REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 122 OF 2017

(FORMERLY MACHAKOS HCCRA NO. 149 OF 2015)

DOMINIC KYALLO UTWII ……. APPELLANT

-VERSUS-

REPUBLIC …….. RESPONDENT

(From the original conviction and sentence of Hon. W.K Cheruiyot(RM) in Criminal Case No. 5 of 2014 of the Senior Resident Magistrate's Court at Tawa)

JUDGEMENT

INTRODUCTION

1. The Appellant 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 the 25th day of December 2013 at Sophia market, Waia location, Usalala sub location, Mbooni East District within Makueni County, the Appellant did grievous harm to Raphael Ndolo Ndavi.

2. The learned Trial Magistrate convicted and sentenced the Appellant to 4 years imprisonment.

THE APPEAL

3. Aggrieved by that decision, the Appellant filed this appeal and raised the following 7 grounds;

> **a. That** *the learned magistrate failed to consider the mitigation offered by the accused, more so that he was a student.*
>
> **b. That** the learned magistrate failed to identify points for determination, the decision thereon and the reasons for the decision thus misdirecting himself on the ingredients of the offence.
>
> **c. That** the learned magistrate failed to consider the medical evidence as mere hearsay.
>
> **d. That** the learned magistrate misdirected himself when he refused to give an alternative sentence of fine or probation.
>
> **e. That** the learned magistrate erred in both law and fact when he failed to evaluate and analyze evidence on record and more so ignored the defence witnesses.

4. When the matter came up for hearing, the parties agreed to canvass the appeal by way of written submissions. The Appellant was represented by learned Counsel Mr. Tamata and the state was represented by learned prosecution Counsel, Mr. Kihara.

5. The Appellant's submissions were a complete departure from the petition.

6. He introduced new grounds without leave of the Court. Section 350 of the Criminal Procedure Code expressly provides that;

> **"….an Appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal……"**

7. I will therefore abstain from entertaining any new grounds which have been disguised as submissions. The state through the office of the

Director of Public Prosecutions did not help the situation because they responded to the impugned submissions. Be that as it may, it is clear that they have opposed the appeal.

8. For the above reasons, I will look at the appeal based only on the grounds in the petition and re-evaluation of the evidence on record.

MITIGATION

9. From the record, it is clear that the learned magistrate considered the accused's mitigation and treated him as a first offender. He was sentenced to serve four years for an offence which attracts life imprisonment. This ideally means that there were mitigating factors which informed the learned magistrate's decision not to give him the maximum sentence. Furthermore, being a student does not mean that a convict should automatically get a lenient sentence.

POINTS FOR DETERMINATION, THE DECISION AND REASONS FOR THE DECISION.

10. From the record and specifically page 45 of the proceedings, the points for determination are clearly visible. The reasoning of the learned Trial Magistrate which culminated into the decision to convict is also there for all and sundry. The judgment is compliant with the provisions of Section 169 of the Criminal Procedure Code.

11. As for the ingredients of the offence, section 231 and 4 of the Penal Code are instructive. Section 231 states *inter alia* that;

> **"Grievous harm means any unlawful acts by a person intended to maim, disfigure or disable another person…"**

12. Section 4 of the Penal Code (Cap 63) defines grievous harm as follows;

> **"Any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely to so injure health or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, membrane or sense."**

13. Guided by the above sections, it is my considered view that the ingredients of the offence of causing grievous are;

> **a. Whether the injuries sustained by the Complainant fall within the definition of grievous harm.**
>
> **b. Whether the accused is responsible for the Complainant's injuries.**

14. Page 35 of the proceedings shows the issues for determination identified by the learned Trial Magistrate which clearly shows that she addressed her mind to the ingredients of the offence. I find no misdirection on her part and accordingly, this ground should fail.

MEDICAL EVIDENCE

15. According to the Appellant, the learned Trial Magistrate should have dismissed the medical evidence as mere hearsay.

16. The Blacks Law Dictionary 7th Edition defines hearsay evidence as follows:

> **"A testimony that is given by a witness who relates not what he or she knows personally but what others have said and that is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under the rules of evidence."**

17. PW1, Raphael Ndolo Ndivi was the Complainant. He testified that the accused person assaulted him on 25/12/2013 by hitting him with a beer bottle on the mouth.

18. He reported the matter at Kilungu patrol base and was given a note to go to the hospital. He went to Kisau sub-district hospital where first aid was administered. He was referred to Makueni to see a Dentist but upon going there the next morning, there was no dentist. He was given an injection to ease the pain.

19. He then proceeded to Kathonzweni *(Afya Bora Medical & Dental Clinic)* where the Dentist removed six teeth that were broken. He was given the teeth that were removed and took them to the police. He was then issued with a P3 form which he took to Kisau sub district hospital and it was filled.

20. He identified a blood stained t-shirt, the treatment notes, the six teeth in a plastic bottle and the P3 form.

21. PW5 was the Clinical Officer, Geoffrey Mutie; he testified that the Complainant had been seen at Kisau Sub-District hospital, Makueni District Hospital and Afya Bora Medical & Dental clinic in Kathonzweni.

22. On specific examination, the Complainant had a wound on the lower lip, two loose upper incisors and four loose lower incisors. The approximate age of the injuries was hours and the probable type of weapon was a blunt object.

23. The six loose teeth were extracted at Afya Bora Medical & Dental clinic.

24. The degree of injury was grievous harm. He filled the Complainant's P3 form on 30/12/2013 at Kisau Sub–District hospital. He produced all the treatment notes and the P3 form.

25. On cross examination, he said that the age of injuries on the P3 form referred to the time of injury and that he was the one who had filled and signed the P3 form. He did not know who filled and signed the others.

26. In re-examination, he said that he was the first one to see the Complainant at Kisau Sub-District hospital. The injuries were hours old. He issued him with a treatment card and filled the P3 form.

27. At the start of the trial, the accused person was unrepresented. While cross examining the Complainant, he neither challenged the authenticity of the injuries nor the documents which had been marked for identification.

28. In fact, while being cross examined by the prosecutor, the Appellant confirmed that the Complainant was assaulted, injured and taken to the hospital.

29. Later on, Mr. Tamata came on record for the Appellant and applied to have the witnesses, who had testified, recalled for further cross examination. His application was allowed.

30. Again, neither the injuries nor the documents were challenged. Of importance is that when the Clinical Officer (PW5) testified, Mr. Tamata was already on record for the Appellant. He produced all the treatment notes and the P3 form without objection. This is the witness who had prepared the treatment notes from Kisau Sub-District hospital as well as the P3. His evidence with regard to those two documents was therefore direct.

31. It is imperative that PW5 was the first one to see the Complainant after the assault. It is my considered view that he was in a position to speak about the injuries authoritatively. He is also the one who referred the Complainant to Makueni to see the Dentist. The Complainant proceeded to Kathonzweni after failing to find a dentist in Makueni.

32. I looked at the medical evidence keenly and my view is that, as much as PW5 was not the maker of the treatment notes from Makueni hospital and Afya Bora clinic, all those documents are corroborative and actually give a sequence of how the events unfolded after the assault.

33. Further, there was no contest as to whether the six teeth were actually extracted. Infact, they were produced in evidence. I do not think that the Trial Magistrate would have failed to notice the status of the Complainant's mouth at the time he testified.

34. The upshot of the foregoing is that the medical evidence was credible and direct. That ground of appeal should accordingly fail.

ALTERNATIVE SENTENCE OF FINE OR PROBATION

35. This ground of appeal is in my view, a veiled admission. Be that as it may, the Appellant was given four years for an offence which attracts a sentence of life imprisonment. The sentence is not mandatory, it allows the Trial Magistrate to exercise discretion and give a lesser sentence depending on the circumstances of each case.

36. The ground of appeal essentially raised is that the Appellant should have been sentenced to pay fine or serve under probation. The case of **Shadrack Kipchoge Kogo –Vs- Republic; Criminal Appeal No. 253 of 2003** gives guidance on when an appellate Court can interfere with the sentence of the trial Court.

37. The Court of Appeal sitting in Eldoret stated that;

> **"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere, it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these the sentence itself is so excessive and therefore an error of principle must be interfered."**

38. The Court of Appeal, in deciding the Shadrack Kogo case *(supra)*, followed and approved the decision in **Ogolla S/O Owuor –Vs- Republic [1954] EACA 270** where it was held that;

> **"The court does not alter a sentence unless the trial judge had acted upon wrong principles or overlooked some material factors. To this, we would add a third criterion namely that the sentence is manifestly excessive in view of the circumstances of the case."**

39. In the current case, it was the opinion of the learned Trial Magistrate that the sentence imposed was meant to serve a deterrent purpose. I find nothing wrong with that as it is totally in line with the principles and guidelines of sentencing and also in light of the fact that no grounds were advanced by the Appellant to warrant this Court's interference with the discretion of the learned Trial Magistrate.

40. Further, in light of the harsh penalty which the offence attracts, a sentence of four years cannot be said to be harsh or excessive. This ground of appeal fails.

EVALUATION AND ANALYSIS OF THE EVIDENCE ON RECORD/DEFENCE WITNESSES

41. From the foregoing and in light of the ingredients of the offence, it is clear that the Complainant was assaulted and suffered grievous harm.

42. The only issue, in my view, which this Court needs to look at, is whether the learned Trial Magistrate evaluated and analyzed the evidence on record with regard to culpability of the Appellant.

43. PW1, the Complainant recalled that on 25/12/2013 at 9.30 p.m., he wanted to go home after taking some beers at Sophia. After igniting the car, the Appellant called out saying that the car was on fire. They came out and checked the car but there was no fire. The Appellant was known to him and was his neighbor. The Complainant asked the Appellant why he was disturbing them. He *(Appellant)* then threw a bottle from four meters away which hit the Complainant on the mouth and he started bleeding profusely. He said that he had never had a grudge or quarrel with the Appellant.

44. On cross examination, he said that at the time of the incident, there were security lights outside the bar where he had parked as well as lights from a nearby disco. He could not recall the colour of the Appellant's clothes but he had a long sleeved shirt. He called the Complainant by his nickname 'mamluki'.

45. That after assaulting him, the Appellant ran away for a whole week. The Complainant then laid a trap and the Appellant was arrested. According to PW1, the Appellant's parents had contacted him asking him to forgive the Appellant. He agreed that the witnesses were his friends and they were from the same clan.

46. PW2, Francis Muli Mulika, was with the Complainant and three others in the car when some youth outside shouted that the car was on fire. They alighted and checked but there was no fire. After doing this mischief three times, PW1 asked them what they wanted. The Appellant answered that he thought PW1 had a lot of money but it appeared he had none. He then threw a beer bottle at PW1 which hit him on the mouth.

47. PW2 said that he managed to see the Appellant because there were security lights. The Appellant was also well known to him as he was his neighbor as well as his son's age mate. He said he had no grudge against him.

48. On cross examination, he said that the generator at the disco was the source of light and he recognized the Appellant from the other youth. That he did not look at the Appellant's clothing and only identified him by face. They showed the police officer the scene and was present when the broken bottle was collected. He said that the Complainant was his neighbor and also a relative as they were from the same clan.

49. PW4, Daniel Mutunga testified that he knew both the Complainant and the Appellant as they were from the same village. On the material day at 9.30 p.m., they were in a bar at Sophia market. They boarded the Complainant's car ready to leave but someone shouted that there was fire.

50. They alighted and found the Appellant behind the car. He said that the lights from the bar and security lights enabled him to identify the Appellant.

51. Upon being asked by the Complainant as to why he was disturbing them, the Appellant threw a beer bottle which badly injured the Complainant.

52. On cross examination, he said that there were people who witnessed the incident. He did not ask the Appellant whether he was the one shouting. He was present when the Complainant got injured and also when the teeth were removed.

53. In his sworn statement, the Appellant DW1 said that the Complainant was his neighbor and had known him for ten years. That on 25/12/2013, he was at a disco in Sophia market at 9.00 p.m. That he saw the Complainant at 2.00 a.m. while leaving the disco to go home. He *(Complainant)* was struggling with other young men.

54. He enquired what was happening but nobody answered him. One of the young men had a beer bottle in his pocket. He removed the bottle and hit the Complainant. The following day, he met the Complainant's nephew who told him that the Complainant said that the Appellant knew the attackers.

55. On 27/12/2013, he went to Nairobi to assist his brother who was moving houses. On 01/01/2014, his cousin Ikonze told him what the Complainant was saying-that the Appellant knew the attackers.

56. On 02/01/2014, he met the Complainant, in a club at Sophia market, who told him that if he refused to disclose the attackers, he would answer for it. Shortly thereafter, police officers came and asked him the same questions i.e. whether he knew who had attacked the Complainant. He was then arrested. He denied assaulting the Complainant.

57. On cross examination, he agreed that he was known to the Complainant. The people who were with him in the car took him to the hospital. He had no grudge with the Complainant. He agreed that PW2 and PW3 knew him as they were from Usalala sub-location where he also hailed from. He also agreed that PW4 was known to him as he was also from Usalala sub-location.

58. I have looked at the above evidence carefully. It is clear that the Appellant was at the scene on the day and time that the Complainant was assaulted. There were eye witnesses who the Appellant admitted were well known to him and vice versa.

59. I have also analyzed and evaluated the evidence with regard to the source of light and its distance from the scene and I am satisfied that it was sufficient to enable the witnesses recognize the Appellant.

60. It was the prosecution's case that the Appellant disappeared after the incident but the police managed to arrest him after being tricked by the Complainant. This position was actually buttressed by the Appellant who testified that he travelled to Nairobi on 27/12/2013 to help his brother move houses. So, it is actually true that he was away for some time after the incident.

61. The Appellant also admitted to have received a call from his cousin Ikonze and it is my considered view that this was in line with the Complainant's version *(that he used the Appellant's cousin to trick him).*

62. From the Appellant's testimony, his cousin Ikonze had already told him what the Complainant was saying i.e., that he knew the attackers. Despite being aware of this, he still agreed to meet the Complainant. Now, if he actually did not know the attackers, what was he going to discuss with the Complainant?

63. The most logical conclusion is that, he was told that the meeting would be about reconciliation and that's the probable reason as to why he agreed to it. The learned Trial Magistrate addressed her mind to these questions and it is my view that they were totally valid.

64. In his defence, the Appellant said that he saw the Complainant at 2.00 a.m. while leaving the disco to go home.

65. It is my considered view that this line of defence was sufficiently rebutted by the evidence tendered by the prosecution. The treatment card from Kisau Sub-District hospital *(exhibit 2)* where the Complainant was first treated shows that he was there at 11.00 p.m. It is highly unlikely that the Complainant would be at the bar area at 2.00 a.m. with the kind of injuries that he had.

66. Having looked at the judgment, it is clear that the learned Trial Magistrate analyzed and evaluated the evidence on record and arrived at the correct finding. The prosecution's evidence was consistent, corroborative and proved the offence beyond reasonable doubt.

CONCLUSION

67. In sum the court finds that the appeal has no merit and therefore same is dismissed and court makes the following orders;

i. The Appeal is dismissed, Conviction is affirmed and Sentence confirmed.

SIGNED AND DATED THIS 24TH DAY OF JULY 2018,

IN OPEN COURT.

…….……..

C KARIUKI

JUDGE