



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 121 OF 2015**

*(An Appeal arising out of the conviction and sentence of Hon. E. Cherono– SPM delivered on 7<sup>th</sup> July 2015 in Nairobi CMC. CR. Case No.2122 of 2010)*

**PETER KABERIA NTUNDU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Peter Kaberia Ntundu was charged with **causing grievous harm** contrary to **Section 234** of the **Penal Code**. The particulars of the offence were that on 17<sup>th</sup> October 2010 at Petkam Bar along Keekorok Road in Nairobi County, the Appellant, jointly with others not before court, unlawfully did grievous harm to David Muthee Kionga (hereinafter referred to as the complainant). 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 and sentenced to serve two (2) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court against the said conviction and sentence. Pending the hearing and determination of the appeal, he was released on bail pending appeal.

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 despite the fact that the evidence adduced by the prosecution witnesses did not support the charge. The Appellant accused the trial court of convicting him against the weight of the evidence that was adduced by both the prosecution and the defence witnesses during trial. The Appellant faulted the trial magistrate for failing to take into consideration the fact that the complainant had been convicted out of events that took place at the same time that he alleges that he was assaulted and grievously harmed. The Appellant faulted the trial magistrate for sentencing him to serve a sentence that was harsh and excessive in the circumstances. 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.

Prior to the hearing of the appeal, Mr. Wandugi, counsel for the Appellant and Ms. Kimiri for the State filed written submission in support of their respective opposing positions. They also gave oral submission in support of their respective opposing cases. Mr. Wandugi submitted that the trial of the Appellant was vitiated by the fact that **Section 200** of the **Criminal Procedure Code** was not complied with. He explained that despite the fact that the trial court ordered that the case to start *de novo*, the Appellant was not given an opportunity to have the witnesses recalled, and further, to cross-examine the said witnesses. Learned counsel further submitted that the Appellant was not allowed to give final oral submission after the close of the case but was instead asked to submit written submission. This was irregular and contrary to the law. He stated that under **Article 50** of the **Constitution**, the Appellant was required to be present at all times when proceedings are conducted including when final submissions are being made.

On the evidence, Mr. Wandugi submitted that the trial court failed to analyze all the evidence including the evidence adduced by the Appellant in his defence. In particular, he submitted that the trial court failed to consider that the complainant was charged and convicted for threatening to kill the Appellant. In his view, this was an important issue that should have informed the court when reaching its verdict. Learned counsel pointed out that there were material contradictions in the evidence that was adduced by the prosecution witnesses. He pointed out the fact that the particulars of the date when the alleged offence happened and the evidence that was adduced before court was at variance. He urged the court to re-evaluate the evidence and find that the trial court erred in relying on the evidence of a single witness to convict the Appellant in circumstances that required that such evidence be corroborated. It was the Appellant's appeal that he had been sentenced to serve a custodial sentence that was harsh and excessive. In the premises therefore, learned counsel urged the court to allow the appeal.

Ms. Kimiri for the State opposed the appeal. She submitted that the trial was initially conducted by a court which later recused itself. The trial court that subsequently took over the proceedings started the case *de novo*. All prosecution witnesses were recalled to testify in the case. Learned state counsel stated that the allegation by the Appellant that **Section 200** of the **Criminal Procedure Code** was not complied with was therefore misplaced. As regard the evidence, she submitted that the prosecution adduced evidence which established to the required standard of proof that the Appellant assaulted the complainant as a result of which he suffered grievous harm. There was no dispute as to the

identity of the perpetrator because the Appellant and the complainant had known each other for a long time prior to the assault. The doctor who testified confirmed that the complainant was indeed grievously harmed. He produced the medical report which indicated that after the assault, the complainant was admitted for seven (7) days at Guru Nanak Hospital. She submitted that the trial court properly evaluated and analyzed the evidence and reached the correct verdict finding the Appellant guilty as charged. On sentence, she submitted that taking into consideration the serious nature of the injuries that the victim sustained, the court was entitled to sentence the Appellant to serve the custodial sentence. In the premises therefore, she urged the court to disallow the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court 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, Ruwalla v R [1957] EA 570)”.***

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **causing grievous harm** contrary to **Section 234** of the **Penal Code**.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the grounds of appeal put forward by the Appellant and the submission made, both written and oral. The first issue for this court to determine is whether the proceedings before the trial court ought to be invalidated on account of non-compliance by the trial court of **Section 200(3)** of the **Criminal Procedure Code**. This section grants an accused person the right to have prosecution witnesses, who had testified before the previous magistrate, to be recalled before the continuing magistrate for the purposes of further cross-examination. In the present appeal, Mr. Wandugi submitted that the Appellant's right to fair trial was infringed in that he was denied the right to have the witnesses recalled when the convicting magistrate took over proceedings from the previous magistrate. Learned counsel was of the view that the non-compliance of this section of the law vitiated the trial. Ms. Kimiri was of the contrary view. She submitted that the convicting magistrate not only took over the proceedings from the previous magistrate who had disqualified herself from conducting the trial, but had acceded to the Appellant's request to have the case start *de novo*. The Appellant's rights to fair trial were therefore not infringed.

This court perused the proceedings of the trial court. The trial commenced before Hon. E. Nduva (Mrs.) - (RM). Five (5) prosecution witnesses adduced evidence. The Appellant was put on his defence. The Appellant sought to have two of the prosecution witnesses recalled. The trial court disqualified itself because it was of the view that it had already formed an opinion about the case irrespective of whether or not the two prosecution witnesses were recalled. The case was referred to another court. On 18<sup>th</sup> November 2013, the matter was placed before Hon. PM Ndwiga (SPM). The Appellant's counsel applied that the case starts *de novo*. The court ordered the investigating officer to appear before him to enable the court determines whether or not to accede to the Appellant's request. On 4<sup>th</sup> December 2013, the matter was placed before Hon. E. Cherono (SPM) (as he then was). The court directed that the case starts *de novo* as per the Appellant's request. All the prosecution witnesses who had testified before Hon. E. Nduva were recalled and gave their testimony in the retrial before Hon. E. Cherono (SPM). The claim by the Appellant that his rights as provided under **Section 200(3)** of the **Criminal Procedure Code** were infringed therefore has no basis. The Appellant made the request for the trial to start *de novo*. The request was granted. The Appellant was represented by counsel throughout the proceedings. The prosecution witnesses were robustly cross-examined by the Appellant's counsel. There was no basis therefore for the Appellant to claim that his rights to fair trial were infringed. That ground of appeal lacks merit and is dismissed.

On the merits, it was clear from the evidence that was adduced by the prosecution witnesses and offered by the defence that there were two versions that were put before the court for the court to determine where the truth lay. The complainant testified that on 17<sup>th</sup> October 2010 while he was at Petkam Bar along Keekorok Road, he was called to a table where the Appellant was seated with his two friends. The Appellant and the complainant were long time acquaintances. In fact, they had been, previous to that day, business partners. According to the complainant, the Appellant provoked him, then slapped him, pushed him to the ground and stamped on him. He was attacked by the Appellant and his two friends. He told the court that he was assaulted until he lost consciousness. When he regained consciousness, he was sore all over his body. The Appellant and his friends then took him to Central Police Station where he was detained on allegation that he had threatened to kill the Appellant and further that he had created disturbance. He was bailed out by his wife and taken to Guru Nanak Hospital where he was admitted for seven (7) days. An x-ray of his jaw revealed that the complainant's jaw was fractured.

According to Dr. Zephania Kamau based at the Police Surgery (he testified as PW1), when he examined the complainant on 28<sup>th</sup> October 2010, he saw that the complainant's right jaw was swollen. He had a fracture of the same jaw. The lower teeth had been immobilized. The fracture was internally fixed with wires. He was of the view that the injury was caused by a blunt object. He filled the P3 form which was produced into evidence as **Prosecution's Exhibit No.1**.

On his part, it was the Appellant's case that on the material day, the complainant caused fracas in the bar where he was having a drink with his friends. He banged tables as a result of which some patrons' beer spilt. He threatened to kill the Appellant. The patrons descended on the complainant and beat him up. The complainant escaped from the bar and while walking down the stairs he fell down and injured himself. The Appellant's testimony in his defence was corroborated by DW2 Boniface Muriithi and DW3 Jessie Nderitu Wanjiru. The Appellant testified that they decided to take the Appellant to Central Police Station and lodge a complaint in regard to the things that he had done. As a result of the complaint, the Appellant was charged and convicted in **Nairobi CMC Criminal Case No.1969 of 2010**. The Appellant attributed the present charge brought against him to the charge that the Appellant was convicted.

On re-evaluation of the evidence adduced, it was clear to this court that the prosecution was required to establish that the Appellant assaulted the complainant and caused him to sustain grievous harm. **“Grievous harm”** is defined under **Section 2** of the **Penal Code** to mean:

***“Any harm which amounts to maim or dangerous harm, or seriously or permanently injures health, or which is likely so 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.”***

In the present appeal, the prosecution established to the required standard of proof beyond any reasonable doubt that indeed the complainant sustained grievous harm. The testimony of Dr. Zephania Kamau clearly shows that the injury that the complainant sustained on his jaw was of a permanent nature. The complainant’s jaw was fractured to the extent that it required wires to be inserted for it to be fixed. The injury on the complainant’s jaw is a permanent disfigurement and therefore it fits into the definition ascribed to the term **grievous harm** under **Section 2** of the **Penal Code**.

As regard the perpetrator of the injury, on re-analysis of the evidence adduced before the trial court, this court is convinced to the required standard of proof beyond any reasonable doubt that it was the Appellant and his friends who injured the complainant. The complainant’s version of the events that took place on the material day is credible and consistent. The complainant’s testimony was not shaken on cross-examination. He was able to vividly narrate how he was called to the table where the Appellant was sitting with his friends after which he was viciously assaulted. The motive for the attack appears to be a grievance the Appellant had with the complainant in regard to a business relationship that went south. The Appellant’s version of events is not believable because of his subsequent conduct after the complainant’s assault. Instead of taking the complainant to hospital, he took him to a police station and made a criminal complaint against the complainant. The fact that the complainant was convicted of the charges that were brought against him does not exonerate the Appellant from the crime that he committed. There was no legal justification for the Appellant to assault the complainant and cause him to sustain the serious injuries that he suffered. This court cannot fault the trial court for reaching the verdict that it reached. The appeal against conviction therefore lacks merit and is hereby dismissed.

On sentence, this court agrees with the Appellant that before he was sentenced to serve a custodial sentence, the trial court should have explored other sentencing options including non-custodial sentence. This court is prepared to give the Appellant a chance to serve a non-custodial sentence provided he shows remorse by appropriately compensating the complainant. In that regard, the custodial sentence imposed on the Appellant shall be stayed as this court awaits a Probation Officer’s report to be prepared and be submitted to this court on **28<sup>th</sup> June 2018**. The report shall contain input from the complainant to enable this court have all the facts before it can sentence the Appellant. It is so ordered.

**DATED AT NAIROBI THIS 18<sup>TH</sup> DAY OF JUNE 2018**

**L. KIMARU**

**JUDGE**