REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 2 OF 2016

SOFIA MWITA...APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

(Being an appeal against the judgment, conviction and sentence of Hon. P. N. Maina, Principal Magistrate in Kehancha Principal Magistrates Court Criminal Case No. 55 of 2014 delivered on 13/01/2016)

JUDGMENT

1. Article 29(c) of the **Constitution of Kenya** has a bearing in this appeal. The said Article provide as follows:-

> ***"29(c) Every person has the right to freedom and security of the person, which includes the right not to be-***
>
> ***(a) ......***
>
> ***(b) ....***
>
> ***(c) subjected to any form of violence from either public or private sources;***

2. The appellant herein, **SOFIA MWITA**, was initially charged with **Assault** contrary to **Section 251** of the Penal Code, Cap. 63 of the Laws of Kenya. She denied committing the offence. The charge was however shortly substituted with that of **Grievous harm** contrary to **Section 234** of the Penal Code, Cap. 63 of the Laws of Kenya which offence the appellant herein equally denied committing. That led to the hearing of the case.

3. The prosecution availed a total of 8 witnesses in support of the charge of grievous harm. The Complainant, **NYAIRABU CHACHA MWITA** testified as **PW1.** She was later recalled to identify some documents. **PW2** was one **JOSEPH NYAMOHANGA ALLOYANCE** who was an eye-witness as well as one **ELIZABETH MORAA MOI** who testified as **PW3**. **PW4** was the Medical Officer in charge of Kuria West Sub-County and the Kehancha Hospital whereas **PW6** and **PW7** were Clinical Officers from Isebania Sub-District Hospital and Akidiva Hospital respectively. The arresting officer testified as **PW5** while the investigating officer testified as **PW8.**

4. At the close of the prosecution's case, the appellant was placed on her defence. She opted for sworn defence and called one witness. The court in its considered judgment was satisfied that the appellant had actually caused grievous harm to PW1 and convicted the appellant. A sentence of 5 years

imprisonment was rendered.

5. Being aggrieved by the said conviction and sentence the appellant lodged an appeal. Her main contention in the Petition of Appeal filed in this Court on 25/01/2016 was that her defence was not taken into consideration and further that the sentence was too harsh in the circumstances of the case.

6. At the hearing of the appeal the appellant appeared in person and filed written submissions where she reiterated her grounds as in the Petition and also submitted that the matter was to be treated as a case of Affray and not grievous harm as she was also injured in the incident which is the subject of this appeal.

7. The State strenuously opposed the appeal and prayed for its dismissal.

8. This being the appellant's first appeal the role of this court is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

9. In this appeal there is no doubt that PW1 and the appellant had an encounter in the night of 17/01/2014 which resulted to both of them sustaining some physical injuries. In dealing with this appeal, I will first endeavour to ascertain whether the circumstances of the case favored the charge of affray and if not, whether the offence of grievous harm was committed and if so, if the issue of self defence was rightly handled by the trial court before looking at the aspect of sentence, if need be.

10. The prosecution's case was fairly straight-forward. PW1 was in her shop at Mabera Trading Centre in the night of 17/01/2014 with her husband and children. PW1 lives with her family on the rear part of the shop. As the family was taking supper at around 10:00pm they heard screams outside their shop. PW1 and her husband responded and rushed outside. They saw people surrounding a person who was alleged to have fallen from a moving motor cycle.

11. PW1 like many other people at the scene struggled to see the person who had fallen on the ground. In doing so she used the light from her phone-torch. In that state of affairs it appears that PW1 may have bumped into the appellant who was also at the scene without even noticing it. PW1 was surprised when the appellant held her by the throat from her back. The appellant threatened to beat PW1 in retaliation as she argued that PW1 had hit her. PW1 readily apologized and told the appellant that if that had happened then it was not intentional. As the appellant continued holding PW1's neck, PW1 had to push the appellant away in order to free herself and in the process PW1's phone fell down some distance away. PW1 went and picked her phone and as she stood up the appellant was on her again and this time she grabbed PW1 by the waist and begun wrestling her. The two were separated by the members of public and PW1 was taken home by her husband.

12. The encounter did not end there. As PW1 retreated to her shop, the appellant followed her and as she was serving a customer, PW3, the appellant started abusing her while holding a plastic torch in her hands. PW1 asked the appellant why she was abusing her and instead the appellant hit PW1 with the torch on her head. The trial court noted a scar on PW1's head where she was allegedly hit. PW1 then engaged the appellant in a bid to dislodge the torch from her hands and as a result they both fell down as the appellant sat on PW1. The appellant continued her onslaught on PW1 by raining blows on her and eventually ended up biting her on the right cheek. On hearing some commotion outside the shop, PW1's husband rushed out and rescued his wife from further attack. He separated the two and took PW1 into their house. By that time PW1 had been injured and was bleeding profusely from the cheek where she had been bitten. PW1 was later that night taken to Isebania Sub- District Hospital by her husband where she was treated and discharged.

13. As PW1 was still in pains by the following morning, she went back to the hospital and after further medical intervention PW1 proceeded to the Isebania Police Station where she reported the matter. PW1

met the appellant at the police station and after PW1 lodged her complaint she left the appellant at the police station as she returned to her home. She was also issued with a P3 Form which was duly filled and returned to the police. That P3 Form indicated the degree of injury as harm and was evenly dated and signed on 18/01/2014. I shall refer to it as ***'the first P3 Form'***.

14. One week later PW1 was still nursing the wounds which seemed to instead worsen. She then sought medical attention at a private facility known as Akidiva Hospital where she was admitted for two weeks. When PW1 was discharged from the hospital, she was issued with another P3 Form which was also filled in and returned to the police. That P3 Form indicated the degree of injury as grievous harm and was evenly dated and signed on 26/02/2014. I shall refer to it as ***'the second P3 Form'***.

15. PW1 indentified the treatment notes from Isebania Sub-District Hospital, the discharge summaries from Akidiva Hospital and the P3 Forms before the trial court. She also indentified the appellant as the aggressor whom she had never quarreled or disagreed with.

16. PW3 witnessed the attack on PW1 by the appellant outside PW1's shop. PW3 had gone to buy some rice from the shop in the night of 17/01/2014 when she witnessed the appellant abusing PW1, hitting PW1 on the head with a plastic torch and also the appellant biting PW1 on the cheek. It was also PW3's testimony that when the appellant attacked PW1 they both fell down and the appellant was on top of PW1 as she continued assaulting PW1. PW3 attempted to separate them in vain until when PW1's husband came and successfully separated the two and took PW1 into their house before taking her to the hospital.

17. PW2 also witnessed the ordeal from the time people gathered where a person had fallen down from a motor cycle until when PW1 was taken to hospital. He saw the appellant threatening to beat PW1 at the accident scene and that PW1 left with her husband back into their shop at the trading centre, PW2 also witnessed the appellant following PW1 into her shop where she abused her, hit PW1 on the head with a plastic torch and bitten PW1 on the right cheek as well. PW2 assisted in taking PW1 to hospital with PW1's husband after the husband had rescued his wife from the appellant's wrath. PW2 recorded a statement with the police.

18. The prosecution also produced the twin P3 forms filled in favour of PW1. The first P3 Form was filled on 18/1/2014 and the second P3 Form on 26/7/2014. They were both produced by their makers who testified as PW6 and PW7 respectively. PW4 was the Medical Officer-in-charge of Kehancha Hospital and produced a report explaining the two P3 forms. PW4 also physically examined PW1. It was PW4's opinion that the first P3 Form was filled in when the injuries on PW1 were still fresh whereas the second P3 form was filled after the injuries on PW1 had turned septic leading to her admission at Akidiva Hospital. PW4 did not however find any conflict between the two P3 Forms and his findings and opinions were contained in a report which was produced in evidence. PW4 as well as PW7 confirmed that the injuries sustained by PW1 were correctly classified as grievous harm.

19. PW5 was an Administration Police Officer from the Isebania D.O's office. He confirmed receiving an arrest order from Isebania Police Station on 18/01/2014 directing him to arrest the appellant and hand her over to the Isebania Police Station. PW5 managed to arrest the appellant on 22/01/2014 and handed her over to the Isebania Police Station.

20. At the close of the prosecution's case, the appellant was placed on her defence and she gave sworn testimony and called one witness, DW2.

21. The appellant admitted being at the scene of the accident in the night of 17/01/2014. She testified that it was PW1 who picked a quarrel with her by pushing her way so that she could see the accident victim and as the appellant asked PW1 to assist in carrying the victim, PW1 instead slapped her. The appellant did not retaliate and proceeded to her home. As the appellant was approaching the gate to her home she found PW1 waiting for her by the gate and PW1 again attacked her forcing the appellant to fight back. In the course of the fight they both fell down and were rescued by members of public. The two then realized that they had both sustained injuries. The appellant went to hospital on the following day and also reported the matter to the police. She produced treatment notes and a P3 forms together with an arrest

order against PW1 as her defence exhibits.

22. The appellant's witness (DW2) had a complete different version of what happened. According to him when he reached the accident scene he found three woman fighting. They were the appellant, PW1 and PW3. He rescued them as PW1 continued insulting PW1. To him both the appellant and PW1 sustained injuries in the fight where the appellant even lost her tooth. DW2 accompanied the appellant to hospital and later to the Isebania Police station the following day.

23. By placing the prosecution evidence and the defence evidence side by side, it comes out clearly that the defence cannot stand. I say so because the evidence of DW2 is at variance with that of the appellant. Further the appellant never talked about a fight involving three woman at the scene of the accident neither did she talk about three woman fighting near her gate. It is therefore highly possible that DW2 was not truthful and may not have even witnessed any confrontation either as alleged or at all. The appellant contends that it was PW1 who assaulted her without any cause by first shoving her to have an opportunity to see the injured person at the scene of accident and by slapping her when the appellant asked PW1 to assist her carry the injured person. There was also the attack outside the appellant's gate which was alleged to have again been sparked off by PW1. In all those three instances the appellant contends that PW1 attacked her without any slightest provocation or justification. I find it difficult to believe that piece of evidence moreso given that there was no allegation of any history of bad blood between the appellant and PW1 or any provocation on the part of PW1 or at all. Further had the events occurred as alleged by the appellant I am sure there would be some pointer towards that direction from the evidence of the other witnesses especially when they were cross-examined by the appellant's Counsel. I hence concur with the trial court that the appellant's defence cannot stand and is for rejection.

24. On the other hand the prosecution evidence comes out as very credible and consistent. I find that the evidence depicts a scenario where the appellant was the aggressor and that the injuries she sustained could only have been as a result of PW1 acting in her self-defence as she attempted to ward off the appellant. I also do not see any justification in the appellant attacking PW1 on three distinct instances further to following her to her house when PW1 and her husband had retreated to. I therefore find that the circumstances of this case do not reveal that PW1 and the appellant took part in a fight in a public place but that it was PW1 who was viciously attacked by the appellant. The submission that this was a case of affray contrary to **Section 92** of the penal Code does not therefore hold and hereby fails.

25. The appellant was therefore rightly charged with the offence of causing grievous harm.Having considered both prosecution and defence cases above, I will now look at the issue of the injuries sustained by the appellant. According to the first P3 Form produced by PW6 and the second P3 Form produced by PW7 and medical report produced by PW4 there is no doubt that PW1 sustained very serious injuries in the hands of the appellant. The result was that PW1 had to be admitted for around two weeks. The injuries although healed left permanent cosmetic disfigurements on her face. PW4 and PW7 classified the injuries sustained as grievous harm. PW4 explained that the first P3 Form initially classified the injuries as harm but as the injuries got infected and purulent, it graduated to grievous harm instead and that is why the second P3 Form indicates more serious injuries.

26. By looking at the medical evidence and the provisions of **Section 4** of the Penal Code Chapter 63 of the Laws of Kenya on the definitions of **'harm'** and **'grievous harm'**, this Court has no reason to depart from the findings and opinions in the medical evidence. I hence find that grievous harm was occasioned on PW1 by the appellant.

27. That brings me to the question as to whether the contention that the appellant acted in self-defence is plausible. **Section 17** of the Penal Code Chapter 63 of the Laws of Kenya states as follows:

> ***'17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.'***

28. The common law position has evolved with time from an objective approach to a subjective one. The

Court of Appeal in **Ahmed Mohammed Omar & 5 others vs. Republic (2014) eKLR** dealt with the aspect of self-defence in great detail. I fully concur with the analysis in that decision not only because the decision is binding upon this Court but also given that the legal position was rightly and clearly settled. I will herein below reproduced how the Court of Appeal expressed itself in part thus:

> ***''The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in DPP v. MORGAN [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in DPP v MORGAN (supra) it was held that:***
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> *"...........if the appellant might have been labouring under mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not the mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant."*
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> ***In BECKFORD v R (supra) it was also held that if self-defence is raised as an issue in criminal trial, it must be disproved by the prosecution. This is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the accused was unlawful.***
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> ***In R. v WILLIAMS [1987] 3 ALL ER 411, Lord Lane,C.J. held:***
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> *"In case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistaken was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it."*
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> ***It is acknowledge that the case of DPP v MORGAN (supra) was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one. See also SMITH AND HOGAN'S CRIMINAL LAW, 13TH Edition, Page 331.***
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> ***Section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya. In the appeal before us, the trial court rejected the appellants' defence because it applied an objective test.'***

29. By applying the subjective test and in taking the particular circumstances of this case, this Court is not convinced that the appellant acted in self-defence. There is no evidence that the appellant was either attacked by PW1 or even provoked but to the contrary there is ample evidence that it is the appellant who attacked PW1 on three instances without any justification. The defence therefore fails and is hereby rejected. The appellant was rightly convicted of the offence of grievous harm. In so finding this Court echos the holding in the case of **Palmer v. Regina (1971) All ER 1077** where the Court stated that:

'Where the evidence is sufficient to raise the issue of self defence, that defence will only fail if the prosecution shows beyond doubt that what the accused did was not by way of self-defence.'

I say no more.

30.I will now deal with issue of sentence. **Section 234** of the Penal Code states that:

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

31. The appellant was sentence to 5 years imprisonment after the Court had a look at the Pre-Sentence report which, although not binding to the sentencing court, was of the view that the appellant was not fit for a non-custodial sentence. I am aware that for this Court to interfere with the issue of sentence is not a mean thing unless that so happens within the defined legal confines. In The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act upon in dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not take into account a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and as long as the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

32. I do not find any justification in interfering with the sentence imposed. I further note that the three distinct attacks on PW1 were unwarranted, uncalled for, gravely inhuman and totally unprovocated that led to serious and permanent disfigurement of PW1.

33. The upshot is therefore that the conviction and sentence are affirmed. The appeal is hereby dismissed .

Orders accordingly.

DATED, SIGNED and DELIVERED at MIGORI this 20th day of July 2016

A. C. MRIMA

JUDGE