REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 9 OF 2018

PATRICK MUTEGI ELIJAH.....1ST APPELLANT

FRIDAH NJERI KAGWIRIA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being appeal from original conviction and sentence in the Principal Magistrate's

Court at Chuka in Criminal Case No.1489 of 2011 delivered by M.SUDI.

(Senior Resident Magistrate (S.R.M) on 8th March, 2018).

J U D G M E N T

1. **PATRICK MUTEGI ELIJAH** 1st Appellant and **FRINDAH NJERI KAGWIRIA** 2nd Appellants herein were jointly charged with the offence of Grievous Harm contrary to **Section 234** of the **Penal Code** vide ***Chuka Chief Magistrate's Court Criminal Case No.1489 of 2011*** and the particulars were that on 18th December 2011 at Iruku village Muiru within Tharaka Nithi County, the Appellants jointly and unlawfully did grievous harm to **JAMES MURIUKI MUTEGI**, the complainant. The Appellant denied committing the offence but after trial they were was found guilty of the said offence, convicted and sentenced to each serve 15 years imprisonment. They felt aggrieved and preferred this appeal citing seven grounds.

2. Before I delve into the grounds of appeal, this court will briefly look at the summary of the prosecution's case and appellant defence at the trial.

The prosecution's case against the Appellants was that they jointly as husband and wife cut James Muriuki Mutegi several times with a machete (panga) and caused him grievous harm. James Muriuki Mutegi (PW1) gave the trial court details of what took place on 18th December, 2011, the material time. It was his evidence that while he was in his parcel of land (a parcel he apparently bought from a sister to the 1st Appellant) with a boda boda person and an intended buyer, the 2nd Appellant confronted him and send her child to call his father who came and together they attacked the complainant cutting him several times (17 cuts). The evidence was supported by Eric Muthomi Mutegi, the motorcycle rider commonly referred to boda boda.

3. Joseph Mwenda a clinical officer from the then Chuka District Hospital testified and confirmed that the complainant was cut 17 times and tendered P3 (P. exhibit 1 (b)) and discharge summary (P Exhibit 1 (b)) to confirm the injuries which were classified as grievous harm by another medical officer known as Hillary Kangichu.

4. The investigating officer, Corporal Richard Oburoge from Chuka Police Station, told the trial court that he recovered the machete (P. Exhibit 2) at the scene (complainant's home at Muiru) after being led there by the 1st appellant who volunteered to show him where he had hidden the panga. He further observed that he noticed blood stains at the scene of crime and sign of struggle. He further told the trial court that the appellant showed him the panga hidden on the ground. The investigating officer told the trial court how he visited the hospital where the complainant was admitted and the serious condition he found him in. It was his evidence that the attack was motivated by a dispute over a parcel of land the complainant had bought from 1st appellant's sister.

5. In his defence, the 1st appellant stated that on the material day, he was at home with his wife when he heard a motorbike and saw four to five people walk towards his farm and that he called his wife and went to find out. He further added that the four people fled to downwards to the stream screaming. He denied harming any of them.

6. On her part, the 2nd Appellant and co-accused in the case also denied the charge and confirmed the chain of events as narrated by her husband (the 1st Appellant herein).

7. The trial court found that based on the evidence tendered the prosecution's case had been proved beyond reasonable doubt. The trial court observed that the complainant suffered 17 cuts and as a result lost consciousness and could not talk for days and was admitted for two weeks in Hospital. The trial court further found that the 2nd Appellant clearly called for a panga and her husband the 1st Appellant herein with obvious intentions of causing harm to the complainant. The two appellants (appellant and his wife) were both convicted and sentenced to serve 15 years each in prison after the trial court took mitigating factors into consideration.

8. The Appellants have listed the following grounds in their appeal.

> ***i. That the learned magistrate erred in law and fact by failing to analyse the sworn statement of defence thereby denying him a right to a fair hearing.***
>
> ***ii. That the learned magistrate erred by dismissing the Appellant's defence without giving reasons.***
>
> ***iii. That the learned magistrate erred in law and fact by finding that the case against the Appellant had been proved beyond reasonable doubt.***
>
> ***iv. That the appellants was not positively identified.***
>
> ***v. That the learned magistrate disregarded the mitigating circumstances and handing out 15 years sentence which in their view is harsh and excessive.***
>
> ***vi. That the learned magistrate erred by not giving the appellant a fair hearing and arriving at a wrong decision which in his view was wrong, unreasonable and unjust.***

9. The Appellants in their written submissions through ***Yunis Osman & Mwiti Advocates*** contended and urged this court to subject the evidence against them to a fresh examination. According to them the complainant (PW1) contradicted himself and that the court only noted three scars when the complainant had said he was cut 17 times.

10. They also point out that there was a discrepancy in prosecution's case as PW1 stated that the incident took place at 10 a.m while PW4 indicated that it was at 3 pm. They have pointed out that PW4 stated that he saw him hitting the complainant with a shovel while the accused stated it was a panga.

11. The Appellants have further pointed out that the discharge summary indicated that the injuries suffered by the complainant in their view was mild while the P3 classified the injuries as grievous and that the discharge summary must have been used to fill the P3 in their view the doctor must have used the opinion of the complainant who had everything to gain from falsehoods.

12. The Appellants have faulted PW6 (the investigating officer) who testified that the Appellant and his co-accused went to the police station to report the incident but that the same report was never booked but disregarded. He also contends that the Assistant Chief identified them yet he was not at the scene of crime at the material time.

13. They further contend that 1st Appellant was led to reveal where the panga was without being informed of his Constitutional right against self- incrimination and his right to legal representation and he has relied on the provisions of **Article 50(4**) of **Constitution** of **Kenya 2010** to buttress their contention.

14. The Appellants have cited a number of decisions to support their appeal. They have cited the decision of ***Twehang Alfred -vs- Uganda cited in Kendi -vs- Republic [2016] eKLR*** where the court held that minor contradictions in a case will be ignored unless they point to deliberate untruthfulness. They have also cited the case of ***James Karumba -vs- Republic [2016] eKLR*** where the Court of Appeal stated that what is important where discrepancies appear in a case is to check if such discrepancies are of such a nature as to create doubt as to the guilt of the accused but where discrepancies do not affect the weight of the prosecution's case, the same can be overlooked.

15. The Appellants have faulted the trial court for ignoring the injuries described in the discharge summary and not recording the specific weapons used by the Appellants. They submit that there were doubts in prosecution's case and that they should have been given the benefit of the same as held in ***Philiph Muiruri Ndaruga- vs- Republic [2016] eKLR*** where the court held that even a single circumstance is sufficient to create doubts in the mind of the court.

16. The appellants have also submitted that that the prosecution failed to call an eye witness named Murathi and a taxi driver who took PW1 to hospital . In their view the trial court should infer that the witnesses not called would have given adverse evidence and they relied on the decision of ***Halkano Bagaja -vs- Republic [2015] eKLR.*** This ground however appears to have been raised without leave of this court pursuant to **Section 350 (1) (i)** of the **Criminal Procedure Code**. The ground as such was raised improperly at submissions stage. The Appellants ought to have sought leave from this court because it is not one of the seven grounds raised in their petition of appeal.

17. The Appellants have contended that they could not have been identified properly because the evidence tendered indicated that the complainant fell unconscious and could not therefore see who attacked him. In their view an Identification Parade should have been conducted.

18. They further state that the trial court ignored their defence and in particular the fact that trespass is a criminal offence and that it was wrong for the trial court to conclude that the 2nd Appellant's defence that she was assaulted was a cover up. They submit that all are equal in the eyes of the law and that the police should have investigated the two reports instead of casually dismissing them.

19. On mitigation, the Appellants have faulted the trial court for not analyzing the arguments addressed during mitigation. In their view the trial court did not consider the fact that the Appellants were elderly remorseful and positively provoked due to underlying land feuds. They content that they are both first offenders and bread winners of their young children. They have cited the decision in ***Walter Ouma Wabwire -vs- Republic [2018] eKLR*** which held that an appellate court would not interfere on the discretion by a trial court unless it is established that the Judge acted upon wrong principle, overlooked a material factor or that the sentence was manifestly excessive in the circumstances. They have urged this court to interfere with the trial court's discretion because in their view, they have established circumstances that warrant interference.

20. In their oral submissions the appellants pointed out that the panga recovered was no subjected to forensic testing and that the production contravened **Section 25 A** of the **Evidence Act** as the same in their view was not properly tendered in evidence.

The State/Respondent through the Office of Director of Public Prosecution opposed this appeal and infact prayed that the sentence against the Appellant be enhanced in view of the aggravating factors which they pointed out were the weapons used to inflict grievous harm to the complainant.

21. The Respondent in its written submissions have further contended that the Appellants have introduced a new ground of appeal which should not be considered and that ground relates to not calling some witnesses. They have all the same cited the decision in ***Bukenya & Others -vs- Republic (1972)*** **EA 349** which held that prosecution must make available all necessary witnesses to establish the truth and where the evidence is inadequate, the court may infer that the evidence of uncalled witness would have tendered to be adverse to the prosecution. They have contended that the witnesses they availed at the trial court were adequate and that failure to call the cited witnesses was not fatal and have cited the decision in the case of ***Jeremiah Gathiku -vs- Republic (CRA . NO.73 OF 2008)*** to butress their contention. It is submitted that the Appellants have failed to demonstrate that the failure to call witnesses was motivated by an oblique motive.

22. The Respondent has supported the trial court's finding of guilt against the Appellants asserting the case against them was proved beyond reasonable doubt and has detailed evidence they opine proved that the Appellants caused grievous harm to the complainant.

23. The Respondent has contended that evidence on identification was beyond doubt pointing out that the assault happened during the day and the complainant knew the neighbours well. The Respondent further asserts that PW4- Eric Muthomi Mutegi also positively identified the Appellants.

24. **Determination**

This court has carefully considered this appeal and grounds in the petition and the written submissions. I have also considered the response by the Respondent through the Director of Public Prosecution. This court being the 1st appellate court must re-evaluate the evidence tendered at the trial and draw its own conclusion bearing in mind that it does not have the benefit of the trial court which had the benefit of hearing first hand the evidence by the witnesses.

25. The issues in this appeal in summary are as follows namely:-

a) Whether or not there were inconsistencies and contradictions in the prosecution's case and whether the same affected the weight of prosecution's case.

b) Whether the defence was disregarded.

c) Whether the prosecution's case proven beyond reasonable doubt.

d) Whether the Appellants were positively identified.

e) Whether the sentence meted out against the appellant was too harsh.

26. (a) **Inconstistencies/contradictions**

The Appellants have pointed out areas of contradictions or inconsistencies in the prosecution's case which they feel were not taken into account by the learned trial magistrate. They have stated that the complainant contradicted himself in the evidence he gave before and after the case began *de novo*. They have stated that in one instance he stated that he saw his assailants and on the other he stated that he could not count the pangas that cut him because he fell down unconscious. The Appellant have stated that the evidence of the complainant must be discredited on account of this. I am not however persuaded that there was any major inconsistency in the complainant's evidence regarding the attack. He clearly told the trial court that he saw the 2nd Appellant with a panga standing infront of him and the 1st Appellant standing 5 metres behind him with a panga, and a fork jembe he had been using in his farm threatening that he would kill someone and before long he was cut on the side of his head by 1st Appellant as the 2nd Appellant also jointed in the assault. The fact that the trial noted 3 scars and not 17 as noted by the medical officer who treated the appellant does not show that there is any inconsistency because may be by the time trial took place on 5th December, 2013, the other scars might have healed with the passage of time.

I have noted that it is true that there is inconsistency on the evidence of PW1 (complainant) and PW4 on the question of time the incident took place because while PW1 states that it was around 10 pm, PW4 states that it was 3pm I am however not convinced that the discrepancy about the time the incident is said to have taken place is significant or was it of such a nature that could have created my doubt on its own about the guilt of the Appellants. I am not persuaded that the discrepancies pointed out by the Appellants affected the over all weight of the prosecution's case. The same were insignificant and did not affect the insight of prosecution's case.

(b) **Whether the defence was considered**

The Appellants have contended that they were denied their rights to defend themselves because, the trial court disregarded their defence. I have gone through the record of proceedings and I have noted that the Appellants were granted an opportunity to defend themselves and indeed did after their defence by giving sworn statements of defence. The trial court found that their defence was not plausible enough. I have re-evaluated the evidence offered by both the Appellants. The 1st Appellant stated that he saw 4 to 5 ***"unknown"*** persons come in a motorbike or boda boda and that they got off the boda boda and went to what he term as ***"his"*** farm and that he called his wife and together they went to find out who they were and that it was at instance that the people ran downwards towards a river ***"screaming''*** and sounded like they were fighting. The 2nd Appellant adopted the same narrative and considering what actually took place it is evident that the defence was an afterthought. In the first place, the 1st Appellant states that the complainant had trespassed onto his farm but then he stated in his defence that the four people he saw were strangers and the they ran towards the river screaming. They have further stated that they reported to the police about trespass which was rightfully found by the trial court to be a ***"cover up".*** Why would they report that some people he did not even know had trespassed when they had ran towards the river and disappeared? They did not say what the people were doing and so why would they even be bothered unless of course they clearly knew that the complainant had an interest in a parcel of land which interests were adverse to them?.

27. In their defence, the Appellants did not offer any evidence to counter the evidence tendered by the investigating officer (PW6). They have belatedly attempted to discredit the evidence in this appeal that the Investigating Officer did not warn the 1st Appellant against giving self incriminating evidence and that he was not represented and that the panga tendered as evidence was not subjected to forensic examination. All these in my view are excuses rather than an explanation on why they feel their defence was disregarded. In the first place the 1st Appellants had a right to refuse to lead the police to where he had hidden the panga but he willingly led the police to the scene of crime and the Investigating Officer gave vivid description of the scene and how he recovered one of the weapons used in the attack of the complainant. The Appellants did not challenge that evidence during trial and/or offered any defence. This clearly raised doubts about their version of events on the material date. This court upon re evaluation of the defence offered finds that the same did not shake the prosecution's case in any way.

28 **(c) Whether the prosecution's case was proved beyond reasonable doubt.**

The Appellants were charged and convicted with the offence of causing grievous harm to the complainant contrary to **Section 234** of **Penal Code.** The prosecution's case rested on the evidence of the complainant (PW1), an eye witness (PW4 - Eric Muthoni- a boda boda rider), the medical evidence (tendered by Joseph Mwenda (PW5) - clinical officer) and the evidence of investigating officer (PW6). Their evidence in totality in my view revealed that the complainant (PW1) indeed suffered serious injuries (17 cuts on the head) that forced him to be admitted for two weeks in hospital. The trial court observed and noted three visible scars on the head of complainant when he testified during trial. The Appellants have pointed out that the discharge summary (P. Exhibit 1 a) described the injuries as mild and that the injuries on the P3 are not reflective of what the complainant suffered. However it is not disputed that the complainant was admitted for two weeks in Hospital. The Investigating Officer told the trial court that when he first visited the complainant at the District Hospital he was unable to speak and that it was not until 14th January, 2012 that he was able to talk and that is when he took his statement. That shows that the complainant was only able to talk after 14 days due to the nature or the seriousness of the injuries inflicted on him. He received 17 cuts on his head and that in my re- evaluation is grievous. The evidence tendered by the prosecution clearly established beyond reasonable doubt that the complainant indeed suffered injuries that can be classified as grievous harm. The only question was who inflicted the said injuries and that brings me to the next issue for determination in this appeal.

29. (d) **Whether the Appellants were positively identified.**

There is no dispute that the incident took place in broad daylight and that the assailants and the victim were known to each other well as they wee neighbours with the complainant having bought a parcel belonging to 1st Appellant's sister. It is quite apparent that the transaction that led to the complainant's possession of that parcel was a source of differences between him and the Appellants. There is no dispute that they therefore knew each other well and the contention that an Identification Parade should have been conducted in my view do not hold any water. Identification Parade are usually conducted as a legal requirement where the suspect(s) is/are unknown to the victim. But where the suspect is well known, then there is no purpose for conducting an Identification Parade because, the victim would simply pick the suspect from any parade owing to familiarity. The purpose of Identification Parade will as a result be defeated. I am not therefore persuaded that there was need for the police to conduct an identification parade in this instance. On the other hand, I am persuaded given the evidence tendered by PW1, PW4 and PW6 the investigating officer, that the identification of the Appellants as the culprits was beyond doubt. As I have observed above, the 1st Appellant himself voluntarily after reporting the incident, took the police to the scene of crime and showed them where he had hidden the panga which had been used to inflict the sort of injuries observed by the medical officer in the P3 and even noted by the trial court. The Appellants themselves in their evidence squarely placed themselves at the scene of crime and there is no doubt that they are responsible for the injuries suffered by the complainant. Their conviction was save and based on the evidence tendered by the prosecution.

30 (e) **Whether the sentence passed against the Appellant was too harsh.**

It is clear from the statute that the sentence provided under **Section 234** of the **Penal Code** is a maximum of life sentence. The learned trial magistrate exercised her discretion under **Section 26(2)** of the **Penal Code** and sentenced the appellants to imprisonment of 15 years each.

The trial court clearly considered the sentence guidelines and the mitigating factors. In such circumstances an appellate court would rarely interfere with the exercise of trial court's discretion. In the case of ***Benard Ocheng Opiyo -vs- Republic [2015] eKLR***, the court made the following observations:-

> ***" As to whether the sentence was excessive, I am alive to the general principle that the appellate court should only interfere in the sentence where the subordinate court disregarded a material fact, or considered an irrelevant factor or that the sentence was manifestly harsh or excessive."***

31. The circumstances under which complainant was attacked point to malice aforethought which is clearly discerned from the fact that the appellants armed themselves and proceeded to attack the complainant in a vicious manner due to an underlying land dispute. And although that could be viewed as a mitigating factor, it is an aggravating factor too and I am satisfied that the learned trial magistrate exercised her discretion judiciously. The Appellants are first offenders but the injuries they cause to the complainant who was unarmed are quite serious. In my view the sentence meted out was anything but harsh and that is why perhaps the Respondents called for enhancement. I am not persuaded to either reduce or enhance so the same is upheld.

In conclusion, this appeal for the reasons advanced is disallowed, the conviction and sentences meted out against the appellants are upheld.

Dated, signed and delivered at Chuka this 27th day of May, 2019.

R.K. LIMO

JUDGE

27/5/2019

Judgment signed, dated and delivered in the open court in presence of Kijaru holding brief for Mwiti for the Appellant and Momanyi for State/Respondent.

R . K. LIMO

JUDGE

27/5/2019