REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HCCRA NO. 146 OF 2016

(CORAM: J.A. MAKAU - J.)

MOSES OCHIENG OBUAR…..…….....……APPELLANT

VERSUS

REPUBLIC……..…….....…….....…..…RESPONDENT

(Being an Appeal against both the conviction and the sentence dated 21.10.2016 in Criminal Case No. 15 of 2016 in Ukwala Law Court before Hon. G.Adhiambo-SRM)

J U D G M E N T

1. The accused **MOSES OCHIENG OBUAR** faced a charge of grievous harm contrary to **Section 234 of the Penal Code.** The particulars of the charge are that on the 3rd day of January 2016 at Masat East sub-location, in Ugenya Sub-County within Siaya County, unlawfully did grievous harm to **RAYMOND OBUAR ONYANGO**.

2. After full trial, the Appellant was found guilty, convicted and sentenced to serve three (3) years imprisonment.

3. Aggrieved by both the conviction and sentence, the appellant preferred this appeal through a petition filed on 25th October 2016. However, the appellants Advocate filed further grounds to the petition of appeal dated 9th November 2016 setting out the following grounds of appeal: -

a. That, the Learned Trial Magistrate erred in law and in fact in failing to analyse and make a finding on the facts of the case as a whole.

b. That the learned trial magistrate by basing her findings on evidence that was clearly self contradicting.

c. That the Learned Trial Magistrate erred in law and in fact in seeking to shift to the Appellant the burden of proof in so far as his defence of alibi was in issue.

d. That the Learned Trial Magistrate erred in law in so far as she dispensed with the Appellant's right to legal representation without laying down the grounds for doing so, and without offering him the opportunity to elect whether to proceed on his own or through representation by Counsel.

e. The Learned Trial Magistrate erred in law in pronouncing a sentence with consideration of

matters that were not relevant to the case.

4. I am first appellate court and I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the case of **Kiilu and Another V. R (2005) 1 KLR 174** where the court of Appeal held thus:-

> ***"…..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 in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

5. The facts of the prosecution case form part of the record of appeal and I need not reproduce the same, however, I shall summarize the prosecution case and the defence.

6. The prosecution case is as follows: that on 3rd January 2016 at around 7.30pm, Raymond Onyango Obuar, the complainant was at Masat East by the road side near the William Stage, crossing the road to go and see one Julius Ouma, when he suddenly heard his brother, whose voice he knew, very well shouting to him and threatening to kill him. The complainant who had a torch of his mobile phone turned around and shone the light of his mobile torch towards the person who was shouting at him, and saw that it was Moses Ochieng from a distance of 1metre from him. The complaint then felt something hitting him on his left hand and chest very hard. The complainant did not fight back as he noted the appellant had a weapon. The complainant withdrew back but the appellant followed him rapidly and very fast. The complainant ran away and out-phased the appellant. That he later returned to the road and saw Moses Ochieng, the appellant four (4)metres away from the road. The appellant started advancing towards the complainant and the complainant waived the log of timber and the appellant on noticing the complainant was then armed, he stopped, turned and started walking towards their home. The compliant followed the appellant and made it to the home of Julius Ouma. On the way the complainant saw Julius Ouma (PW2), with aid of the torch of his phone. Julius Ouma and his wife recognized the complainant through the use phone torch light. The compliant then noticed his left hand was bleeding profusely. The complainant was taken to Ukwala sub-county hospital by Julius Ouma(PW2). He was treated, the following day the complainant reported the matter to Ukwala Police Station and was issue with a P3 form. The P3 form was filled and degree of injury classified as maim. The appellant was subsequently arrested and charged with the offence.

7. The appellant gave unsworn statement and gave a defence of alibi, stating that on the date of the alleged offence, he was not around his home. The appellant then prayed for a date to call his witnesses and the defence was adjourned to 9th September 2016 when the appellant sought to close his case stating that his witness had not shown up.

8. At the hearing of the appeal, Mr. Rakewa, Learned Advocate appeared for the appellant whereas M/S M. Odumba, Learned State Counsel appeared for the state. Mr. Rakewa, Learned Advocate urged the appeal in pursuance to grounds of appeal filed by the firm of M/S S.O. Madialo & Co. Advocates. He urged ground no. 4 on its own and combined all other the grounds of appeal and argued them altogether as one ground of appeal.

9. /S Maurine Odumba, Learned State Counsel opposed the appeal against both the convictions and sentence submitting that the prosecution proved their case beyond reasonable doubt as the prosecution evidence was corroborated by PW1 and PW3 who recognized the assailant as the complainant; and that

the constitutional rights to fair trial were not violated. She urged the sentence was lawful but lenient.

10. The appellant contends that the learned trial magistrate erred in law in so far as she dispensed with the appellant's right to legal representation without laying down the grounds for doing so, and without offering the appellant the opportunity to elect whether to proceed on his own or through representation by counsel. The court record reveals that Mr. Odhiambo Obonyo came on record for the appellant before the trial court, when PW1, PW2 and PW3 gave evidence. He cross-examined the three witnesses and was present on 23rd June 2016 when he sought a closer hearing date which was given to be on 8th July 2016, on which date the defence counsel did not attend, however, the appellant informed the court that his counsel was not present. The court proceedings of 8th July 2017 is as follows:-

> ***"Accused: My advocate has not arrived. I pray that the file be placed aside.***
>
> ***Court: Placed aside for hearing.***
>
> ***Later at 12.30pm***
>
> ***Accused: I have not been able to get in touch with my Advocate. I have not been able to reach him on phone. I pray for another date....."***

The case was then adjourned on 26th July 2016. On 26th July 2016, the court record reads as follows: -

> ***"Prosecutor: I am ready to proceed with the witnesses.***
>
> ***Accused: I am ready. I understand Luo, Swahili and English.***
>
> ***Court: Placed aside"***

11. Mr. Rakewa, Learned Advocate urges that the appellant rights to a fair trial as enshrined under **Article 50(2)(g) of the Constitution of Kenya, 2010** were violated in that the appellant's rights to legal representation were dispensed with without the court laying down the grounds for doing so. **Article 50(1)(2)(g) of the Constitution of Kenya, 2010** provides: -

> ***"50…..(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***
>
> ***(2) Every accused person has the right to a fair trial, which includes the right:-***
>
> ***(g) to choose, and be represented by, an advocate, and to be informed of this right promptly."***

12. In the instant case, the appellant was represented by an Advocate of his own choice one Odhiambo Obonyo, who on 23rd June 2016 informed the court he was an advocate representing the appellant at Lower Court. **Article 50(2)(g) of the Constitution of Kenya 2010**, is very clear and expresses that an accused person has the right to a fair trial which includes choosing and being represented by an Advocate and to be informed of that right promptly. The key words under that Article is to be informed promptly of the right. The information should therefore be given at the earliest opportune time as possible. The earliest time should therefore be at the time of plea taking or on the first appearance before plea is taken. In the instant case, the appellant's rights were secured before the hearing as he had an advocate of his own choice, representing him before the trial began. The court was not part to the arrangements between the appellant and his counsel and when his Advocate failed to attend the hearing on 8th July 2016, the appellant informed court that his Advocate had not turned up and sought to wait for his Advocate. When

he sought for another date, the court obliged. On the next hearing date, the appellant's Advocate did not appear and the appellant did not tell the court that as his Advocate had not come he needed an adjournment nor did he sought to have the matter adjourned to await his Advocate but opted to proceed in absence of his Advocate. That being so, the appellant already was aware of his constitutional rights to choose or to be represented by an Advocate and he did not need to be reminded of his constitutional rights which he was very well aware of. The remaining witnesses were the Investigating Officer (PW4) who stated the information he had received and the role of PW1, PW2 and PW3, whereas PW5 the clinical officer produced the P3 form which had been identified by PW1. The court record reveals that the appellant had no difficulties in cross-examining the witnesses as he did so at a great length. I therefore find that the court did not dispense with the appellant's right to legal representation but it was the appellant's counsel for unexplained reasons who did not attend court and the appellant in exercise of his constitutional right to fair hearing as enshrined under **Article 50(1)(e) of the Constitution of Kenya 2010** opted to proceed with the case. **Article 50(1)(2)(e)** provides: -

> ***"50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***
>
> ***(2) Every accused person has the right to a fair trial, which***
>
> ***includes the right:***
>
> ***(e) to have the trial begin and conclude without***
>
> ***unreasonable delay."***

I therefore find that the appellant having opted to proceed in absence of his Advocate was within his constitutional rights and was not prejudiced in any way. He had a fair trial as enshrined in the Constitution of Kenya in that the trial begin and concluded without unreasonable delay. I therefore find no merit on this ground of appeal.

13. The appellant's counsel combined all other grounds of appeal urging the trial court failed to evaluate the whole evidence and based its findings on the evidence which was contradictory. The Learned Counsel for the appellant urged the trial court failed to evaluate evidence of PW3 as to whether the complainant was *slashed* or was *cut* urging there is a difference between cutting and slashing. PW1 in his evidence stated that he saw the appellant a metre from him and felt something hit his left hand and chest very hard. PW2 testified that PW1 told him the appellant had cut him. PW3 stated he saw someone cutting another by the road side. That the person used a slasher that was sharpened on both sides to cut the other. He also stated he saw the appellant slashing the complainant. Oxford Online Dictionary defines "*slash*" as follows: -

> ***"a cut made with a wide sweeping stroke. A wound or gash made by a cut with a wide, sweeping stroke."***

Whereas "*cut*" is defined by Merriam Webster Online Dictionary as follows: -

> ***"to penetrate with or as if with an edged instrument; to strike sharply with a cutting effect."***

From the above, I find that the words 'slashing' and 'cutting' have no difference between them, hence there is no contradiction as the net effect amount to cutting either with a slasher or *panga* or any sharp object PW5 in his evidence testified on examination of the compliant, he found a superficial cut on the left medial side with deep cut wound on the left forearm, the P3 form indicates the probable type of weapon was a sharp object. PW3 stated the appellant used a slasher to cut the complainant and I find no contradiction as one can use interchangeably, the word "*cut*" or "*slash*". In my view, the use of the word "*cut*" or "*slash*" could not amount to contradiction of the

prosecution evidence nor was the appellant prejudiced in any way.

14. The appellant's defence is a defence of alibi. The appellant's defence was raised for the first time in his unsworn defence which the prosecution could not test through cross-examination. I note in this case, the appellant's defence was not raised early enough through cross-examination to give the prosecution a room to check out on it and disapprove it. The evidence of prosecution witnesses PW1 and PW3 who knew the appellant prior to the incident and who recognized him at that material time placed the appellant at the scene of crime. PW1's and PW3's evidence dislodged the appellant's defence. I therefore find the appellant's defence is not sustainable and is a mere denial. The appellant's defence was considered in light of the prosecution case and the same rejected. I agree with the trial court that the defence of alibi is not sustainable and is an afterthought.

15. The appellant's counsel contends the trial magistrate erred in law in pronouncing a sentence with consideration of matters that was not related to the case. In the instant case, before sentence the trial court called for the Probation Officer's report and noted that the appellant and the complainant were yet to reconcile. I agree before sentencing an accused person who has already been convicted, a trial court can call for Probation Officer's report and where the Probation Officer's report forms the basis of sentencing, the same should before sentencing, be availed to the accused and the accused be given an opportunity to comment on adverse reports otherwise the sentence passed thereto without the accused's input might be prejudicial to the accused. In **Nicholas Muli Ngwili V Republic CRA. No 66 of 2008**, the Court of Appeal held: -

> ***"…… 1. In ordinary criminal offences such a theft, when previous convictions were alleged against a person facing a sentence, such as person was always asked to accept or deny such allegations before he was sentenced. In the Probation Officer's report, it was not made clear whether such previous convictions were relevant or not.***
>
> ***2. The sentence passed without the appellant being given an opportunity to challenge the allegations in the probation report could not have been lawful. The appellant had served approximately three years of the sentence. It would not have been just and fair to send him back to the High Court for that exercise. If the High Court had given the appellant that opportunity, it would have settled for a lighter sentence."***

In the instant case, trial court was informed in its sentencing by the Probation Officer's report. However, was the sentence meted excessive? **Section 234 of the Penal Code** provides: -

> ***"234. Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."***

16. In view of the appellant having not been supplied with a copy of the Probation Officer's report and in view of the trial court's judgment being based on failure of parties to reconcile, I find the trial court in pronouncing its sentence considered extraneous matters. I note the injuries were main and serious ones. The court was also influenced by the offence being prevalent in the area, a fact that was not raised by the prosecution and as such the court decided to issue determent sentence. In view of the foregoing, I find the sentence meted in view of the Probation Officer's report is excessive.

17. The upshot is that the conviction is upheld, the sentence is set aside and substitute with probation period of two (2) years and the appellant to pay the complainant a compensation of Kshs. 150,000/= within ten (10) months from today through Probation office, Siaya County who should file a report with Deputy Registrar confirming payment of the compensation to the complainant as soon as the appellant completes payment within the period given for the compensation which should not exceed the ten (10) months period.

DATED AND SIGNED AT SIAYA THIS 23RD DAY OF MARCH 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Mr. Rakewa: for Appellant

M/S Odumba: for State

Appellant - present

Court Assistants:

1. George Ngayo

2. Patience B. Ochieng

3. Sarah Ooro

J.A. MAKAU

JUDGE