



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.142 OF 2014**

*(An Appeal arising out of the conviction and sentence of Hon. Onyina– PM delivered on 26<sup>th</sup> September 2014 in Kibera CM. CR. Case No.1448 of 2011)*

**G S R G ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The Appellant, G S R G was charged with the offence of **causing grievous harm** contrary to **Section 234** of the **Penal Code**. The particulars of the offence were that on 13<sup>th</sup> March 2011 at Kahara Village, Kiserian in Kajiado County, the Appellant unlawfully did cause grievous harm to A S W N. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to life imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court challenging the said decision.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted yet the prosecution had failed to prove the charge to the required standard of proof. The Appellant was of the view that the evidence adduced by the prosecution witnesses was scanty, flawed, contradictory and unsafe to secure his conviction. The Appellant was aggrieved that the trial court had failed to take into consideration the fact that the complainant's testimony had not been corroborated and therefore conviction on the basis of such evidence was unsustainable. The Appellant took issue with the fact that the medical evidence relied on by the prosecution was not authentic and did not support the charge. He was aggrieved that the trial court had proceeded to convict him in violation of his rights as enshrined in **Section 200** of the **Criminal Procedure Code**. He faulted the trial court for failing to take into consideration the fact that the dispute that led to the charge emanated from a family disagreement. He was finally aggrieved that his defence was not taken into consideration before the trial court reached the verdict to convict him. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He also made oral submission urging the court to find in his favour in the appeal. Ms. Sigei for the State opposed the appeal. She submitted that the prosecution had adduced sufficient, credible and cogent evidence that established the guilt of the Appellant on the charge that was brought against him to the required standard of proof beyond any reasonable doubt. She urged the court to dismiss the appeal.

The court shall revert to the arguments made on this appeal after briefly setting out the facts of this case. The Appellant was at the material time married to the complainant (PW1) A W N. At the time it was alleged the incident that led to the charge took place, the Appellant and the complainant had separated. They had a disagreement which led to their separation. The complainant left her matrimonial home and went back to her parents' home. The complainant testified that the disagreement was caused by the Appellant's misuse of funds meant for the education of their children. On his part, the Appellant disputed this fact. He testified that the disagreement was caused by the complainant's conversion of his property.

According to the complainant, on 13<sup>th</sup> March 2011 at about 10.30 a.m., as she was at her home washing clothes, the Appellant demanded that she goes to the nearby road so that they could have a conversation. The complainant refused this request. She told the Appellant that if he wanted to have any conversation with her, then he should either go to the police station with her or alternatively come to the house. The Appellant was not amused by this response. He approached the complainant and kicked the bucket that she was using to wash the clothes. A struggle ensued. PW2 P M rushed to the scene and attempted to separate the two. The incident was also seen by PW3 E M, the complainant and the Appellant's son who at the time was a Standard Six pupil. The complainant testified that when PW3 intervened, she managed to make good her escape. She ran towards the road.

PW2 testified that when he attempted to restrain the Appellant from following the complainant, the Appellant threatened to cut him with a

Somali sword which he had in his possession. He had to let go of the Appellant. The Appellant chased the complainant and managed to catch up with her. According to the complainant, the Appellant cut her severally on the head, back and hands. He cut the complainant's left ear and completely chopped off her left arm. He also cut her severally on her right hand. While this was taking place, PW2 and PW3 were screaming pleading with the Appellant to stop hurting the complainant. At that time, the complainant had lost consciousness. Members of the public arrived at the scene. Among them was PW4 J N W. The Appellant escaped from the scene.

PW3 got a motor vehicle and rushed the complainant first to Kiserian Police Station where a report was made of the incident. The officer who received the report was PW6 PC Chrispine Boit. He told the court that on seeing the state of the injuries that the complainant had sustained, he advised that the complainant be taken immediately to hospital. PW2 testified that the Appellant was then rushed to a local dispensary at Kiserian where first aid was administered before she was referred to Kenyatta National Hospital for further treatment. The complainant testified that due to the serious nature of her injuries, her left arm was amputated. She was admitted for two weeks and three days before she was discharged.

PW6 testified that upon her discharge, she recorded a statement with the police. At that time, the Appellant was nowhere to be seen. PW6 testified that the police issued a public alert notifying the public to give information to the police in the event that the Appellant was seen. A P3 form was filled by Dr. Zephania Kamau based at the Police Surgery in Nairobi. He examined the complainant on 18<sup>th</sup> April 2011. He observed healed scars on the right side of the head and the lower side of the leg. There was also a scar on the shoulder. The left forearm had been amputated. The right thumb and also the top of the left shoulder had scars. He assessed the weapon used to cause the injuries was a sharp object. The degree of injuries suffered by the complainant was grievous harm. The P3 form was produced as an exhibit. The Appellant was later arrested on 26<sup>th</sup> April 2012 and arraigned before court.

When the Appellant was put on his defence, he denied that he committed the offence. He gave in effect what amounted to an alibi defence. He told the court that on the material day it alleged that he assaulted the complainant he was at his house at Kitengela. It was his defence that the charge was brought against him as a result of a family dispute that he had with the complainant. He accused the complainant of selling the house that he had built at Kajiado. He also accused her of stealing the log book of his motor vehicle. He was of the view that the charge brought against him was contrived to enable the complainant escape accountability for the properties that she had taken from him. He denied that he had gone underground after the alleged assault.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced during trial so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

*“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.*

The issue for determination by this court is whether the prosecution established, to the required standard of proof beyond any reasonable doubt, the charge of **causing grievous harm** contrary to **Section 234** of the **Penal Code** that was brought against the Appellant.

There are several issues that came to the fore for determination by this court. The first issue is whether the magistrate who took over the proceedings from the previous magistrate complied with **Section 200** of the **Criminal Procedure Code**. The Appellant claim that when the convicting magistrate took over from the previous magistrate, he did not comply with the provisions of **Section 200(3)** of the **Criminal Procedure Code** that requires an accused to be informed of his right to recall witnesses who had testified before the previous magistrate if he so wished. The prosecution denied this allegation by the Appellant. On perusal of the court records, this court noted at pages 59 and 62 of the proceedings that the Appellant was informed this right under **Section 200** of the **Criminal Procedure Code**. Indeed, the Appellant took advantage of this right and requested for PW2 and PW3 to be recalled for further cross-examination. The claim by the Appellant to the effect that the trial court did not comply with **Section 200(3)** of the **Criminal Procedure Code** therefore lacks merit. It is dismissed.

For the prosecution to establish the charge of grievous harm, it was supposed to establish that the injury sustained by the complainant was of such a nature as defined under **Section 4** of the **Penal Code** which provides thus:

*“Grievous harm means any harm which amounts to maim or dangerous harm or seriously and permanently injures health, or which is likely to injure health, or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, membrane or sense.”*

The Court of Appeal in **John Oketch Abongo -vs- Republic [200] eKLR** held thus:

*“Whether or not grievous harm or any other form of harm is disclosed must be a matter for the court to find from the evidence led and guided by the definition in the Penal Code. A court will be assisted by medical evidence given in coming to the conclusion on the nature and classification of the injury. In many cases, the courts have accepted and gone by the findings and opinions in the medical evidence. But, in appropriate circumstances, the court is at liberty to form its own opinion, having regard to the evidence before it as to the nature and classification of the injury.”*

In the present appeal, the prosecution adduced evidence which established that indeed the complainant sustained injuries, which for all intent and purpose, fits the definition of **grievous harm** in **Section 4** of the **Penal Code**. The complainant was cut with a Somali sword severally on her body. Her left forearm was severely injured that the doctors had no option but to amputate it. That injury permanently disfigured the complainant. The injury resulted into the complainant's arm being maimed. The P3 form produced by Dr. Zephania Kamau indeed established to the required standard of proof beyond any reasonable doubt that the complainant was grievously harmed. The Appellant does

not dispute that the complainant sustained such injury. In the premises therefore, this court holds that the prosecution did establish to the required standard of proof beyond any reasonable doubt that the complainant sustained injuries of a permanent nature that fits the definition of grievous harm.

As regard who perpetrated the injury on the complainant, it was the prosecution's case that the Appellant, after domestic disagreement, followed the complainant to her parents' home after she had left the matrimonial home, then assaulted her using a Somali sword. The evidence adduced by the prosecution was a direct eye witness account of the complainant herself, PW2 and PW3. PW3 is the child of the Appellant and the complainant. Upon re-evaluation of the evidence adduced, this court is satisfied that indeed the prosecution established to the required standard of proof that it was the Appellant who assaulted the complainant and caused her to suffer grievous harm.

The Appellant claims that he was framed. He gave an alibi defence. His alibi defence was however displaced by the eye witness account of the complainant, PW2 and PW3 who placed the Appellant at the scene of crime. There was no reason for the complainant, PW2 and PW3, who are close relatives of the Appellant, to implicate him if he had not assaulted the complainant. Although, it is not necessary for the prosecution to establish motive in such an offence, in the present appeal, it was clear that the Appellant assaulted the complainant to settle a score as he felt that the complainant had deprived him of his property which he formed the view that he had no possibility of recovery. The fact that the complainant had left the matrimonial home concretized the Appellant's intention to harm her. The fact that the complainant had previously sought protection from the police is further proof of the Appellant's antipathy towards her. Taking into consideration the totality of the evidence adduced, this court holds that the prosecution established, to the required standard of proof beyond any reasonable doubt, that the Appellant was the perpetrator of the assault.

The upshot of the above reasons that the appeal against conviction lacks merit and is hereby dismissed. The appeal against sentence is similarly dismissed because the act by the Appellant was deliberate and has caused the complainant to sustain permanent debilitating injuries. The conviction and the sentence of the trial court is upheld. It is so ordered.

**DATED AT NAIROBI THIS 23<sup>RD</sup> DAY OF MAY 2018**

**L. KIMARU**

**JUDGE**