REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 62 OF 2018

DOUGLAS OTIENO OKUMU.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. C. M. Kamau, Resident Magistrate in Rongo Magistrate's Court Criminal Case No. 182 of 2018 delivered on 8/11/2018)

JUDGMENT

1. **Douglas Otieno Okumu**, the Appellant herein, was charged with the offence of G**reviuos Harm** contrary to **Section 234** of the **Penal Code, Cap. 63** of the Laws of Kenya.

2. He denied committing the offence and was tried. Five witnesses testified in support of the prosecution's case. The complainant testified as **PW1**. He was **Robinson Odhiambo**, a cousin to the Appellant. **PW2** was one **Eric Omondi Ogallo. PW3** was a Clinical Officer attached to Rongo Sub-County Hospital**.** A neighbour to both the Appellant and the complaianant one **William Onyore** testified as **PW4**. **PW5** was the investigating officer who was also the arresting officer one **No. 106649 PC. Rodgers Wafula** attached to Kamagambo Police Station. The Appellant was unrepresented 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 person on his defence where he opted to and gave sworn defence without calling any witness. He raised an *alibi* defence and alleged a plot by PW1 to fix him resulting from differences at their homes. He was suprised to be arrested and charged.

4. Judgment was rendered on 08/11/2018 where the Appellant was found guilty as charged and convicted. He was sentenced to 20 years' imprisonment.

5. Being aggrieved by the conviction and sentence, the Appellant timeously filed a Petition of Appeal on 21/11/2018 where he challenged the conviction on grounds that the case was not proved beyong reasonable doubt, that the *alibi* defence as not considered and that the sentence was too harsh.

6. The appeal was heard by way of written submissions on the part of the Appellant and by oral response on the part of the prosecution. The Appellant expounded on the grounds in his submissions and prayed that the appeal be allowed, the conviction quashed and the sentence set-aside and he be set at liberty accordingly.

7. The appeal was opposed. **Mr. Kimanthi**, Learned Senior Principal Prosecution Counsel submitted that the offence was properly proved, the Appellant duly and properly convicted and the sentence lawful. He submitted that there was ample evidence that the Appellant was at the scene of crime and committed the offence. He urged this Court to dismiss the appeal.

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 offences of causing greviuos 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 grevious harm, the prosecution must prove the following ingredients:-

(i) That the complainant sustained actual bodily harm of the category of 'grevious harm' without any legal justification;

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

11. As to whether PW1 was assaulted by the Appellant without any legal justification a result of which he sustained bodily harm, the position is divided. The Appellant denies being at the scene where PW1 was assaulted. He raised an *alibi* defence and stated that he had by then visited his sister elsewhere. On the part of the prosecution it is contended that the Appellant was indeed present at a funeral of one Mzee Jonathan Ouma and did occassion harm to PW1.

12. The prosecution called three witnesses who were at the funeral. They were PW1, PW2 and PW4. All of these witnesses testified that the incident occured at night after the grave had been dug and people were gathering to take supper. They also confirmed that the Appellant was at the funeral. It was however PW1 and PW4 who alleged to have seen the Appellant assault PW1. All the three witnesses also testified on the lighting of the home. They were unanimous that the home was well lit with electricity and there were bulbs everywhere and that visibility was not in any way hindered. PW1 testified that he did not see the assailant approach him but only realized he had been cut on his leg from the back. He immediately looked up and saw the Appellant holding a panga. PW1 raised alarm as the Appellant ran away.

13. PW4 stood next to PW1. He clearly saw the Appellant remove a panga which he had hidden in his trousers and quickly cut PW1 on his right leg. PW1 fell as the Appellant ran away. PW4 was among those who assisted PW1 to hospital. The Appellant cross-examined all the witnesses whose evidence I have reviewed.

14. I am alive to the fact that the attack was spontenous and took place at night. In such instances a Court is called upon to exercise caution on the aspect of identification since cases of mistaken identity can easily arise. Superior Courts have in many instances dealt with the issue of identification in such circumstances and have clearrly expressed themselves. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under: -

> ***It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.***

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

15. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> ***... 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 reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.***

16. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows: -

> ***On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -***
>
> > *I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.*
>
> ***The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...***

17. Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported)** had this to say on the evidence of recognition at night: -

> ***We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.***

18. I am persuaded that PW1, PW2 and PW4 were at the funeral. I am also persuaded that the home was well lit and visibility was not

hindered. There is no doubt that PW1, PW2 and PW4 knew the Appellant well as a close relative and a neighbour. PW1 and PW4 saw the Appellant at a close range. Both readily raised alarm and gave the name of the Appellant as the assaillant. They also gave the assaillant's name to the police. It has been repeatedly stated by Superior Courts that giving the name of a known assaillant is the surest way of confirming the identity of that assaillant. (See the Court of Appeal in **Simiyu & Another vs. R. (2005) 1 KLR 192**, **R. vs. Alexander Mutuiri Rutere alias Sanda & Others (2006) eKLR**, **Lesarau vs. R. (1988) KLR 783**, **Morris Gikundi Kamunde vs. Republic (2015) eKLR** among others). PW1 and PW4 did so.

19. But the Appellant contend that he was not at the funeral. In such a case a Court must weigh the evidence of the prosecution against the *alibi* irrespective of the time the defence of *alibi* was raised. By placing the prosecution's evidence on one hand and the defence on the other I find that the corroborated prosecution's evidence outweighs the defence and rightly places the Appellant at the scene and as the assaillant. The *alibi* defence does not therefore raise any doubt at all. To that end I note that the witnesses were candid and straight-forward in their testimonies and withstood cross-examination. There was either no adverse comments by the trial court on any of the witnesses.

20. As to whether the Appellant was fixed to settle scores, I must state that none of the witnesses were examined on any of the alleged issues of sale of chang'aa and bhang (*cannabis sativa*), cutting of trees or even closing of a certain road. These were important issues which ought to have been raised at the earliest for the police to investigate and make decisions on. Further, had the said issues been raised during the prosecution's case the trial court would have formed its opinion on how the witnesses shielded the issues. That however did not happen. The issues came up at the very tail end of the proceedings and respectfully the prosecution was not accorded a proper opportunity to counter that adverse evidence on its part. To that extent, the defence contravened **Article 50(2)(k)** of the **Constitution**. The trial court was hence right in rejecting that line of defence which according to me is pure afterthought. The upshot is that it is the Appellant who assaulted PW1 at the funeral and his identification was not in error. Likewise, I find no legal justification to the assault.

21. On the nature of the injurues sustained, PW3 corroborated the evidence of PW1, PW2, PW4 and PW5. PW3 stated that as a result of the injuries sustained PW1's leg was amputated above the knee. Medical records were produced to that end. The trial court also saw and noted the injuries on PW1. The P3 Form which was produced as an exhibit classified the injury as '**Grevious harm**' since the injury amounted to '*maim or endangers life or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or any permanent or seroius injury to any external or internal organ*'.

22. I note that the foregone evidence was not adversely challenged. I therefore find and hold that the ingredients of the offence of grievous harm were duly and adequately proved and that the conviction was proper. The appeal on the conviction be and is hereby disallowed.

23. On sentence, the Appellant submits that the 20 years' imprisonment term is too excessive and harsh. As rightly pointed out by the prosecution the offence carries a maximum life imprisonment. As earlier found the Appellant acted without any legal justification and injured PW1. Settled, an appeal on sentence is one against the exercise of discretion. 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 take into account 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 as long as the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

24. The sentencing court received the Appellant's mitigations and duly considered them. The court would have been much aided by a Pre-Sentence Report in this particular case prior to passing sentence. The Report would have enlarged the court's latitude within which to exercise its discretion. Respectfully, I hereby interfere with the sentence and do set it aside. Given the powers of this Court to take additional evidence on appeal I hereby direct that a Pre-Sentence Report be filed for consideration. Needless to say, the Report must capture the true positions of all the parties thereto.

25. The Report shall be considered for sentencing on 08/08/2019.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 26th day of July 2019.**

A. C. MRIMA

JUDGE

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

Douglas Otieno Okumu, the Appellant in person.

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

Everlyn Nyauke – Court Assistant