REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 64 OF 2018

NEHEMIAH MBANI ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original convictions and sentences of Hon. C. M. Kamau Magistrate inRongo Magistrate's Court Criminal Case No. 260 of 2016 delivered on 24/9/2018)

JUDGMENT

1. The Appellant herein, **Nehemiah Mbani Onyango,** was charged with the offence of **Maim** contrary to **Section 231(a)** of the **Penal Code, Cap. 63** of the Laws of Kenya to one **George Omondi Onyango**, who was the complaianant.

2. He denied committing the offence and he was tried, found guilty and convicted accordingly. He was sentenced to 10 years' imprisonment.

3. The complainant testified as **PW1**. A neighbour to PW1 testified as **PW4**. A Clinical Officer from at Awendo Sub-County Hospital testified as **PW2** and The investigating officer **No. 70937 PC Bernard Mihaye** attached to Awendo Police Station testified as **PW3**. PW1 was a tenant in a house owned by the Appellant. 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.

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 a sworn defence without calling any witness. Judgment was rendered on 24/09/2018.

5. Being aggrieved by the conviction and sentence, the Appellant filed an appeal with the leave of this Court and challenged the sentence as being manifestly harsh and cruel in view of his health status and the mitigations on record.

6. Directions were given and the appeal was heard by way of written submissions. The Appellant however challenged the conviction as well in his submissions by contending that the court shifted the burden of proof to him.

7. The State opposed the appeal and prayed that it be dismisssed as the offence was properly proved.

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 main 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. I would have disregarded the submissions challenging the conviction as the Appellant did not, in the first instance, challenge the conviction in the Petition of Appeal, but nevertheless for the sake of justice and fair play I will consider the challenge on the conviction as well.

11. **Section 231(a)** of the **Penal Code, Cap. 63** of the Laws of Kenya defines '***maim***' in the following words: -

> ***Any person who, with intent to maim, disfigure or disable any person, or to do some grievoius harm to any person, or to resist or prevent teh lawfull arrest or detention of any person-***

(a) unlawfully wounds or does any grievous harm to any person by any means whatever; or

(b) unlawfully attemps in any manner to strike any person with any kind of projectile or with a spear, sword, knife or other dangerous or offensive weapon; or

(c) unlawfully causes any explosive substance to explode; or

(d) sends or delivers any explosive substance or thing to be taken or received by any person; or

(e) causes any such substance or thing to be taken or received by any person; or

(f) puts any corrosive fluid or any destructive or explosive substance in any place; or

(g) unlawfully casts or throws any such fluid or substance at or upon any person, or otherwise applies any such fluid or substance to the person of any person.

Is guilty of a felony and is liable to imprisonment for life.

12. Therefore, for a conviction to stand in a charge of 'maim' under **Section 231(a)** of the **Penal Code** aforesaid the prosecution must prove the assaillant's intention to unlawfully wound or cause grievous harm to a victim by any means whatever.

13. The fact that PW1 sustained injuries is not in doubt since it was vouched by all the witnesses. There is as well medical evidence on the injuries sustained. PW1's left arm was fractured and the injuries clasified as 'Maim' in the P3 Form which was filled and produced as an exhibit by PW2 together with the treatment notes.

14. As to how PW1 sustained the injuries, the record also speaks for itself. PW1 narrated his encounter with the Appellant who was his landlord. That, the Appellant came to the where PW1 stayed at around 09:30 pm and knocked at the door to PW1's room. PW1 who was aiding his child to do some homework recognized the Appellant's voice and opened the door. The Appellant walked inside the room and attacked PW1 using a metal bar on the left arm. PW1 and his child raised alarm as PW1 wriggled in pain on the floor.

15. PW4 who was one of the neighbours to PW1 heard the screams from the child to PW1 that his father was being killed and rushed to PW1's room while carrying a bright torch. As he approached PW1's room PW4 shone the torch and saw the Appellant leaving PW1's room while armed with a metal bar. PW4 entered PW1's room and took PW1 to hospital.

16. I have carefully considered the evidence of PW1 which was corroborated by PW4 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.

17. Closer home the Court of Appeal has also severally emphasized on the need to treat evidence on identification especially at night 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).**

18. 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.

19. The Appellant denied the offence and in his sworn defense narrated how he was arrested on 13/04/2016. PW1 stated that his room was well lit as he was assisting his child to do some homework and that he clearly saw the assaillat who was theAppellant, a person well known to him. PW4 corroborated the testimony of PW1. She also saw the Appellant walking out of PW1's room while armed with a metal bar. PW4 used the bright torch light to see the Appellant. Both PW1 and PW4 knew the Appellant well as they were both tenants to the Appellant.

20. By juxtaposing the law and the facts in this case, the irresistible finding is that the incident occured in PW1's room which was well lit

and that the recognition of the Appellant by PW1 and PW4 as the one who attacked PW1 is not in error. I therefore do not agree with the Appellant that the court shifted the burden of proof to him.

21. The Appellant's intention to injure PW1 is demostarted by his actions. The Appellant armed himself with a metal bar, walked to PW1's room, knocked and gained access thereto. Since there is no legal justification to the Appellant's action on PW1 such actions remain unlawful.

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

23. On **sentence**, the Appellant contended that the 10 years' imprisonment term is excessive, harsh and very punitive and that he ought to be ganted a non-custodial sentence. The offence of 'maim' attracts a sentence of upto life imprisonment on conviction.

24. The sentencing court considered the Appellant's mitigations and the fact that he was afirst offender prior to rendering the sentence. The court hence exercised 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 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.

25. Revisiting the circumstances surrounding the commission of the offence herein and the mitigations tendered, I am of the considered view that the sentencing cort ought to have called for a Pre-Sentence Report prior to sentencing the Appellant. The Report would have enlarged the court's latitude in exercising its discretion. With profound respect to the learned sentencing Magistrate, it is only for that reason and in the peculiar circumstances of this matter that the appeal on sentence is allowed.

26. The sentence of 10 years' imprisonment is hereby set-aside and the Appellant shall be re-sentenced. Given the powers of this Court to take additional evidence on appeal, I do hereby direct that a Pre-Sentence Report be availed for consideration and sentencing on 07/08/2019.

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:

Nehemiah Mbani Onyango, the Appellant in person.

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

Evelyne Nyauke – Court Assistant