



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO 170 OF 2017

ISAACK KAMUREN CHEPYATOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction and sentence in Kabarnet Principal Magistrate's Court Criminal Case No. 316 of 2015 delivered on 5th November 2015 by Hon. E. Kigen (RM)]

JUDGMENT

1. The appellant herein was convicted and sentenced to imprisonment for seven (7) years on 5/11/2015 for the offence of grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that on the 24th day of April, 2015 at Kapkombe village in Baringo North Sub-County within Baringo County, unlawfully did grievous harm to Erick Cherutich Arap Chelimo. The appellant was aggrieved by the decision of the trial court and has appealed to this court on the grounds of appeal that:

1. The trial magistrate erred in law and in fact in failing to consider that the prosecution did not prove my case beyond reasonable doubt.
2. That the trial magistrate failed to consider the consequences of uncalled prosecution witness.
3. That the trial magistrate failed to note that prosecution witnesses which were tendered were not credible.
4. That the trial magistrate failed to recognize that the evidence tendered by the prosecution witnesses were inconsistent.
5. That the sentence be quashed and appellant set free.

2. The appellant through his written submissions urged the court that:

The complainant's name contradicts when he is identified by the name Erick Chelimo and later Erich Cherutich by the Clinical Officer.

The prosecution relied on unproved documented papers, the clinical documents had no stamps in them.

The trial court failed in relying on the evidence of PW1 when he stated that it was at 7pm and there was natural light.

Harrison Chebii who gave the son of the complainant a phone was not in court to testify as a witness.

The evidence produced is from one family, and there is a contradiction into the case. The time of admission to the hospital by their neighbour was on the 24/4/2015 the evidence of PW2 contradicts this.

The P3 Form highlighted that there was no blood stains found, no fracture relating to the allegations raised against the appellant are contradictory.

The examiner who examined the complainant indicated that there were no passages of blood and no vomiting meaning that the allegations raised by the complainant is not true.

The trial magistrate's use of previous records and the probation report without proving the allegations to the correct standard failed.

3. The DPP opposed the appeal and made oral submissions in court as follows:

“Ms Macharia – Ass DPP

Appeal is opposed

Appellant convicted for the offence of grievous harm contrary to section 234 of the Penal Code and sentenced to serve 7 years on 5/11/2015.

Pw1 testified that the appellant is his nephew and that on the 24/4/2015 appellant and his friend named Joshua went to him to ask for work since they were drunk Pw1 gave them Ksh.30/= to take tea and promised him to offer him work the following day. He said that later in the day as he was coming from the centre, the appellant followed him and the appellant took a short cut and PW1 saw him in front of him armed with a stick; the appellant hit PW1 on the left ear. He fell down, the appellant searched his pocket and took his mobile, it was about 7.00pm. The complainant then came to Kabarnet Hospital and later to Nairobi for further treatment.

The complainant says that he was able to identify the appellant whom he knew since he was born and he had encountered with him the same day when the appellant was coming from work and there was also natural light.

Appellant later availed the phone he had taken from the complainant through the village elder who took it to the police station. This was corroborated by PW2, 3, 4 and 5.

The evidence of PW6 is that the complainant developed a hearing problem after the attack and started using hearing aid and was using the same at the time of the hearing of the case. The degree of injury was classified as grievous harm.

The appellant does not deny that he met the complainant on the material day. He denies attacking him with a stick, we submit that we have proved the case

At p.37 of the record shows to be a repeat offender. There was a probation report p.38 that the probation sentence did not work in one of the other cases. We urge the court that the appeal be dismissed.”

4. The prosecution availed a total of 9 witnesses in testimony against the case of the accused. The statements were as follows:

“PW1 Erick Chelimo

I am from Kapkombe, I am a farmer and a retired Educational Officer. The accused is my nephew. I recall on the 24/4/2015 I was in the farm at about 4.00pm where I wanted to plant coffee seedlings, I called nine people who came to help me plant the seedlings. The accused and another man called Joshua Chesaro came and asked me for work, I told them to come the following day. They insisted and since they were drunk I gave them Ksh.30/= for tea and they left. We finished planting at 5.30pm and left for the centre where we stayed in a hotel; it was raining, I left with one Francis. I heard someone calling out ‘uncle’, I saw the accused who came and quarrelled with Francis, I walked ahead. As Francis approached his home I saw the accused following me, he took a turn as a short cut, suddenly I saw him appear in front of me.

About 7.00pm, there was still natural light from the sun and the moon. He came armed with a stick and pushed me. I have known Isaack since he was young; I reached my son’s gate as I entered the accused came and hit me on the left ear; I screamed and fell. He searched my pockets and took my phone and flashed the phone on my face for me to see it.

I crawled through the fence and reached my house where I found my wife standing outside by the time I fell very sick and asked my wife to take me to the hospital. Neighbours came and we went to the centre where we called one Josphat and asked my wife to ask him why the accused had assaulted him. He stated that the accused stated that he wanted to beat me up so that he could report him. I came to Kabarnet District hospital where X-ray was taken and proceeded to the police station to make a report. I was advised to come back the following day. I fell sick and my son came and took me to Nairobi for further medication. While in Nairobi my wife came and informed me that my phone had been recovered as the accused had first given the phone to Harrison his brother to bring to Jackson my son but my son told him to wait for me to come from hospital.

He took the phone to the clan elder (James Kipyegon). I came back on 7th and went back to the police station where I was advised to ask the clan elder to avail the phone to the police. We searched for the suspect and he was traced to Kampi ya Moto by my son Amos where he was arrested and handed over to the police station at Kabarnet.

Cross-examination by accused

There were many people in the centre, you and Josphat were in the shop. You have many uncles, it you who called me I was with Francis from the centre. I was about half a kilometre, we met ahead. I did not meet any people on the road. The stick was at the scene, after you took my phone you dropped the stick. I don’t have any grudge with you, you assisted me with casual work.

PW2 – Simon Aegwo Chesaro

I am from Kapkembo Saimo Location, Kabartonjo Division. I am a farmer and a retired government driver. The complainant is my neighbour and the accused is my neighbour as well. I recall on the (date not indicated in the proceedings) I had gone to Kapkombe

Market at about 10.00pm where I met the complainant and he requested me to go and help him go buy coffee seedlings from Ossen, we took lunch at Kabartonjo and proceeded home. Reaching home I advised him to look for people. He left and I began offloading the seedlings, he came with people we started planting the seedlings. Later the accused and another called Joshua came while drunk and insisted on planting; the complainant told them to come tomorrow. He gave them Ksh.30/= and asked them to drink tea. The said Joshua came back and told Erick to give him money as the accused had taken the other; he replied as he did not have money. It started raining and we went to the centre where the complainant looked for change. We stayed in the hotel and I left as it was heading to 7.00pm.

I reached home and at about 8.00pm I heard somebody knocking my mother's door on checking I found Reuben's son who informed me that that the complainant has been assaulted. I rushed and found the complainant had been put in the vehicle, I tried to talk to him but he was unresponsive as he could not hear me well. I accompanied him to Kabarnet District Hospital where he was treated and discharged and proceeded to the station. Reaching home the complainant's conditions worsened and he was taken to Nairobi for further medication by his children.

After the complainant came back from Nairobi we went to record our statements. He came back with hearing aids which he did not have prior to the incident.

Cross-examination by the accused

I took Erick Chelimo to the hospital, I have told the court what I saw. It was around 5.00pm when you were given Ksh.30/=.

PW3 – Josphat Kibet Konga

From Kapkombe Sub-location, Kabartonjo division. I do business and I operate a shop since 2006. The complainant is my neighbour, the accused s also my neighbour. I recall on 24/4/2015 I was in my shop at about 7.00pm when the accused came while drunk and said "what an enemy" he told me that if he died I should bury him, he kept talking and told me that he wanted to attack the complainant since he was ready.

The complainant came and he was standing outside the shop when the accused called him uncle but the complainant left. The accused started quarrelling with another person. The accused left and followed the complainant, shortly we heard somebody next to complainant's village. I left for home when I heard next to my house shouting o the phone, I went to check and found the complainant had been assaulted. The complainant had injuries on the ear. I talked to him but he was unable to respond as he could not hear what I was telling him. I was later called to record my statement at Kabarnet Police Station.

Cross-examination by accused

You were in my shop, went outside and called. It was about 7.30pm. I recorded what I had seen, I have been told the court the truth, you put your words into action. Wilson was also present.

PW4 – Joyce Chelimo

From Kapkombe Kamolingat village. I am a retired teacher, the complainant is my husband. The accused is my husband's nephew. On 24/4/2015 I was in the kitchen with my son when I heard screams, which I suspected it was my husband. I rushed outside but did not hear the voice again. I talked to him but did not respond, on seeing me he asked why I had not helped him and yet Isaack had assaulted him; it was about 7.00pm and he was crawling. We carried him to the house as he was helpless and with heavy breathing. He talked to us but he was unable to hear what we were telling him. I called my brother-in-law and advised we take the accused to the main road as it was raining. On reaching the scene he showed us where we found an umbrella and a cap. On reaching the centre he asked me to call Josphat and asked him what Isaac had told him.

Josphat informed us that the accused had threatened to beat up the complainant as he had money so that he could go to jail. We left for the hospital and thereafter went to the police to make a report. On reaching home the complainant condition worsened. In the morning I decided to go to the scene and found a jembe stick which had a fresh crack and took it home and showed my husband which he confirmed that it was the one which had used the previous night. The following day my children came and took my husband to hospital for further treatment.

Cross-examination by the accused

It was round 7.00pm, the complainant told us that it was you. I am the one who collected the jembe stick at the scene.

Cross-examination by the court

My husband had never had hearing problems before.

PW5 – James Kipyegon

I am a farmer from Kapkombe, the complainant is my neighbour and my uncle. The accused is my cousin. I recall on the 26/4/2015 I was going to church about 9.00pm one Harrison Chebii gave me Nokia phone and asked me to take to the complainant. I went to his house but did not find him, he had been taken to Nairobi for medication. I kept the phone until the day I was told to go to the police station to take the phone which was on 12/5/2015. I am the village elder

PW6 – Jonathan Chesaro

I am a clinical officer orthopaedics from referral hospital Baringo. ON 29/4/2015 a person by the name Erick Chelimo came to the hospital on allegations of having been assaulted by a person known to him. He was hit on the head and lost consciousness and did not hear well.

An X-ray was done and it was not conclusive, he was referred for further investigations. A CT scan was done on 27/4/2015 at German Medical Centre Nairobi which confirmed that he had a fracture on the psychometric process. He could not hear anyone, he was assisted with a hearing aid which he has used up to date.

I assessed the degree of injury as grievous harm

Cross-examination by the accused

The head had a swelling.

PW7 – Josiah Chebii

I am from Kamarigat, Kapkombe, I am a Fundi. The complainant is my father and the accused is my cousin. On 26/4/2015 I was going to church at around 8.00am where I was called by Harrison Chebii in Kapkombe centre. He gave me a phone to take to my father who was in hospital at the time. The phone belongs to one Erick; I proceeded to church and asked him to give the phone to someone else.

PW8 – No. 22533 Corporal Dominic Mageto

Attached at Kambi ya moto AP camp Rongai. I recall on 10/5/2015 I was on duty when 2 people came to the camp, they asked for assistance to arrest the suspect who had been sighted in Kamp ya moto we went to Kasarani and arrested the suspect and handed him over to Kabarnet Police Station.

Cross-examination by accused

They reported that you had assaulted somebody in Kabarnet. I called the investigating officer in Kabarnet who confirmed the same.

PW9 – No. 50917 PC Zebedayo Wabwire

Currently attached to CID Baringo South previously at Baringo North. I recall on 7/5/2015 the complainant came to the police and reported to me that he had been assaulted and that he had already reported the matter at Kabarnet police station. He was with his witnesses, I received the statements I issued a P3 Form which was duly filed.

Also received an assault weapon which I kept as an exhibit. Later on the village elder brought a mobile phone Nokia which had been handed on the village elder by Hansor Chebu. On 11th May, 2015 I received a suspect who had been arrested by an AP Kampi ya moto Camp. I opened a file and charged the accused with the present offence.

Cross-examination by accused

I interrogated the witness, the stick was recovered at the scene”

5. The appellant/accused gave an unsworn stamen on his defence as **DW1** and stated as follows:

*“I am Isaack Kamwen Kamuren, I live in Kapkombe, I am a farmer. on 24/4/2015 at about 3.00pm I was in Kapkombe centre when Erick came and offloaded the coffee seedlings, I asked him to give me work but he refused stating that I was drunk, he gave me Ksh.30/= and **I went to drink alcohol**. Later we were called to load timber in to a lorry and we proceeded to Kipsaraman. I arrived at the centre at around 7.00pm and entered Josphat’s shop when I bought sugar and left. On the way I met 3 people whom I overtook and proceeded to my house for dinner.*

The following day I went on my duties and finished at 10.00pm. I reached the centre and was informed that there was a man who had been assaulted by unknown people. On 5th I went back to Kampi ya moto where I worked till 11/5/..... [year not indicated] where a group of people came and after introducing myself they arrested me and brought me to Kabarnet Police station where I was informed that I assaulted Erick. I was arraigned in court and given statements.

The complainant stated that there were people who heard me issue threats but the same people who never called. One James brought a phone was never called to come to court to state where he found the phone. Joyce stated that she heard screams at 7.00pm but her statements indicated 6.30pm which time I had not even reached the centre.

The complainant stated that he recovered the exhibits but did not find anybody with it. There were no eye witnesses.”

Issue for determination

6. The issue the court will consider is whether the offence of grievous harm was proved against the accused.

Determination

Proof of the assault

7. From the evidence of the complainant PW1, his neighbour PW3, his wife, PW4 and the examining Clinical officer PW6, the complainant was hit with a stick on the left ear side of the head and he became unconscious and developed hearing problems necessitating his use of hearing aid to the date of the trial. The clinical officer classified the injury as grievous harm. I find the assault causing grievous harm proved.

Identification of the accused

8. PW1 identified by recognition his nephew the accused herein who he had known all the latter's life as the attacker. The incident happened at around 7.00pm when according to the complainant there still was natural light and able to see his attacker. In addition, the complainant had just shortly before at 4.00pm - 5.00pm (according to the PW1 and PW2) interacted with the accused and his friend Joshua when they sought to be hired for plant seedlings on the complainant's shamba. The complainant had refused to hire them because they were drunk whereupon they upon insistence were given some 30sh. to buy tea. Pw1 had testified that somebody had called him "uncle" and having known Isaac "since he was young" could be expected to have identified the accused by voice recognition and in any event he had at that point seen the accused come and quarrel with one Francis, a fact confirmed by PW3, the shop keeper. PW3 the shopkeeper confirmed that the accused had while drunk gone to the shop and threatened to attack the complainant whom he had followed when the latter left the shop. PW4, the complainant's wife confirmed the first report by the complainant after the attack when the complainant had asked her why she had not helped him "yet Isaac had assaulted him". In his defence, the accused had confirmed that he had met the complainant and "*I asked him to give me work but he refused stating that I was drunk, he gave me Ksh.30/= and I went to drink alcohol. Later we were called to load timber in to a lorry and we proceeded to Kipsaraman. I arrived at the centre at around 7.00pm and entered Josphat's shop when I bought sugar and left.*" He, however, alleged that he had after leaving the shop proceeded to his house for dinner. I find that the accused was properly identified by recognition by the complainant, which evidence is corroborated by the evidence of the shopkeeper PW3 on the accused's threat to beat the complainant and that the accused had followed the complainant when he left the shop. In the history of the complainant as he sought treatment he said that he had been assaulted by a person known to him. I find the evidence of the single identifying witness amply corroborated by the evidence of the prosecution witnesses PW2, PW3, PW4 and PW6.

Evidence of theft

9. The accused was fortunate that he was not charged with robbery with violence because in the evidence of PW1, the theft of his mobile phone is complete. It matters not that the phone was returned by family elders as testified by PW5, and PW7. Theft is committed when as provided in section 268 of the Penal Code:

*"268. (1) A person who fraudulently and **without claim of right takes anything capable of being stolen**, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property."*

10. And robbery with violence under section 296 (2) of the Penal Code is committed when the thief is armed with a dangerous weapon or wounds, beats, strikes or otherwise uses violence on any person. The accused may have been found guilty of the offence of robbery with violence, if he had been so charged. Not being a lesser offence, the accused may not be found guilty of the offence, pursuant to section 179 (2) of the Criminal Procedure Code, of robbery with violence since he was not charged with the offence.

Sentence

11. The offence of grievous harm under section 234 of the Penal Code carries a penalty of life imprisonment, and the court has no justification to interfere with the trial court discretion in sentencing. See *Wanjema v R* (1971) E.A. 493, 494. In the circumstances of this case, the sentence herein cannot be said to have been excessive even without remission whose provisions had, at the time of the sentence, been repealed. The accused had at the time of the hearing of the appeal served 2 years and 11 months of his seven (7) year sentence, and the court had called for a pre-sentence report to aid it in the appropriate sentence should there be cause to alter or reduce the sentence. The court attempted to reconcile the parties in this criminal prosecution noting that the complainant was the uncle to the accused, and that family members, PW4, PW5, and PW7 together with others who did not testify were involved, and proposed to promote alternative dispute resolution provisions of Article 159 of the Constitution.

12. The Court's attempt to reconcile the parties was not successful and the Probation Officer's pre-sentence report was negative, the same recommending that "*Going by the negative sentiments expressed by the victim, immediate neighbours and the local administration, it is our opinion that in the absence of reconciliation which is paramount for the success of any community based sentence, the appellant's case is not suitable for a community based sentence and may therefore be dealt with otherwise.*"

ORDERS

13. Accordingly, for the reasons set out above, the court finds that the appellant's appeal is without merit and the same is dismissed.

Order accordingly.

DATED AND DELIVERED THIS 28TH DAY OF NOVEMBER 2018.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent