

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NUMBER 115 OF 2015

JACKSON M'YUMBE KABERIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the Judgment of Hon. W'ang'ang'a – SRM, delivered on 2nd November 2015 in Maua Cr Case No.219 of 2013 at Maua Chief Magistrate's Court)

J U D G M E N T

The appellant was charged with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars of the offence are that the appellant on the 15th day of January 2013 at Ndonyo village Ngatho location in Igembe North District within Meru County unlawfully did grievous harm to David M'Yombe.

The trial court convicted the appellant and sentenced him to serve ten (10) years imprisonment. The grounds of appeal are that the trial court erred in law by convicting the appellant on the basis of the evidence on record. That the prosecution evidence is full of contradictions. That the trial court erred in law by dismissing the appellant's defence without any reason. The prosecution failed to prove its case beyond reasonable doubt and that the sentence was manifestly excessive. The appellant filed his written submissions which mainly concentrate on the issue of sentence. It is submitted that the trial court failed to consider that the appellant is a first offender. The appellant is remorseful and he has been rehabilitated. The ten (10) years sentence does not have any remission and is excessive. He is seeking the court's leniency.

Mr. Odhiambo, prosecution counsel, submitted that the complainant was a brother to the appellant. Although the injuries sustained were serious, the ten (10) year sentence can be reviewed as it is excessive.

This is a first appeal and this court is supposed to evaluate the evidence afresh and make its own conclusion. **David Kobia M'Yombe** was the complainant. He is the elder brother to the appellant. On 17th January 2013 at about 10.00am he was heading home when he met the appellant on the way armed with a C-line. The appellant started to attack him. He was cut on the left leg and right leg below the knee. He screamed and members of the public went to the scene. The appellant ran away. He was taken to Chogoria P.C.E.A. Hospital where he was admitted from 17th January 2013 to 15th August 2013. He later reported the matter at the Mutuati Police Station on 19th August 2013. The appellant was arrested and charged with the offence. The appellant had trespassed on his land.

PW2 and **ALDRIANO KANENE** testified that the appellant is his neighbour. On the material day he saw the appellant standing beside the road. The complainant was on his way from a shop. He heard the complainant screaming. He went to the scene and met PW1 and the appellant. The appellant was standing while armed with a C-line. PW1 was lying down while bleeding and screaming. Together with other people they scared away the appellant using stones. PW1 was then taken to hospital. PW3 **MUSYOKA MUTUKU** was on his way to a shop on 17th March 2013 at 10.00am when he met PW1 carrying flour heading home. The appellant appeared from the opposite direction. The appellant cut PW1 on his left leg and when he turned back he cut him on the right leg. PW3 screamed and other people went to the scene. PW1 was taken to hospital.

PW4 PC **ANDERSON KITHINJI** was based at the Mutuati police station. He investigated the case and recorded witness statements. A P3 form was filled at Laare hospital. He later caused the appellant to be charged. PW5 **ROMANO MWENDA** is a clinical officer who was stationed at Laare Health Centre. He filled the P3 form for PW1. It is his evidence that PW1 suffered a compound tissue fibular fracture on the right leg. He also suffered a secondary tissue deep cut. He was hospitalized for nine months and seven days.

In his unsworn defence, the appellant stated that PW1 is his elder brother. The case was framed as there was land dispute. PW1 encroached on his land and he reported to the police. PW1 disappeared until when the appellant was arrested. The appellant produced a copy of a demand letter from his advocate asking the complainant to vacate the land and also produced a title deed. He denied committing the offence.

From the evidence on record it is established that the offence occurred at 10.00am during the day. The complainant knew the appellant as they are brothers. PW2 and PW3 went to the scene and saw the appellant standing at the scene while armed. The complaint narrated to the court how he was attacked by the appellant. I do find that the conviction is proper. The appellant was positively identified and he is the one who committed the offence.

The trial court sentenced the appellant to serve ten (10) years imprisonment. The injuries sustained by PW1 are quite serious. The complainant was hospitalized for over (9) nine months. The injuries have caused him permanent incapacity. The parties herein are brothers. There is a possibility of reconciliation. However it is clear that the appellant took the law into his own hands. He was convicted on 2nd November 2015 and has served less than two (2) years. Although the ten (10) years sentence is excessive, I do find that a custodial sentence is quite ideal in the circumstances. The appellant should learn how to control his anger. I do set aside the ten (10) years imprisonment imposed by the trial court and replace it with four (4) years imprisonment. The appellant shall serve four (4) years imprisonment from the

date of conviction.

In the end, the appeal on conviction is disallowed. The ten (10) year imprisonment sentence imposed by the trial court is set aside and replaced with four (4) years imprisonment from the date of conviction.

Dated signed and delivered at Meru this 19th day of October, 2017.

SAID CHITEMBWE

JUDGE