REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 37 OF 2018

MARIBA CHACHA MWITA *Alias* BISAKA CHACHA KONGATI.....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. 398 of 2017 delivered on 14/03/2017)

JUDGMENT

1. The Appellant herein, **Mariba Chacha Mwita** *alias* **Bisaka Chacha Kongati,** 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 **Stephen Mwita Robi**, the complainant herein. The particulars were that the offence was committed on 01/02/2017 at Wangirabose Market, Wangirabose Location, Kuria East Sub-County within Migori County.

2. The Appellant 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** was a Watchman at a bar at the Wangirabose Market. He was one **Haron Gaingi Paulo. PW3** was one **Chacha Samuel Mwita**, **PW4** was one **Wambura Gisiri** who was in the company of the Appellant. **PW5** was the arresting officer one **No. 2005016438 APC Elias Okwemwa** attached at Ntimaru Sub-County Headquarters. A Clinical Officer attached at Lolgorian Sub-County Hospital testified as **PW6** the investigating officer **No. 67595 Corp. William Ogeto** attached to Ntimaru Police Station testified as **PW7**. The complaianant and the Appellant were 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 14/03/2017.

5. Being aggrieved by the conviction and sentence, the Appellant filed the appeal subject of this judgment on 26/07/2018 with leave of this Court granted on 24/07/2018. The Appellant preferred five main grounds as follows: -

> **1. That I pleaded not guilty to ther charge herein.**
>
> **2. That the trial court erred in law and in fact by convicting without considering that I the appellant was not accorded a fair trial as Article 50(2) j of the Constitution was not complied with as required in law.**
>
> **3. That teh trial court erred in law and fact by convicting me without considering that the findings were insuficient in law hence teh decisions was unsatisfactory in law.**
>
> **4. That the trial court erred in lawa without considering that teh prosecution case was not proved beyond reasonable doubts hence the decision was insatisfactory in law.**
>
> **5. That the trial court erred in law by failing to find that my defense statement was not given due consideration.**

6. The Appellant prayed that the appeal be allowed in its entirety.

7. The appeal was heard by way of written submissions. The Appellant mainly contended that the prosecution did not adduce sufficient evidence to prove the charge, that the evidence was riddled with several unreconciled contradictions and that he was not properly identified

as the assaillant. 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 sustained actual bodily harm without any legal justification;

ii. 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 prosecution's case was that the complainant went to a bar at Wangirabose Market where he had gone to see one of his tenants. That, as the complainant was talking to the tenant the Appellant and PW4 entered the bar while armed with pangas. PW2 quickly followed them and asked them to surrender their pangas at the counter as they settled down in the bar. PW4 obliged but the Appellant refused insisting that he was leaving. The Appellant left the main bar and sat at the verandah just outside the bar as PW4 remained inside. That, shortly the complainant walked out and as he was drawing the curtain at the main door to the bar at the verandah, his hand was abruptly cut. He raised alarm and people quickly turned up.

13. PW2 saw the Appellant running away immediately the complainant raised alarm. PW2 knew the Appellant well as he was his nephew. The complainant, PW2 and PW3 testified that the bar was well lit with bulbs powered by solar as well as the outside and that visibilty was not hindered. PW3 was a patron in the bar who responded the call for help. He only found the complainant already injured. PW4 did not also witness the attack on the complainant. It was the prosecution's further case that the Appellant ran away and disappeared from the village until 28/06/2017 when he resurfaced and was arrested.

14. The compalainant was taken to hospital where he was attended to by PW6 who later filled in and produced a P3 Form in court. The complainant reported the matter at Ntimaru Police Station and PW7 issued an Order of Arrest against the Appellant which was executed by PW5.

15. One of the Appellant's main contention's is on identification. There is no doubt that the incident occured at night and it appears that there was no eye-witness. That being the case, the matter revolved around circumstantial evidence. This Court is hence called upon to closely examine the evidence on record as to ascertain whether the evidence satisfies the following requirements: -

(i) The circumstances from which an inference of guilt is sought to be drawn, must be congently and firmly established;

(ii) The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

16. The foregone principles were set out in the *locus classicus* case of **R -vs- Kipkering arap Koske & Another (supra)** and have repeatedly been used in subsequent cases including the Court of Appeal cases of **GMI -vs- Republic (2013) eKLR**, **Musii Tulo vs. Republic (2014) eKLR** among many others.

17. The Court of Appeal in the case of **Musii Tulo (supra)** in expounding the above principles expressed itself as follows:-

4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of Musoke v. R (1958) EA 715 citing with approval Teper v. R (1952) AL 480 thus: -

> 'It is also necessary before drawing he inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

18. PW4 was invited by the Appellant for a drink at a bar at Wangirabose Market and accepted the invitation. He accompanied the Appellant and entered the bar. Both were armed with pangas. On entry into the bar, PW2 asked them to surrender the pangas at the counter as they joined the other patrons in the bar. PW4 obliged, but the Appellant refused. He instead walked out of the bar. PW4 remained inside the bar. The complainant was also inside the bar. The complainant was attacked at the door as he walked out. According to the complainant there was a curtain at the door and as he was drawing it using his hand the hand was cut. The complainant screamed and PW2 who was outside the bar quickly turned towards the direction of the screams and saw the Appellant running away. Other people shortly gathered.

19. The Appellant was a neighbour to the complainant. After the incident the Appellant disappeared from the village and resurfaced about five months later. It was the Appellant who invited PW4 for a drink into the bar. The fact that the Appellant refused to surrender his panga and changed his mind and instead walked out of the bar leaving behind PW4 whom he had invited for a drink on seeing the complainant inside the bar coupled with the fact that the Appellant was seen by PW2 running away from the door to the bar immediately the complainant screamed and the disapearance from his home for such a long period form a chain so complete that there is no escape from the conclusion that within all human probability that it was the Appellant who attacked the complainant.

20. The injuries were classified as grevious harm by PW6 in the P3 Form. Whereas a Court is entitled to treat the medical evidence on the injuries as persuasive and is at liberty to form its own opinion having regard to the evidence before it as to the nature and classification of the injuries, the complaianant testified and the trial court saw the gravity of the injuries. The court noted that the injuries were not only life-threatening but also permanrnet in nature. (See the Court of Appeal in **John Oketch Abongo vs. Republic (2000) eKLR)**. I therefore ahve no doubt that the complainant sustained injuries which were classifed as greviuos harm.

21. The Appellant was hence rightly found guilty and convicted. I have carefully perused the record and do not seem to see the alleged contradictions. The witnesses were quite specific on what they witnessed and so informed the court. If there were any alleged contradictions then the same must have been of a minor nature and **Section 382** of the **Criminal Procedure Code**, **Cap. 75** of the Laws of Kenya becomes the remedy in such instances. The appeal on conviction is therefore dismissed.

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

23. 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.

24. 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 the compalainant's right hand to non-functional. 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.

25. 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 28th day of March 2019.**

A. C. MRIMA

JUDGE

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

Mariba Chacha Mwita *alias* **Bisaka Chacha Kongati,** the Appellant in person.

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

Evelyne Nyauke – Court Assistant