REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.12 OF 2016

BETWEEN

DUNCAN OKOTH ONYIEGO .... APPELLANT

AND

STATE .... RESPONDENT

(An appeal from original conviction and sentence of the PM's

Court at Homa Bay in criminal Case No.123 of 2011)

JUDGMENT

1. The Appellant (**DUNCAN OKOTH**) was convicted on a charge of grievous harm contrary to **Section 234 Penal Code** and sentenced to serve 15 years imprisonment. The particular of the charge stated that on 14th January 2011 at **RURI WEST** Location, **RAMBWE EAST** Location, within **MBITA** District, the Appellant unlawfully did grievous harm to **PATRICK WILLIAM OTIENO** (Complainant).

2. The evidence presented at the trial was that on the material date at about 1.00 a.m., the complainant who testified as PW1 left his wife **ZIPPORAH** in bed in their matrimonial home, to go outside and answer a call of nature. While standing outside, someone whom he recognised as the Appellant emerged from the shades and confronted him with a panga. As the Appellant cut him on the left wrist, he screamed loudly and his wife came out.

3. PW1 lost balance and as he was falling down, the Appellant cut him on the right eye and passed out. He woke up in hospital – the eye was completely damaged.

4. The clinical officer **IMELDA ODIER** (PW3) who examined PW1 confirmed that he lost the right eye and classified the degree of injury as grievous harm – the P3 form was produced as exhibit.

5. The Appellant's wife **ZIPPORAH** explained to the trial court that the Appellant was once her boyfriend and she even got a baby boy with him while at school in 2008. She went back to school and upon completion; she got married to the Appellant in 2010.

6. She confirmed that her husband got out of the house for a short call and shortly she heard some noise as though there was a struggle. She got outside and realised her husband was trying to depend himself by moving backwards. As he fell she saw and identified the Appellant as the attacker – she explained that she was able to identify him because there was moonlight.

7. She saw the Appellant cut the complainant on the forehead, and advanced towards her. She screamed

while running to her grandmother's house (who had by then opened the door). It was at this point that the Appellant fled.

8. **ROSALINA AUMA OTIENO** (PW4) the complainant's mother recalled how the Appellant had approached her on 11/1/2011 inquiring whether **ZIPPORAH** was her daughter in-law. When she confirmed, the Appellant threatened that she and her husband would be harmed.

9. On 14/1/2011 at 1.00 a.m., while inside her house, she heard someone crying while saying **"he has cut me."** She got out of the house and found the complainant on the ground while PW2 was running towards her house. She also saw the Appellant pursuing PW2 whilst armed with a panga – she was also to see him because there was moonlight. She also had a spotlight which she flashed at him – the Appellant then went away.

10. She confirmed that PW2 had told her the Appellant was her former boyfriend. **PC PETER WAMBANI (PW6)** confirmed that when PW1 reported the incident to him he said he was able to identify his attacker using moonlight which was bright.

11. The Appellant in his defence narrated events surrounding the day of his arrest and made no mention of the 14/01/2011. His wife **JOSEPHINE AKOTH (DW2)** similarly made reference to events of the day the Appellant was arrested, saying she did not know the date of the incident.

12. The trial magistrate in his judgment warned himself regarding the circumstances surrounding identification, as well as well as the intimate relationship that had existed between Appellant and PW2 noting that there could easily be the possibility of a frame-up resulting from the love triangle. He however resolved this by pointing out that the appellant never raised that possibility in his defence.

13. He held that there was corroboration by all the witnesses concerning the available light (being a bright moon) and that the appellant was known to PW1, PW2 and PW4 before the date of the attack having had opportunity to encounter him in broad daylight. What more the Appellant had issued threats and even visited PW1 twice, days before the attack.

14. The trial magistrate found that the motive for the attack was sour grapes being unhappy that his former lover was now married to PW1, so he was out to revenge.

15. The trial magistrate also found out there was conclusive evidence that the Appellant was armed with a panga which he used to harm the complainant as stated by PLW2 and PW4 and the fact that upon medical examination the probable weapon used was stated to be a sharp object.

16. The defence was rejected as immaterial and weightless since it referred to events of 11/02/2011 at 10.30 a.m. when the Appellant was arrested and not the night of 14/01/2011.

17. In meting out the 15 years sentence, the trial magistrate observed that the Appellant was not remorseful and had caused the complainant to become blind on one eye so he deserved a punitive sentence.

18. In appealing against both conviction and sentence, the Appellant submits that the trial magistrate failed to critically evaluate the evidence regarding the circumstances surrounding identification and ought to have found that he was not properly identified. He argues that the attack was a surprise coupled with confusion and tension, so there is no way any of witnesses could have identified him positively.

19. He also contends that the evidence was contradictory and uncorroborated because PW1 and PW2 gave different dates when they got married, and the age of PW2 as well as the age of PW2's child. He also confirmed that there was contradiction as to who reported the incident because whereas PW2 said it was PW1 and herself, whilst PW1 and PLW6 said it was PW1's brother.

20. Appellant also submitted that there was disparity in the description of his clothes, because

complainant said he had a dark jumper with a half hood where PW4 said Appellant had a red T-shirt with an open neck.

21. The Appellant also faulted the trial magistrate for not giving him the option of a fine.

22. In opposing this appeal Mr. Oluoch submitted on behalf of the State that the Appellant was properly identified because earlier in the day he had gone and talked to PW1. Further at the time of commission of the offence, he saw and recognized the Appellant with the aid of moonlight as they stood face to face for 5 minutes. In any event the very clothing he wore during the day were the same one he had during the incident, and he did not attempt to disguise himself in any way.

23. Counsel also pointed out that PW2 too identified the Appellant due to the bright moonlight and appellant was someone known to her for a long time as a boyfriend, so there was no likelihood of mistaken identity. It was also confirmed that the identification of the Appellant by PW4 was free from error as she had earlier met him and spoke to him and on the night in question there was a bright moon to enable her identify the Appellant.

24. Mr. Oluoch submitted that the evidence of PW1-PW4 corroborated each other and there were no material contradictions.

25. On sentence, Mr. Oluoch pointed out that the nature of the injuries, the weapon used, the part of the body injured and the fact that the attack was wilfully and maliciously executed warranted the justified cause.

26. I have carefully considered the arguments tendered by both counsel and appellant. The fact of the complainant's injury was not disputed. The two issues that are raised in this appeal are:-

  i. **Whether there was concluded evidence regarding identification of the Appellant.**

  ii. **Whether the trial magistrate ought to have given him the option of a fine.**

27. The celebrated case of **CHARLES O. MAITANYI –VS- R. (1986) KLR 198** discusses in detail issues a court ought to take into consideration when dealing with evidence on identification under difficult circumstances. It points out that the court must take into account the nature of light available, the intensity and its positioning in relation to the accused and the person identifying.

28. It also considered that evidence of visual identification alone can bring about miscarriage of justice and it is important that such evidence be carefully examined to minimize the danger.

29. This was repeated in **KARANJA & ANOTHER –V. R(2004) 2 KLR Page 140** which observed that recognition may be more reliable than identification of a stranger, but even when a witness is purporting to recognize someone, he knows, it must be borne in mind that mistakes even in recognizing close relatives may occur.

30. Taking into account the a foregoing, I observe that the offence took place at night. However, both PW1 and PW2 they were able to see and identify the appellant with the aid of moonlight. PW2 clarified it was full moon. This was also confirmed by PW4, but she also had a spotlight which she used to flash on the appellant.

31. The appellant was not a stranger to PW1, PW2 and PW3. PW2 had known him well enough as at one time they were lovers and even had a child.

32. PW1 met the appellant just on 5/1/11 at 1700hrs when he went to the former's home, pretending to be lost and they had had a discussion. Apart from that initial meeting, on the night of the attack, with the aid of the moonlight, the witness saw the appellant very well as they stood facing each other, at arms length and the incident lasted 5 minutes as the appellant attacked PW1 who kept moving backwards.

33. PW4 had also met the appellant on 11/01/11 at 10.00 a.m. when he confronted her on her way from the river and demanded to know whether Z**IPPORAH** was her daughter-in-law and warned of due consequence. So when she next saw him on the night of the attack she recognized him.

34. The three prosecution witnesses who identified appellant were categorical that the appellant was not a stranger to them – so it was more than ample first time identification. It was recognition of someone they knew and had encountered. This link of evidence was not challenged by the defence at the trial.

35. Secondly all the witnesses said they recognized the clothing he wore, which were the same ones he had worn during their earlier encounters. PW1 described them as a green jumper with a half hood, a muffin with writings **"Athens Boys 2000"** and dark grey trouser, black sports shoes with white stripes.

36. PW2 had a further opportunity of seeing the appellant as he cut her husband then charged towards her and as he began chasing her, PW4 saw him as she had come out of the house, having been attracted by the noise outside. She described on cross examination that the appellant wore a black trouser and a black T-shirt.

37. PW4 described those clothes as a red T-shirt with open neck, and a grey trouser. Although there were slight discrepancies in the colour of clothing, I take note that the clothes did not form the sole basis of identification and I also take note that individual's percept of colour is relative – some people in rural Kenya, especially when using vernacular refer to grey and black as black.

38. There is also a thin line between a jumper and a T-shirt with many referring to any item of clothing worn as a top garment with flannel like material as a T-shirt. I hold the view that those contradictions did not touch on the material particulars of the case and were not fatal. They are easily recovered in favour of the prosecution due to the a foregoing observation.

39. The trial magistrate rightly warned himself of the possibility of a frame up against the appellant due to the object of both men's alternative, but noted that it not only provides the motive for the attack, but confirmed PW4's evidence about her conversation with the appellant and his warning that he would harm them. I cannot fault the trial magistrate's findings on that.

40. IN meting out sentence, the court must be founded by the nature of the offence and extent of the injury inflicted. This was a situation where the complainant lost use of one eye completely.

41. The court must also take into account the reason for the attack – the past relationship between the appellant and PW2 was no longer alive and that was not contested by the appellant. He however did not seem to accept that and was on a mission to punish PW1 for taking over the apple of his eye. Instead of using his charm to woo back the object of his desire, he resorted to violence and malice aforethought was demonstrated by his conduct. The offence under **Section 234** attracts life imprisonment and the 15 years sentence under the circumstances was neither excessive nor harsh.

42. Consequently, I hold that the conviction was based on sound evidence and is upheld.

43. The sentence was legal and fair and I confirm it. The appeal is dismissed.

Delivered and dated this **28th** day of **July,** 2016 at Homa Bay.

H.A. OMONDI

JUDGE