REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 29 OF 2016

BARNABAS NYANGARESI OURO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

{Being an appeal against the conviction and the sentence of Hon. N. Kahara – RM dated and delivered on the 30th day of June 2016 in the Original Keroka Principal Magistrate's Court Criminal Case No. 368 of 2015}

JUDGEMENT

The appellant was found guilty, convicted and sentenced to seven (7) years imprisonment on a charge of GRIEVOUS HARM CONTRARY TO SECTION 234 of the Penal Code. The particulars of the charge were that on 28th January 2015 at Rigoma village, Monyenya Sub-location in Borabu Sub-county jointly with others not before court he unlawfully did grievous harm to DOUGLAS ONDIEK ODIERE.

Being aggrieved by the conviction and sentence he preferred this appeal and has been on bond pending hearing and determination of the appeal. The appeal is premised on ten grounds, namely: -

> **"1. That the learned trial magistrate erred both in law and facts by basing my conviction on contradicting and inconsistent evidence.**
>
> **2. That I was convicted on weak evidence of the prosecution witnesses who lied to the court cause we have had a long outstanding grudge over land dispute between me and the complainant herein.**
>
> **3. That the learned trial magistrate erred both in law and facts by not considering and convicting the appellant on the evidence of prosecution witnesses without warning himself adequately with caution.**
>
> **4. That the learned trial magistrate erred in law and facts by disregarding the defence of the appellant herein.**
>
> **5. The trial magistrate erred in law and fact by entering a conviction whereas the particulars of the charge did not support the statement of the charge.**
>
> **6. That if the trial magistrate could have analysed the evidence of prosecution witnesses properly she could have arrived at the correct judgement which is acquitting me.**
>
> **7. That the learned trial magistrate made crucial error when he seemingly based the conviction on misapprehension given to the fact that there was no eye witness from the prosecution.**
>
> **8. That judgement against the Appellant be reversed, set aside, varied and/or be quashed."**

The appeal was canvassed through written submissions. In summary, Counsel for the appellant faulted the trial magistrate for what he refers to as accepting the evidence of the complainant when there is evidence that the complainant sustained the injuries in a fight with the complainant. Counsel submitted that both suffered grievous harm and the only injury the appellant inflicted on the complainant was a bite on the nose which is simple assault and not grievous harm. Counsel also stated that the appellant's trial was not fair as his rights under **Articles 50 (4) and Article 28** of the Constitution was violated following the alleged beating he got from members of the public. Counsel contended that the trial magistrate's theory that the appellant was a victim of mob justice was not founded and that the learned magistrate had shifted the burden of proof to the appellant.

Mr. Ochieng, Learned Principal Prosecution Counsel, opposed the appeal. He submitted that this was a clear cut case that was witnessed by

the four prosecution witnesses whose testimonies were flawless, vivid and corroborative of each other. Mr. Ochieng concurred with the trial magistrate that the charge was proved beyond reasonable doubt. He contended that medical evidence adduced by the doctors confirmed the nature and extent of the injuries suffered by the complainant and it is clear the same amounted to grievous harm. Counsel discredited the appellant's evidence saying it was a sham as in the appellant's P3 Form it was indicated that he was assaulted by six people while in court he alleged the assailants were four. He also disputed the appellant's ground that the particulars of the charge did not support the statement of the charge. Counsel submitted that the charge complied with **Section 134 of the Criminal Procedure Code.** He further contended that the sentence of seven (7) years imprisonment was fair and lawful for the injuries inflicted upon the complainant.

I have carefully considered the submissions by both sides and also done my duty as an appellate court by re-evaluating the evidence in the trial court so as to arrive at my own conclusion. I have done so while bearing in mind that I did not have the benefit of hearing or seeing the witnesses give evidence and so did not observe their demeanour. It is my finding that the charge against the appellant was proved beyond reasonable doubt. This offence occurred in broad daylight as the complainant was supervising two people who were working on a piece of land upon which his father and the appellant were disputing. The complainant stated that the appellant went there with a boda boda rider who had a camera and started taking photographs of him, the land and the workers. The appellant got annoyed when the complainant asked him why he was taking photographs. He shouted and attracted the attention of his son and nephew who seem to have been waiting for the signal. The three of them set upon the complainant inflicting injuries whose extent and degree was confirmed by medical evidence. Although the appellant adduced evidence that he also sustained injuries, it is my finding that he did not prove that those injuries were occasioned by the complainant or the two workers he was with. I am also not satisfied that this was a fight. Both Pw3 and Pw4 who I am convinced were truthful and reliable witnesses fled from the scene when the appellant and his accomplices set upon the complainant. They also corroborated the complainant's evidence in all material particulars including the fact that they recognized the appellant who was their neighbour. They were categorical that there was no fight; that it was the appellant and his accomplices who beat the complainant. After assaulting the complainant, the appellant and his accomplices threw him into a hole and poured water on him. He was in that hole when his father Pw2 went to the farm after being told that his son had died. It is difficult to believe that the complainant who had been beaten and left for dead could have assaulted the appellant. This court finds that the appellant acted in concert with his son and nephew. Had he not signalled them they would not have gone to beat the appellant. It is my finding that the bite he inflicted upon the complainant cannot be isolated from the injuries inflicted by the other two assailants. The appellant is deemed under **Section 20 (1) of the Penal Code** to have inflicted those injuries upon the complainant and is as guilty of the offence of grievous harm as they would have been had they also been charged. The appellant acted unlawfully. He should have taken his dispute with the complainant's father to lawful authorities for adjudication instead of beating the complainant.

Counsel for the appellant submitted that the appellant's right to a fair trial was violated because he was beaten by a mob. That happened before the trial but not during the trial and did not in any way affect the proceedings. The appellant was accorded sufficient opportunity to cross examine the witnesses and the record shows that he made a good job of it. Accordingly, I find no merit in the appeal against the conviction.

The appellant has also asked this court to set aside the sentence imposed by the lower court on the ground that it is excessive. I am satisfied that there are reasonable grounds to do so. The sentence prescribed under **Section 234 of the Penal Code** is life imprisonment. In sentencing him, the trial court took into consideration various factors such as his antecedents, mitigation, prevalence of the offence and his attitude to the offence. I am however persuaded that the appellant being a first offender the sentence of seven (7) years was excessive. A non-custodial sentence would have been more appropriate in the circumstances. Accordingly, the sentence is reduced to a fine of Kshs. 200,000/= (two hundred thousand shillings only) or twelve (12) months imprisonment. The appellant shall be taken into custody to start serving the sentence in the event that he does not pay the fine. It is so ordered.

Signed, dated and pronounced in open court this 14th day of March, 2019.

E. N. MAINA

JUDGE