REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HCR.A NO. 86 OF 2015

BONIFACE MULWA MUSAU.................................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal against a conviction and sentence in Senior Resident Magistrates court at Mutomo by Hon. S.A. Ogot RM on 20/9/2013)

JUDGMENT

1. The Appellant, **Boniface Mulwa,** was charged with the offence of **Grievous harm**, Contrary to **Section 234 of the Penal Code.**

Particulars of the offence being that on the **20th day of May 2013** at about **12.00p.m**. at**Ikutha town**, **Ikutha Location** of **Ikutha District** within **Kitui County**, unlawfully did grievous harm to **MWATHI KING'ONDU**.

2. He was tried,convictedand **sentenced** to **life imprisonment**.

3. Aggrieved by the conviction and sentence he appealed on grounds that:

> ***(i) The trial Magistrate erred by convicting him relying on his defence, yet, he did not defend himself.***
>
> ***(ii) The trial Magistrate failed to rely on report on psychology and thereby failed to give (Appellant) time to recuperate in order to commence trial without prejudice.***
>
> ***(iii) Evidence adduced was not evaluated to establish that the Appellant was insane therefore not fit to stand trial.***

4. Facts of the case were that **PW1 Mwanthi King'ondu** was under a tree leaning on his motorcycle when he was hit from behind by an object. He tried to check only to see a person holding a metal bar and he lost consciousness. **PW3 Muema Nyamai** who was nearby assisted him. He was taken to hospital by a Veterinary Doctor who was passing by. He regained consciousness two (2) days later to find himself at Machakos General Hospital where he had been admitted. In the meantime the Appellant was arrested by members of the public and handed over to the Administration Police. They recovered a metal rod that was used to assault the complainant. **PW4 NO. 20090116422 APC Charles MurindoMugo** took him to **Mutomo Police Station** where he was re-arrested by **PW5 NO. 69403 PC Benjamin Maundu.** He investigated the case and took him to a **psychiatrist** for examination. Subsequently **PW6 Daniel Mulwa**, a **Registered Clinical Officer** examined the complainant and found that he sustained a fracture of the left parietal bone and the left frontal and left temporal bones. He assessed the degree of injury sustained by the complainant as grievous harm hence this case.

5. When put on his defence the Appellant opted to remain silent.

6. At the hearing of the Appeal the Appellant relied upon written submissions. He stated that he did not defend himself being a vulnerable person. That at the outset the trial Magistrate cautioned himself, sought a mental assessment report of the Appellant. That the court was told that he was taken to a psychiatrist and it was not established how long he was in the office of the psychiatrist. That the trial Magistrate failed to analyze Evidence adduced by witnesses which suggested that the Appellant was insane therefore not fit to stand trial. He called upon the court to order a fresh trial.

7. In response, the state through **learned counsel, Mr. Mamba** opposed the appeal. He reiterated facts as presented by the prosecution and urged the court to find that the case was proved beyond doubt.

8. In reply the Appellant stated that when the offence was committed he was very sick and he was treated at Mathari Hospital. He denied having been in the right senses at the time of the offence.

9. This being a first Appellate Court, I am duty bound to re-evaluate and re-consider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. **(See Okeno vs. Republic (1973) EA 32).**

10. A perusal of the record show that on being arraigned in court for the holding charge of assault causing actual bodily harm, prior to the charge being read the trial Magistrate ordered for a mental assessment to be done on the Appellant. Consequently he took plea on the 4/6/2013. There is a report on record from **Kitui District Hospital** signed by **Dr. Mabire** for the Medical Superintendent dated the **28th May 2013**. The comments states thus:

"Patient is of Good misc"

11. Looking at the evidence adduced prior to being hit from behind PW1 had not seen the Appellant. PW2 said the Appellant, a person they refer to as *'Rasta'* passed and walked for 5 metres prior to returning to assault the complainant. And after the act of assault he went to stand near the saloon (Barber shop). It was only after people started pelting him with stones that he started running away. According to PW5 the Appellant was taken for mental assessment and found to be fit to stand trial.

12. Throughout the proceedings, the Appellant had no questions for the witnesses and when he was put on his defence he stated thus:

> ***" I will sit silent and wait for the court's decision. I have no witnesses to call".***

13. Section 162 (1) and (2) of the Criminal Procedure Code provides thus:

> ***"…(1)When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.***

(2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.…".

14. At the outset the Learned Magistrate who took the plea, Hon. Mutai observed the Appellant and was in doubt of his mental capacity. He postponed the proceedingand sought a Mental assessment of the Appellant. He was specific in his order, he required a report from Psychiatrist. The document that was subsequently filed in court was a signed by a Medical Practitioner. It was silent on his area of expertise.

15. In the case of ***Julius WanombaGithua V. R Criminal Appeal No. 261 of 2006*** the court stated that the Criminal Procedure is that it is the duty of the court to ensure that the accused person's mental status at the time he is alleged to have committed the offence is established… ***(Also see Leonard MwangemiMunyasia VS. Republic (2015)eKLR)***

16. It is only a Psychiatrist, a Medical practitioner who specializes in diagnosis of mental illness that could have evaluated the Appellant to determine whether or not he had mental ailment.

17. This being the case the learned Magistrate misdirected himself by failing to record his opinion regarding what he had observed. This is a matter where on appearing before the High Court it became apparent that the soundness of mind of the Appellant had to be inquired into. On the 14/10/2014 following this court's order a report filed by the psychiatrist indicated that the appellant was mentally unstable. He underwent treatment until 6.6.2016 when a certificate of his fitness was filed.

18. In the case of ***Kaplotwa S/O Tarino (1957) EA 553*** the court stated that:

> ***"……It was the duty of the court to consider not only whether he was capable of understanding the charge, but also whether he was capable of making a defence…"***

19. It is apparent that the court failed to discharge its duty of considering whether the Appellant was capable of defending himself and as it turned out whatever he told the court was unintelligible.

20. The trial having been vitiated by the court the question to be determined is therefore whether a retrial should be ordered? The appellant asked for a hearing of the matter a fresh. The learned state counsel did not respond to that aspect of the submissions. In the ***Caseof Fatehali Manji VS. Republic 1966 EA 343 the court stated thus:***

> ***" In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of the insufficiency of evidence or the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court to which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person".***

This was a straight forward case where the prosecution will not be required to fill in gaps. There is nothing prejudicial to the appellant. It is therefore a proper case for a retrial.

21. In the premises, **I allow the appeal and order a retrial.** The Appellant shall be produced before the **Senior Principal Magistrate,**

Mutomo on the **26th** day of **March**, **2018** to be retried by a court of competent jurisdiction.

22. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **21st** day of **March, 2018.**

L.N. MUTENDE

JUDGE