REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

MISC. CRIMINAL APPEAL NO. 25 OF 2014

LINUS NJIRU KIMUNYE.....APPLICANT

V E R S U S

STATE.....RESPONDENT

JUDGMENT

The appellant Linus Njiru Kamunye was convicted of the offence of causing Grievous Harm contrary to Section 234 of the Penal Code and sentenced to 25 years imprisonment.

Being dissatisfied with both conviction and sentence he lodged an appeal claiming that:-

1. PWI confirmed that he was with PW 2 and there was nobody else he saw before he was hit from behind.

2. The exhibit produced was not recovered from the scene since it was issued to the investigating officer by PW 2.

3. Court relied on evidence of PW 2, who is his wife with whom he had separated for over 3 years and she had a grudge against him, because he had married another woman.

4. PW 2 evidence that PW I was assaulted for 15 minutes raised doubt on how he vanished from the scene since PW 3 and PW4 came 3 minutes after. PW -2- screamed loudly without waking the closest neighbours rather than landlord who is 30 metres from the scene.

The appellant filed supplementary grounds of appeal with leave of the court and states as follows:-

- The learned Magistrate convicted the appellant against the weight of the evidence.

- The learned trial Magistrate erred in law and fact in not saying why he did not believe the testimony of the appellant.

The state opposed the appeal and submits that they discharged the burden to prove beyond any reasonable doubts the identity of the offender and the nature of the injuries which was grievous harm. Through the prosecutions counsel Mr. Geoffrey Obiri the State urged the court to dismiss the appeal.

The brief facts of this case are that the complainant in this case David Mwai had visited his friend Ester Nyawira Kiuge on 18/8/12 where he also spent the night. Ester Nyawira Kiuge was the estranged wife of the appellant. The following morning Ester Nyawira Kiuge opened the door at 6.00 a.m for the complainant to leave. After the complainant stepped out Ester Nyawira Kiuge (PW-1) heard a bang out and on checking she spotted the complainant on the ground and was being hit by the appellant who was using a big stick. Upon being asked why he was doing that the appellant asked the PW-2- for how long he was going to stress him. The appellant ran towards the road. The complainant was left at the scene while unconscious. The matter was reported to the police. The complainant was treated at Karira Hospital and Kenyatta National Hospital. The appellant was arrested and charged with this offence.

This is the first appeal. Directions were given that the parties file written submissions and highlight them orally. This being the 1st appellate court it has a duty to consider the evidence adduced before the trial court and come up with its own independent finding while bearing in mind that the trial Magistrate had the opportunity to see the witnesses when they testified and leave some room for that. This was stated in the case of ***Okeno –v- R. 1972 EA 32***. This court has to consider the evidence and the law and come to its own independent finding on the facts and the law. The Court of Appeal in ***Kiilii & Another –v- R(2015)KLR 174*** stated:

> ***"an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusions ……in doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses ……."***

The evidence adduced by PW-2-, Ester Nyawira Kiuge was that the complainant David Mwai was her boyfriend for three months after she had separated with the appellant who was her husband for seventeen years. On the material night the said boyfriend spent the night in her house and on the material morning after she opened the door for him to leave at 6.00 a.m she suddenly heard a bang and on checking saw the appellant beating the complainant with a big stick. The aftermath was that the complainant lay on the ground unconscious and the appellant walked away from the scene.

Being a mother courage she did manage to ask the appellant what he had done and the reason for it. The appellant responded bitterly asking her for how long she shall stress him. She then assisted to report the matter to the police and to escort the complainant to hospital. In cross examination she stated that the appellant was close to him and he talked to her and that is how she was able to recognize him.

PWI David Mwai Mwaniki is the complainant. He testified that on 19/8/13 as he left his friends house, Linus Njiru assaulted him on the head. He testified that he could not tell what he used to assault him as he assaulted him from behind. He testified that he lost consciousness and came to after three days while in hospital at Karira. He was admitted at Kenyatta Hospital for one month. He lost coherence in speech and lost power on the right hand and right leg. He could not walk or lift his right hand. He maintained that it is the appellant who assaulted him.

PW-3- Peterson Mugame Muchira testified that he heard screams from the house of Nyawira (PWI) he went and found Mwai (complainant) with an injury on the head and was unconscious. He assisted him with others to take him to the Police station and later to hospital. He testified that it is PWI who told him that the complainant was hit by Njiru who is the appellant. PW-4- James Njuguna Kamau testified that he is the owner of the rental houses where Nyawira (PW-1-) was living. On 19/8/13 he heard screams from the residential houses and rushed there. He found the complainant on the ground and was unconscious. There was a stick on the ground. He assisted to take the complainant to hospital.

PW-5- Corporal Patrick Gikunda testified that he received the report and was given a piece of wood which was used to strike the complainant. He testified that the appellant was identified by PW-1- & 2 as the person who assaulted the complainant. PW-6- Dr. Douglas Njau Cira testified that the complainant, on examination had a deformity on the left side of the head. He alleged to have been assaulted. There was bleeding in the brain and multiple skull fractures with fracture base of skull. The degree of injury was grievous harm. He produced the P3 form and medical reports as exhibit 2 & 3.

I have considered these evidence and the submissions. The appellant challenges his conviction on the trial courts reliance on the evidence of PWI & PW2 . These two witnesses were the eye witnesses. Though it is submitted that the PW-1- was the only eye witness, this is not the position as PW-2- witnessed when the appellant assaulted the complainant while the complainant testified to the fact that it is the appellant who assaulted him. The evidence by PW1 & 2 was cogent and as submitted by the prosecution identifies the appellant as the assailant. PW-1- had no difficulties recognizing the appellant who was her former husband and the appellant talked to her and she recognized him and his voice. The trial Magistrate in his judgment stated that he had no doubt in his mind that the appellant was at the scene of the crime. He rejected the defence of the appellant as it was raised very late in the day and not at the outset of the trial.

The trial Magistrate had the chance to see the two witnesses when they testified and was satisfied with their testimony as they placed the appellant at the scene of crime. From the testimony of PW-1- & PW-2- at that hour of the morning it was only the 3 of them who were at the scene. Neighbours came when they heard the alarm raised by PW-1-. I find that the appellant was identified as the person who assaulted the complainant. There is no difficult in arriving at this finding as the appellant was known to PW-1- & PW-2- and he clearly stated the motive of the attack. It is clear from the evidence that PW-1- was the estranged wife of the appellant and the complainant had spent the night with PW-1-. This must have stressed him and is the reason why he lay in wait as the complainant left PW-1's house and attacked him. The motive of the attack was proved beyond any reasonable doubts. The allegation that another man could have been involved is a mere speculation. The prosecution has proved that it is the appellant and no other person who executed the assault.

The evidence of PW-1- & -2- was sufficient. It is trite law that no particular number of witnesses is required to prove a case. ***Section 143 of the Evidence Act*** provides:-

> ***" No particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for the proof of any fact."***

PW-1- and PW-2- gave direct evidence. I am of the view that PW2 corroborated the evidence of PW-1-. The witnesses who went to the scene on hearing screams from PW-1- found the complainant at the scene, unconscious and with an injury on the head. They confirmed that PW-1- informed them that it is appellant who assaulted the complainant. The evidence tendered by the PW-I- & PW2 who gave an eye witness account and that adduced by PW-3- & -4- is sufficient and places the appellant at the scene and is the one who assaulted the complainant.

The state tendered sufficient evidence and it is not true for the appellant to state that the conviction was against the weight of the evidence. The evidence tendered was cogent, direct and leaves no doubt on the guilt of the appellant.

The trial Magistrate gave reasons for rejecting the defence of the appellant. He stated that the appellant was placed at the scene and the defence of alibi was raised very late in the day. This is apparent from the record and the trial Magistrate cannot be faulted for rejecting it. Where an accused person relies on the defence of alibi, it must be raised at the earliest opportunity possible so that the prosecution has an opportunity to enquire on that defence. Such defence must be raised as early as when the accused was initially charged. In the case of

Karanja –v- R.(1983) KLR 501 the Court of Appeal stated:-

> ***"The word alibi is a latin verb meaning "elsewhere" or "at another place." Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed hence not guilty, then it can be said that the accused has set up an alibi. The appellant's story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and furthermore, it was not raised at the earliest convenience i.e, when he was initially charged. In a proper case the court may in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubts take into account the fact that he had not put forward his defence, or his alibi if it amounts thereto at an early stage in the case, and so that it can be tested by those responsible for investigations and prevent any suggestion that the defence was an afterthought."***

The evidence tendered did not leave any doubt on the identity of the assailant. The trial Magistrate found that the appellant was positively identified at the scene and rejected his defence as it was not raised at the onset of the trial. The trial Magistrate properly addressed his mind to the evidence and the law and reached the inevitable conclusion that the appellant was at the scene and found his defence was not true. The evidence was not fabricated by PW-1.

The fact of assault was well corroborated by the medical evidence adduced by PW-6- Doctor Douglas Ciira who produced the P-3- form and medical report. The report from our Lady of Lourdes Mwea Hospital exhibit -3- states that the patient was assaulted by somebody known to him. He was unconscious and had injuries on the head which I have earlier listed. The P3 form exhibit -2- confirms that the complainant sustained injury on the head which was grievous harm. The term grievous harm is defined under ***Section 4 of the Penal Code*** as follows:-

> ***"grievous harm" means any harm which amounts to a maim or dangerous harm, or seriously or permanently injuries 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."***

This definition is also captured at Paragraph -5- of part B, of the P.3 form. The doctor observed injuries on the complainant which maimed him and were assessed as grievous harm. ***Section 234 of the Penal Code*** provides:

> ***"Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."***

From the evidence adduced by the doctor it is clear that the complainant was assaulted on 19/8/2013 and sustained injuries which were permanent in nature and life-threatening. The complainant was assaulted and left for dead. The prosecution has discharged the burden to proof that the injuries sustained were grievous harm.

Having analysed the evidence, the defence and the submissions. I am of the firm considered view that the prosecution adduced sufficient evidence to find a conviction and the conviction is well founded. I confirm the conviction by the trial Magistrate. I find no reason to interfere with the sentence. The charge attracts a sentence of imprisonment for life. The sentence meted out is deserved as the offence was well planned and executed leaving the complainant with life threatening injuries which he will live with for the rest of his life.

The upshot is that this appeal is without merits and is dismissed.

Dated at Kerugoya this 27th day of September 2018.

L. W. GITARI

JUDGE