred in both law and facts by meeting a harsh and excessive sentence on merely one eye witness (PW1) who even did not enlighten the court on the cause of assault and the injuries he sustained to warrant the harsh sentence imposed.***
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> ***c) That the trial court erred in both law and facts by not observing that my constitution rights were prejudiced by subjecting me to a full hearing before supplied with prosecution witnesses statements for PW1, PW2 and PW3.***
>
> ***d) That the trial court erred in both law and facts by not observing that there were critical contradictions which could not warrant teh harsh sentence, in that, even the clinical officer did not conclude whether PW1 was permanetly injured. PW1 said he was injured at the backbone and PW4 said that teh complainnat had cuts, chest injury and spinal injury. How could it possible that teh complainant was pierced once and teh same sharp object inflicted so many cuts?***
>
> ***e) That teh trial court erred in both law and facts by not questioning why the exhibit was not produced in court. Furthermore the prosecution did not table in court the absconded warrant of arrest copies to proof I had ran away, PW1 also failed to englighten the court why none of the members of the public did not testify in court to support his allegations.***

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

7. The appeal was heard by way of written submissions. The Appellant mainly contended that the judgment did not evaluate the evidence rightly as to sustain a conviction and that the evidence was riddled with several unreconciled contradictions. The State opposed the appeal

and prayed that it be dismisssed.

8. 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.

9. 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.

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

(i) That the complainant was assaulted without any legal justification;

(ii) That the complainant sustained actual bodily harm;

(iii) It was the Appellant who unlawfully assaulted the complainant and occassioned him harm.

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

12. The fact that the complainant sustained injuries is not in doubt since it was vouched by all the witnesses. There is as well medical evidence on the injuries. As to how the complainant sustained the injuries, the record also speaks for itself. The complainant narrated his encounter with the Appellant. He met the Appellant as he was passing near the Appellant's house. The Appellant stopped him and told him not to use that route. As they were exchanging words, the Area Assistant-Chief (PW5) appeared and intervened. He asked the two not to quarel and separated them. The Appellant walked towards his house whereas the complainant and PW5 took different routes.

13. Shortly PW5 heard screams from the direction where the complainant and the Appellant had met. He rushed back only to find the complainant lying on the ground and bleeding profusely from the back. He asked him what had happened and he told him that it was the Appellant who had attacked him with an iron road that was sharpened on both sides and disappeared. People gathered and PW5 asked PW3 to call PW2. The complainant was then taken to hospital by PW2.

14. I have carefully considered the evidence of the complainant which was corroborated by that of PW5 and PW6 on the issue of the recognition of the assailant. I have also taken the caution as laid down in various case law including **R –vs- Turnbull & Others (1973) 3 ALL ER 549** where the Court had the following to say: -

... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

15. Closer home the Court of Appeal has also severally emphasized on the need to treat evidence by a single identifying witness with caution. (See **Wamunga vs Republic (1989) KLR 426, Nzaro vs Republic (1991) KAR 212**, **Kiarie vs Republic (1984) KLR 739, Douglas Muthanwa Ntoribi vs Republic (2014) eKLR**, **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported).**

16. In Uganda, the Court of Appeal in **Obwana & Others v. Uganda (2009)2 EA 333** presented itself thus:

....It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it. .....This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence.

17. The Appellant raised an unsworn defence. It was the Appellant's position that he did not attack the complainant and that he was framed due to a grudge with the complainant as it was the complainant who had stopped him from using a public road. That, the Appellant had been arrested over another offence and that the current offence was only planted on him. He wondered that the offence was allegedly committed at a trading centre yet there was no eye witness other than the complainant.

18. Although the Appellant acted squarely within the law by opting to give an unsworn testimony, the prosecution was denied the opportunity to interrogate that defence. The Appellant did not examie any of the witnesses on the alleged grudge with the complainant. He only brought out the matter at the tail-end of the proceedings. That, however, does not lessen the duty on the part of the prosecution to prove

its case since the Appellant is not required to prove his innocence.

19. The complainant was the only identifying witness. He was a brother to the Appellant. The incident occured at around 04:00pm when it was during day time. The record has no indication of anything that may have hindered a clear identification. Further, PW5 met the Appellant and the complainant in an argument where the Appellant did not want the complainant to use a road which passed near his house. PW5 asked them to stop the quarel and allowed the complainant to use the road since it was a public road and the complainant didnot require any one's permit to use the road. The decision must have angered the Appellant more who rushed to his house which was nearby, armed himself and attacked the complainant. Coupled with that is the fact that the Appellant disaapeared immediately after the incident until he was arrested on a different offence on 22/03/2016. That was a period of around 18 months. The complainant as well and immediately gave the name of the assaillant to PW5 and the police.

20. By juxtaposing the law and the facts in this case, the irresistible finding is that the incident occured on a road that passed near the house of the Appellant and not at a trading centre and, without shifting the burden of proof, the grudge between the Appellant and the complainant arising from the complainant's refusal to allow the Appellant use a certain road was not adequately established at least through examination of the witnesses.The defence was hence an afterthought and was rightly rejected. Instead, the Appellant was sufficiently placed at the scene as the one who stopped the complainant from using a public road and injured him shortly thereafter without any lawful justification. Therefore, the identification of the Appellant by recognition as the one who attacked the complainant was not in error.

21. As to the nature and extent of the injuries sustained by the complainant, there is the unchallenged medical evidence from the treatment notes and P3 Form as well as PW4. The complainant sustained very serious injuries which were classified as '*greviuos harm*' and were caused by a sharp object. The complainant suffered injuries on the back towards the left side of the chest with a resultant cut on the 7th rib and serious weakening of both legs which also lost sensation. Indeed when the compalainant testified he stated that '*he used to be a farmer*' meaning that he could not engage in his farming activities any more. At the age of 42 years, the complainant was instead reduced to a burden on his family. The rest of his life changed from an active farmer to being dependent on others.

22. I have also considered the contention that the prosecution evidence was riddled with unreconciled contradictions. Having carefully gone through the evidence I did not come across such contradictions qualifying to be unreconcilible. The trial court dealt with and reconciled all issues which were in controversy. That ground fails.

23. The foregone analysis yields that the Appellant was rightly found guilty and convicted as charged. The appeal against conviction is unsucessful.

24. On sentence, the Appellant contended that the 20-year imprisonment term is excessive, harsh and very punitive and that he ought to be ganted a non-custodial sentence. The offence of causing grevious harm attracts a sentence of upto life imprisonment on conviction. The sentence was handed down after the sentencing court received mitigations and a comprehensive Pre-Sentence Report.

25. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act upon in dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

26. Revisiting the circumstances surrounding the commission of the offence herein and the mitigations tendered, I do not see how the sentencing court can be faulted. The Appellant attacked the complainant without any justification at all. He reduced his brother to a beggar at such an early age while he is still fit to continue with his life as before. The Appellant cannot call for leniency in such circumstances. I therefore find that the sentence was appropriate in the circumstances of this case. The appeal on sentence is as well disallowed.

27. The entire appeal is hence not merited. It is hereby dismissed, and the decision of the trial court is hereby affirmed.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 27th day of February 2019.

A. C. MRIMA

JUDGE

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

Robert Mwikwabe Maitaria, the Appellant in person.

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

Miss Nyauke – Court Assistant