**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT VOI**

**CRIMINAL APPEAL NO 47 OF 2015**

**CLEMENT MWAMBURI……..……..……... APPELLANT**

**VERSUS**

**REPUBLIC…… RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 338of 2011 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon M. ChesangMrs (RM) on 14th June 2012)**

**JUDGMENT**

## INTRODUCTION

1. The Appellant herein, Clement Mwamburi, was tried and convicted by Hon M. Chesang Mrs Resident Magistrate for the offence of causing grievous harm contrary to Section 234 of the Penal Code respectively. He was sentenced to life imprisonment.

2. The particulars of the charge were as follows :-

> **"On the 28thday of July 2011 at about 8.00 pm at Mwangia Village Nyolo Sub-location Bura Location within Taita Taveta County unlawfully did grievous harm to JONATHAN MWAMBURI."**

3. Being dissatisfied with the said judgment, on 4th November 2013, the Appellant filed a Petition of Appeal. The Grounds of Mitigation were as follows:-

> **1. THAT the Learned Trial Magistrate erred in law and fact on the circumstantial evidence which was not proved.**
>
> **2. THAT the Learned Trial Magistrate erred in law and fact by not upholding that the crucial witnesses mentioned in the Trial were never called to testify**(sic).
>
> **3. THAT the Learned Trial Magistrate erred in law and fact on** (sic) **failing to see that the prosecution case was contradictory hence section 168(1)(c) of the Evidence Act was breached.**
>
> **4. THAT the Learned Trial Magistrate failed to consider his defence.**

4. On 13th July 2016, the court directed the Appellant to file his Written Submissions. Instead, on 27th July 2016, he filed his said Submissions and Amended Grounds of Appeal. The same were as follows:-

**1. THAT the Learned Trial Magistrate erred in law and fact by not considering the defence submission and the importance of a thorough investigation as per the law in her sentencing.**

**2. THAT the Learned Trial Magistrate erred in law and fact by finding that PW 1's evidence was corroborated by that of PW 2 without seeing her evidence was just mere hearsay and not an eye-witness**(sic)**.**

**3. THAT the Learned Trial Magistrate erred in law and fact by believing the circumstantial evidence in her sentencing.**

**4. THAT the Learned Trial Magistrate erred in law and fact by failing to appreciate the evidence of PW 2, PW 3 and PW 6 which did not show any direct evidence to sustain the life imprisonment sentence.**

**5. THAT the Learned Trial Magistrate erred in law and fact by finding that the evidence adduced by the prosecution witnesses was proved enough to warrant her conviction**(sic)**.**

5. The State's Written Submissions were dated 22nd August 2016 and filed on 24th August 2016. The Appellant's Response to the State's Written Submissions was filed on 29th September 2016.

6. When the matter came up on 29th September 2016, both the Appellant and the counsel for the State asked the court to rely on their respective Written Submissions when writing its decision. The Judgment herein is there based on the said Written Submissions.

**LEGAL ANALYSIS**

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

8. This court identified the following issues for its determination:-

**a. Whether or not the Prosecution proved its case against the Appellant herein against reasonable doubt;and**

**b Whether or not the sentence that the Learned Trial Magistrate meted upon the Appellant herein was manifestly excessive as to warrant interference by this court.**

9. This court therefore addressed the said issues under the separate heads shown hereinbelow.

**I PROOF OF THE PROSECUTION CASE**

10. Amended Grounds of Appeal Nos (2), (3), (4) and (5) of the Appellant's Grounds of Appeal were dealt with together as they were all related.

11. The Appellant submitted that on 28th July 2011 at about 8.45 pm, Jonathan Mwamburi(hereinafter referred to as "PW 1"), who was his brother, came and claimed that he had been injured by the worker. In his Written Submissions and unsworn evidence, which the Learned Trial Magistrate indicated to have been sworn, he stated that he immediately set out to search for the said worker. He was accosted by the villagers the following morning and accused of having been PW 1's Attacker.

12. He argued that there was no evidence that was presented before the Trial Court to demonstrate what happened after PW 1 greeted him as PW 1 had contended. He suggested that there may have been a possibility of another person being in the compound. He asked this court to dismiss the evidence of Mary Wanjala Mwamburi (hereinafter referred to as "PW 2") as she was not at the place the incident occurred and her evidence was mere hearsay. He pointed out that she was only called at about 9.30 pm and informed that PW 1 had been seriously injured.

13. In respect of Patrick Kinduchimu (hereinafter referred to as "PW 3"), the Appellant submitted that no other witness was called to corroborate that PW 3 met him at the compound where PW 1 was said to have been attacked. He also contended that PW 3's evidence that he had a machete was only intended to implicate him to PW 1's injury.

14. It was his further submission that there was a lot of time between when PW 1 was injured, when PW 2 was called and informed of PW 1's injury and when PW 6 was said to have arrived at the compound. He therefore urged this court to disregard the circumstantial evidence that had been relied upon by the Prosecution because none of the witnesses who testified proved that he was the one who assaulted PW 1.

15. On its part, the State contended that PW 1 went home after looking after his cows and cutting grass. It stated that PW 1 greeted the Appellant but he did not respond. It was its averment that there was no one else in the compound when PW 1 was hit rendering him to be unconscious. He came round in hospital where he was rushed for treatment.

16. It was its further submission that PW 2 confirmed the injuries PW 1 had sustained and that she had found him lying at home in a pool of blood. It added that both AP No 200805920 PC Gregory Ng'etich and No 30803 Sergeant David Macharia (hereinafter referred to as "PW 4" and "PW 5" respectively) also confirmed the occurrence of the incident and the subsequent arrest of the Appellant herein.

It was therefore its submission that the evidence that was adduced by all the Prosecution witnesses was consistent and that the Appellant's testimony which was unsworn was false and a mere denial.

18. A perusal of the proceedings shows on the material date of 29th July 2011, PW 1 was called by his wife and informed that there was no one to take care of the cows, which were at Nyolo. He passed by Bura to greet PW 2, who was his sister. On reaching the home wherethe Appellant, who lived with a handy man, he found the same to have been abandoned. He went to look at the cows and cut grass.

19. He stated that he greeted the Appellant but he refused to respond. He had stated in his evidence that the Appellant never talked much. He appeared to this court as a man of few words.PW 1 then said that when he entered the house, he was hit on his head from behind. He fell down and lost consciousness. He sustained injuries on the head and back of his neck and lost two (2) teeth.

20. He was taken to Voi Hospital where he was stitched and a wire was inserted in his jaw to help him chew. At the time of the trial, he complained of poor hearing. He was emphatic that on the day he was injured, it was just him and the Appellant only who were in the compound.

21. PW 2 testified that PW 1 passed by her place of work at about 5.00 pm and informed her that he was going to the shamba as the worker had been chasedand the cows left unattended. It was her testimony that PW 1 was called and given this information. It was her further evidence that the person who chased the worker away was the Appellant herein, whom she referred to as "Shuma." She was called at about 9.30 pm and informed that PW 1 had been cut with a machete and required to be taken to the hospital immediately. She found PW 1 at Bura Police Station in a bad condition and rushed him to Mwatate dispensary after which he was transferred to Voi Hospital and thereafter Coast General Hospital.

22. PW 3 stated that on the material date at about 8.00 pm, he was at his house when two (2) women came and told him that they had been called by one Rose who told them that there were noises emanating from the Appellant's home. He said that as they were talking, they were joined by a Maltilda Mboza and a Mr Juma. He testified that they went to the Appellant's home and heard a person groaning. He then heard

a thud. The Appellant's only allowed five (5) people to enter the compound.

23. He said that they saw a lot of blood outside the house and asked him who was bleeding.It was his testimony that the Appellant was at that time holding a machete behind his back and he told them that there was something. He contended that they went back to the road because the Appellant refused to let me them in. It was his evidence that when the police came, they followed the blood trail to the house where they found PW 1 lying in a pool of blood. During Cross-examination, he said that although it was at night, he saw the Appellant with a machete. He admitted that he did not see the Appellant hit PW 1 but only suspected him.

24. PW 4 and PW 5 only confirmed having found PW 1 at the scene badly injured while Dr Wilson Charo (hereinafter referred to as "PW 6") reiterated the serious injuries that PW 1 sustained on that material date.

25. The Learned Trial Magistrate considered the unsworn evidence that the Appellant had adduced and found it to have been lies and a mere denial "like bones without flesh."Notably, the Appellant's unsworn evidence was of little or no probative value as it was not put through the rigours of Cross-examination.

26. There is no doubt that PW 1 sustained very severe injuries. During the Trial, the Learned Trial Court observed that PW 1 was still in a lot of pain as a result of the injuries and he had difficulties opening his mouth to talk. However, the big elephant in the room was,who occasioned PW 1 the said injuries?

27. As the Learned Trial Magistrate ably pointed out, the burden lies on the Prosecution to prove its case. Indeed, an accused person is not obligated to say anything to fill gaps in the Prosecution's case or to say anything in his defence. He has the option of remaining silent and leaving the prosecution to prove its case.

28. In any trial, proof of exact times and dates of an incident or any transaction and consistency of oral and documentary evidence are extremely critical. Any inconsistency or lack of cogency in the evidence can deal a fatal blow to a party's case.

29. Notably, PW 1'stestimony that he did not talk much with the Appellant on the material date was indicative of the fact that the looking after the cows and cutting of grass may have taken some time.He was, however, silent on the exact time that he was hit from behind. This critical piece of evidence would have assisted in tying the loose ends because the later it got in the day, the more difficult it would have been to see an attacker or any other person entering the compound as night fall would ordinarily have set in.

30. Having said so, PW 3's evidence, the Charge Sheet and the Appellant's evidence, though unsworn, were consistent that the incident occurred at 8.00pm or thereabouts. However, PW 2's evidence on when the incident occurred was materially different from the aforesaid evidence. Whereas she was not present when the incident occurred, this court could not ignore her evidence during Cross-examination that the incident herein occurred at 5.30 pm.

31. As was rightly pointed out by the Appellant, PW 2 did not explain what had happened between 5.30 pm when she said PW 1 was hit and 9.30 pm when said she received a call informing her that PW 1 had been injured.

32. It was not lost to this court that PW 1's wife did not feature anywhere in the evidence save for when she was said to have informed PW 1 that the worker had been chased away. It was also not clear from the evidence whether she got the information of PW 1's injury on the same night because only PW 2 testified that she was called at 9.30 pm and informed of the incident. Notably, she was also not mentioned of having gone to Bura Police Station, Mwatate dispensary or Voi Hospital which were the places that PW 2 said she was with PW 1.

33. As PW 1's wife was not called as a witness herein, from the evidence before this court, her

whereabouts could not be accounted for. Shecould also have shed more light on who chased the worker and eliminate him as a possible suspect who may have had a grudge after being chased away. Indeed, it was not lost to this court that PW 1 was injured on the same date that the said worker was chased away. The question of how many people who would have had access to the said home remained unresolved.

34. It was also the considered opinion of this court that the Prosecution ought to have delved into the question of distances between the houses to establish if noises could filterthrough the surrounding homes from the Appellant's compound. If the said Rose was the one who called Matilda Mboza and Mr Juma informing them about the groans, she ought to have been called as a witness as this first piece of information emanated from her.

35 .It did appear from his evidence that although several people heard groans from the Appellant's home, PW 3 did not hear the same and had to be called from his house by neighbours. Left at it is, there was a lacuna as to how PW 3 found himself at the Appellant's home on that material night.

36. The Prosecution ought also to have interrogated the issue of lighting in the said home. Indeed, it was difficult for this court to comprehend how PW 3 followed the trail of blood leading to where PW 1 was found because in his own testimony, this was at about 8.00 pm. Proof of proper lighting would also have convinced this court to believe PW 3 that he did actually see the Appellant herein with a machete. In the absence of such proof, this court was very hesitant to believe PW 3's evidence that the Appellant had a machete. In fact, this court found it difficult to accept his evidence hook, line and sinker for the reason that there were several gaps in his evidence.

37. Accordingly, having considered the evidence that was adduced in the Trial Court, the Written Submissions and the case law that was relied by the respective parties herein, this court came to the firm conclusion that even though the Appellant did not adduce any valuable evidence, the burden of proof lay with the Prosecution but it did not prove its case beyond reasonable doubt.

38. As can be seen hereinabove, PW 1 did not see who hit him on the head as he was struck from behind. No one saw the Appellant hit PW 1. Additionally, PW 1'swife's movements and those of the said worker on that material night were unexplained. This made it difficult for this court to make a definite conclusion that there were no other persons in the compound and that PW 1 was indeed hit by the Appellant herein.

39.39. In this respect, Amended Grounds of Appeal Nos (2), (3), (4) and (5) of the Appellant's Grounds of Appeal were successful and the same are hereby upheld.

**II. <u>SENTENCE</u>**

40. It would not have been necessary for this court to address Amended Ground of Appeal No (1) in view of the finding that the other Amended Grounds of Appeal were successful. However, this court felt compelled to render its opinion on the sentence that the Learned Trial Magistrate handed down to the Appellant herein.

41. There is no doubt in the mind of this court that PW 1 sustained serious injuries for which the person who caused him the same was liable to be sentenced to life imprisonment. Notably, Section 234 of the Penal Code Cap 63 (Laws of Kenya) under which the Appellant herein was charged provides as follows:-

> **"Any person who unlawfully does grievous harm to another is guilty and liable to imprisonment to life."**

42. The nature of the penalty gave the Learned Trial Magistrate latitude on what she could have given. On this issue of discretion of penalties, in the case of **<u>Osman Ibrahim vs Republic [2008] eKLR</u>**, Ojwang J (as he then as was) observed as follows:-

> **""There are many authorities on the sentencing discretion by a trial Court. In *Wanjema v. Republic* [1971] E.A. 493, for instance, *Trevelyan, J* thus held (at p.494):**

**"A sentence must in the end, depend on the facts of its own particular case... "Such is, of course, a maximum sentence and, within that constraint, the Court has a wide discretion which is exercised on judicial principles. Such principles would, I believe, take into account the ordinary span of life of a human being; the general circumstances surrounding the commission of the offence; the possibility that the culprit may reform and become a law-abiding member of the community; the goals of peace and mutual tolerance and accommodation among people – those who are injured, and those who have occasioned injury.""**

43. In respect of the meaning of "liable to life imprisonment", the Court of Appeal rendered itself in the case of **Daniel Kyalo Muema V Republic [2009] eKLR.**It stated as follows:-

**"….The last observation we want to make is that the phrase as used in Penal statutes was judicially construed by the predecessor of this Court in Opoya vs. Uganda [1967] EA 752 where the Court said at page 754 paragraph B:**

**"It seems to us beyond argument the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it".**

44. It was therefore evident from the aforesaid cases that since Section 234 of the Penal Code provided for a maximum sentence, the Learned Trial Magistrate misconstrued the phrase "liable to life imprisonment" by imposing the maximum sentence possible under Section 234 of the Penal Code. She may very well have exercised her discretion in meting the same out to the Appellant herein.

45. However, this court was of the considered opinion that in a case with similar circumstances such as this one, a life imprisonment was manifestly excessive and would have warranted the interference by this court. The Appellant was a first offender. Indeed, the Prosecution had indicated that he had no previous convictions and proposed that he be treated as a first offender.

46. If the Learned Trial Magistrate could hand down a life imprisonment for a first offender, what then should she have meted on a serial offender? That is not to say that a first offender cannot be sentenced to a life imprisonment in the first instance. Far from it. It only means that at all given times courts ought to give penalties that are proportionate to the offences committed and bear in mind the Sentencing Policy Guidelines.

47. The said Guidelines several instances that ought to be considered before a penalty is meted out to a convicted person, which this court trusts that the Learned Trial Magistrate could consider in her future decisions.

**DISPOSITION**

48. For the foregoing reasons, in view of the fact that the evidence that was adduced before the trial created doubt in mind of this court, that benefit of doubt leads it to quash the conviction and set aside the sentence that was meted upon the Appellant by the trial court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

49. It is so ordered.

**DATED** and **DELIVERED** at **VOI** this **22$^{ND}$**day of **NOVEMBER** 2016

**J. KAMAU**

**JUDGE**

In the presence of:-

Clement Mwamburi……..……. Appellant

Miss Anyumba……. for State

Josphat Mavu– Court Clerk