



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAJIADO**  
**CRIMINAL APPEAL NO. 9 OF 2017**

**JACKSON MANDI MUINDI.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(Being an appeal against both the conviction and served in Criminal Case No. 1641 of 2016 at Kajiado Chief Magistrate's Court before Hon. S. Shitubi (CM))**

**JUDGMENT**

The appellant Jackson Mandi Muindi was charged with the offence of grievous harm contrary to section 234 of the Penal Code. He was convicted after a full trial before Hon. S. Shitubi and sentenced to three (3) years imprisonment. The charge of grievous harm arose from the brief facts as supported by the record; that on 2<sup>nd</sup> day of August 2016 at Kimameni village in Isinya Sub-County the appellant, then the accused unlawfully inflicted grievous harm to Emmanuel Mwanja Kingoo who testified as PW1.

Being dissatisfied with both the conviction and sentence he now appeals to this court on three grounds, namely;

- (1) That the learned trial magistrate erred in law and facts for putting into consideration his plea of not guilty.
- (2) That the trial learned magistrate was biased for not considering the fact that appellant was a first offender.
- (3) That the learned trial magistrate erred in both law and fact by not evaluating the evidence and the defence.

At the trial the prosecution based their case on the evidence of six witnesses whose summary is as follows:

The first to take stand was PW1 Emmanuel Mwanja Kingoo, the complainant to the charge of grievous harm against the appellant. According to PW1 he had accompanied PW2 to go to the appellant kiosk on 2/8/2016 for PW2 to be paid money for a mobile phone sold to him earlier but the sale not yet concluded.

While walking on the road PW1 and PW2 came into contact with the appellant. When PW2 asked for his money from the appellant a fight broke out between them necessitating PW1 to intervene. It was at that time the appellant drew a knife in his possession and stabbed him occasioning bodily harm to the abdomen, shoulder, hip joint and left hand. According to PW1 and PW2 the appellant ran away only to return to the scene in company of his father and brother while armed with a panga and his brother a hoe

stick. The screams made at the time of attack attracted the neighbours who included PW1 own mother who testified as PW3 Jane Kingoo.

In the testimony of PW1, PW2 and PW3 during the second episode the appellant and his family created some disturbance including the father hurling insults to PW1. They however left leaving PW1, PW2 and PW3 at the scene. The evidence by PW1, PW2 and PW3 was also supported by PW5 who stated before court that he was at the scene when the appellant assaulted PW1 on 2/8/2016. It emerged from the testimonies of PW1, PW2, PW3 and PW5 that both parties knew each other before the day in question when PW1 suffered harm in the hands of the appellant. According to PW1, PW2, PW3 and PW5 they made arrangements to have PW1 escorted to the hospital and a report made to the police at Isinya station. The police action was taken by PW6 Sgt Peter Kioo who investigated the matter and caused the appellant to be indicted with the offence.

PW4 Agnes Risie, a clinical officer testified that she examined the complainant PW1 on 10/8/2016. She observed the injuries to the complainant's stomach. The injuries which were occasioned by a sharp object like a knife had been stitched. In her opinion as indicated in the P3 form the injuries suffered by PW1 were consistent with grievous harm.

In the appellant's answer to the charge as stated by the prosecution witnesses he raised the defence of self. According to the appellant on the material day he was walking home when he was attacked by two people who were armed with rungun. As a result of the attack he sustained injuries to the finger and right shoulder. On the day in question the appellant further told the court that he managed to escape and went to call his father and brother for assistance. He denied assaulting the appellant. The appellant also stated that he reported the matter to Salama police station but referred to seek medical treatment before returning back to the station. It was the appellant defence that he sought treatment and was issued with the P3 by Chumvi police station which was not filled because the doctors were on strike. The appellant told this court that he made a report to the police station but they never acted on his complaint.

The first task of this appellate court was well illustrated in the decision of the East African Court of Appeal in *Pandya v Republic [1957] EA 335* which held as follows:

**“On first appellate from a conviction by a judge or magistrate sitting without a jury the appellant is entitled to have, the appellate courts own consideration and views of the evidence as a whole and its own decision therein. It has the duty to rehear the case and consider the materials before the judge or magistrate with such other materials as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it. When the question arises which witnesses is to be believed rather than another and that question turns on the manner and demeanor, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses, but these may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court in differing from the judge or magistrate even on question of fact turning on the credibility of witnesses whom the appellate court has not seen.”**

I will therefore apply the above principles to this appeal by examining the evidence as a whole with a view to come up with my own conclusions and decision.

On considering the memorandum of appeal I will condense ground 1 and 3 by reformulating it to read thus:

- That the learned trial magistrate erred in law and fact by failing to evaluate the defence alongside the case for the prosecution thereby denying the appellant a fair and balanced consideration of his case. The main contention by the appellant was that his defence was not considered.

The facts tendered by the prosecution in support of the charge indicate that PW1 Emmanuel Kigoo was

attacked on 2/8/2016 by the appellant who was known to him prior to this incident. The eye witnesses to the assault recorded statements with the police and testified in court as PW2 and PW5. During the time of committing the offence PW1 screamed which got the attention of his mother who testified as PW3. On arrival at the scene PW3 confirmed that she found her son lying on the ground in pain and bleeding from the abdomen.

At the trial before the learned magistrate PW1, PW2, PW3 and PW5 pointed out that initially the appellant had left the scene but made a comeback in company of his father and brother while armed and ready to confront PW1 the complainant. A short time thereafter they left only to hurling insults at the complainant. For completeness PW2 and PW3 took PW1 to the hospital and the clinical officer PW4 examined him and filled the P3 admitted in evidence as exhibit 1. In her opinion the degree of injury was assessed as grievous harm.

The appellant in his defence did not dispute the fact of the incident save that he denied attacking anybody. The explanation by the appellant in his sworn statement was that of him being assaulted by two people armed with rungs. According to the appellant he left the scene and went to his home for more strength from his father and brother to respond to the attack appropriately. He alluded to the fact that he was treated at an unidentified hospital as per the card produced before the trial court. Secondly the appellant maintained to have been issued with a P3 but which was not filled because the doctors at Machakos hospital were on strike.

From the record the trial court was not supplied with the P3 form issued and presented to Machakos hospital. There wasn't even a copy of the P3 the appellant made reference to in court for the learned trial magistrate to draw inferences as to the existence of that fact. The prosecution on the other hand availed the P3 only filled by PW4 in favour of the complainant. The injuries according to clinical officer were consistent with a person who had sustained injuries inflicted by a sharp object most probably a knife.

As stated at the trial by PW1, PW2 the appellant during the assault was armed with a knife. The appellant sworn defence was to controvert the direct evidence placed before court by PW1, PW2 and PW5 in support of the charge. The witnesses were subjected to cross-examination by the appellant to test their veracity weight and consistency.

In dealing with the effect of that evidence alongside the defence statement by the appellant, the learned magistrate discounted the rejoinder as to the occurrence of the offence. The learned trial magistrate cast doubt to the incomplete medical evidence purported to be relied upon by the appellant. This was on the basis that the prosecution had discharged the burden of proof for the offence of grievous harm against the appellant beyond reasonable doubt.

I have taken a thorough review of the evidence as it relates to the trial and complaints raised in this appeal. It is perfectly clear to me that there was both sound direct and circumstantial evidence to prove the guilt of the appellant beyond reasonable doubt. The grievous injury as pointed out by PW1, PW2 and PW5 was caused by the appellant while the prosecution was very clear on how the crime was committed and who was involved. The appellant approach did not negative any of those elements. The appellant defence that he met some people who were not known to him but identifiable physically was dislodged by the testimony of PW1, PW2, PW3 and PW5.

When one highlights the portions of the prosecution case and that of the defence there is no doubt as to the close proximity between the home of the appellant and that of the complainant PW1. The assessment of this can be found in PW3's testimony who stated that she heard screams from the scene before taking action to go and confirm. She actually found PW1 still lying on the ground after the assault. It was also well stated by the appellant that he went home to get assistance from his father and brother to respond to the attack. The same group who came with the appellant found PW1, PW2 and PW3 still at the scene. It is therefore not true that PW1 had already been taken to the hospital when the appellant and his team arrived at the scene.

In my view there were contradictions and fragmentation in the defence case before the trial magistrate as

it relates to the appellant version of events to the charge. The learned trial magistrate apparently thought through that evidence by the appellant and did arrive at the correct conclusion. The analysis to me is clear and balanced exposition of the facts and the law for the offence which the appellant was charged with on 19/9/2016.

The testimony by the complainant is corroborated by the P3 form which is critical in cases of this nature. The ingredients of the offence under section 234 of the Penal Code are defined in section 231 of the Code which states *inter alia*:

***“Grievous harm means any unlawful acts by a person intended to maim, disfigure, wound, harm or disable any person on any of the circumstances prescribed therein under is considered to have caused grievous harm.”***

In the present case the medical report examined the injured part of the body targeted by the assailant. It was opined by PW4 that the degree of injury suffered was assessed to be grievous harm. In absence of any other evidence to the contrary the testimony by PW4 stand as proof to nature of injuries suffered by the complainant.

Having said so, I am convinced that there was sufficient evidence to ground the case beyond reasonable doubt against the appellant. In this regard these two issues canvassed on appeal by the appellant lacks merit.

Ground 2 - deals with the issue of sentence. The appellant major complaint is that the trial magistrate did not consider that he was a first offender. The appellant in this case was charged with the offence of grievous harm contrary to section 234 of the Penal Code. In terms of section 234 any person convicted of the offence is liable to imprisonment for life. The section is not mandatory. It allows the court to exercise discretion and impose a lesser sentence depending on particulars and aggravating factors of each case. The ground of appeal essentially raised by the appellant is that in view of him being a first offender a lenient and substituted sentence should have been imposed.

I now come to the question of the appellate court jurisdiction to interfere with the sentence of the trial court. The full direction and principles on this issue are set out in the cases of ***Shadrack Kipchoge Kogo v R Cr. Appeal No. 253 of 2003*** at Eldoret. The Court of Appeal followed and approved the decision in ***Ogolla S/O Owuor v R [1954] EACA 270*** where it was held:

***“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.”***

While in the case of ***Shadrack Kogo (Supra)*** the court held 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.”***

In the instant case the facts are sufficiently stated in the judgement of the trial magistrate. In deciding the appropriate sentence it should be noted that the court draws the application of the law from section 234 of the Penal Code. The offence of causing grievous harm is a serious one as denoted by the kind of sentence prescribed by parliament in the code. Thus in aggravating and exceptional circumstances and facts bearing in mind the commission of the crime, the court is obliged to impose a penalty of upto a maximum of life imprisonment. However in this appeal the trial court taking into account the mitigation by the appellant and other extenuating factors imposed a lenient sentence of 3 years imprisonment. This is a case where the clinical officer who examined the complainant found the injuries suffered more specifically those which targeted the abdomen to be grievous in nature. The acts constituting grievous harm are described under section 231 of the Penal Code. The appellant therefore cannot be availed a lighter

sentence as if the bodily harm to the complainant was super ficial.

As far as sentence is concerned and being guided by the principles in the *Kogo's case, Ogolla S/O Owuor (Supra)*, there are no grounds advanced by the appellant to warrant this court to interfere with the discretion of the learned trial magistrate. The sentence of 3 years imprisonment in respect of the charge of grievous harm contrary to section 234 of the Penal Code is hereby affirmed. The appellant got away with a light sentence. The appeal against conviction and sentence is hereby dismissed.

**Dated, signed and delivered in open court at Kajiado this 18<sup>th</sup> day of September, 2017.**

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**R. NYAKUNDI**

**JUDGE**

**Representation:**

Appellant present

Mr. Akula for Director of Public Prosecutions present

Mr. Mateli Court Assistant - present