REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 38 OF 2013

PATRICE KIPLIMO……..…..……APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 2256 of 2006 Republic vs Patrice Kiplimo in the Resident Magistrates Court at Kapsabet by G. Mutiso, Resident Magistrate dated 30th June 2010)

JUDGMENT

1. The appellant was convicted for causing grievous harm to the complainant contrary to section 234 of the Penal Code. He was sentenced to seven years imprisonment.

2. The particulars were that on the 23rd August 2006 at Koitabut Village in Nandi South District within the Rift Valley Province he intentionally and unlawfully caused grievous harm to Simon Jumba.

3. The appellant has appealed against his conviction and sentence. The grounds can be condensed into five: first, that the key prosecution witness was mentally unsound; secondly, that the investigating officer and the medical doctor did not take to the stand; thirdly, that the trial court failed to consider the grudge over land between the appellant and the complainant; fourthly, that the details in the police occurrence book and the charge were at variance; and lastly, that the evidence did not establish the offence. At the hearing of the appeal, the appellant relied on his hand-written submissions filed on 28th January 2015.

4. The State contests the appeal. In a nutshell, the case for the State is that the appellant was positively identified; that the evidence of the complainant was corroborated by PW2; that the injuries to the complainant amounted to grievous harm; that PW1 was not insane; and, that it was not mandatory for the investigating officer to testify. It was submitted that the court considered the matter of the alleged grudge and found it to be a red herring. Regarding the sentence, the State submitted that the lower court considered the mitigation tendered; and, that the sentence was appropriate in the circumstances. I was accordingly urged to dismiss the appeal.

5. This is a first appeal to the High Court. I am required to re-evaluate all the evidence on record and to draw my own conclusions. In doing so, I have been very cautious because I neither saw nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.

6. PW1 was the complainant. On 23rd August 2006 at 6.00 p.m. he was on his way to deliver a letter from a relative. He passed the appellant and Samson Kipngetich (the 1st accused in the lower court) seated by

the roadside. While on his way back, the two attacked him. He told the court as follows-

> *"On my way back I found accused 1, Samson. He had a stick. He said that he had looked for me for a long time. And now was my day. He told me that he could cut off my hand and I should not have taken them to court. He started beating me with his whip. I blocked the whip with my hands and they became …..... the second accused emerged from the bush some meters ahead. He stoned me on my chest. The accused 1 chased me with the whip and caught up with me. He hit me on my head. I became dizzy. I fell down and the two accused continued whipping me while accused 2 was hitting me with a stone. The accused lifted me and hit me on my lower abdomen. I bled profusely. Joseph Liyengwa, an army officer came and restrained the two accused from further attacking me. He saved me form the ordeal. He took me to Koitabut Police Station to enable me make a report. I went home and was given first aid. The following day, I went to Sabatia Health Centre. I had been given a P3 form".*

7. When he was cross-examined by counsel for the 2nd accused, PW1 said that by 6:30 p.m., he had already delivered the letter. He denied having been locked up in any lady's house. He said the police did not accurately record his statement. He said the police kept tossing him from one police station to the other but he stood his ground. He answered further as follows-

> *"In my initial report I told the police that I was attacked by people I know. It was not dark. It was 6.30 pm and I could identify the accused when they were attacking me. I do not hate the accused. I bought land, Nandi/Serem/539. I have the title deed. I do not know Nandi/Serem/664. I have never lived in that land. I was treated at Sabatia. The two accused are the ones who attacked and injured me".*

8. PW2 is a clinical officer. He did not prepare the P3 form for the complainant. It was prepared by his colleague Newton Bakhuya. He said he had worked with him in Kakamega General Hospital for one year and at Vihiga District Hospital for another year. He was thus conversant with his handwriting. According to the P3 form, the complainant had blood stained clothes. He had a cut wound at the left side of the head. He had chest pains, pain on the left side of the hip and loin. He was unable to function sexually. The injuries were two months old. The injuries were caused by a blunt object. He was given antibiotics and analgesics. The injuries were assessed as "*maim*". The P3 form was filled on 12th October 2006 at *Sabatia* Health Centre. It is instructive that the complainant had attended *Serem* Health Centre after the incident. He was bleeding. He received first aid.

9. I have then examined the defence proffered by the appellant. He stated as follows-

> *"PW1 bought land from my father in 1993. Accused 2 is my brother. On 23.8.06 at 6.30 pm, I was in my house cooking for my children. I went out and saw a person standing near my wife's grave. I asked him who he was. He ran away without answering me. I screamed. People came. I did not identify the person. He ran to a neighbour's house. He got into the house of Grace Shaban. We followed him there and recognized him as PW1. Many people (over 300 were there). We took PW1 to Koitabut Police Post. I did not assault PW1".*

10. From that evidence, it is obvious that the complainant and the appellant were not complete strangers. He met the appellant at about 6:30 p.m. on the material day. He said it was not dark. He identified the appellant as the person who emerged from the bush and assaulted him with a stone. The complainant was being hit repeatedly with a stick by Samson. The appellant continued hitting him with the stone on the chest.

11. In *Wamunga v Republic* [1989] KLR 424**,** the Court of Appeal held as follows-

> *"It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error*

before it can safely make it the basis of a conviction."

12. In *Republic v Turnbull & others* [1976] 3 All ER 549, the court held that mistakes can be made even in cases of recognition; and that an honest witness may nonetheless be mistaken. In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal had this to say-

> *"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."*

13. I have reached the inescapable conclusion that the appellant was the person who attacked the complainant with a stone. The complainant positively identified him. As I stated, they were not strangers at all. That to me is evidence of recognition; some stronger evidence than that of identification. The injuries to the complainant were corroborated by the P3 form. I also find that the original P3 form was properly produced in evidence by PW2 on behalf of Newton Bakhuya who made the report. There was no departure from the rules of evidence. From the P3 form, the complainant suffered a cut wound on the left side of the head. He had chest pains, pain on the left side of the hip and loin. He was unable to function sexually. The injuries were two months old. The injuries were caused by a blunt object. The injuries were assessed as *maim*. Grievous harm includes any harm which amounts to *maim*.

14. I have also considered the evidence of the appellant and two other witnesses. Their evidence was inconsistent. The 2nd accused in the lower court had said in cross-examination that he saw the complainant standing near his wife's grave. He said it was dark and raining. He screamed when PW1 failed to identify himself. DW2 (appellant) said he heard the screams at 7:00 p.m. DW3 on the other hand testified that he heard screams at 7.30 pm. The appellant's defence was that the complainant had ran away and was hiding in the house of Grace Shaban. The appellant said over three hundred people witnessed the incident; and, that he did not assault the complainant. What were the three hundred people doing? The different versions or time lines of the appellant (DW2) and DW3 raise doubts on the version of the defence. The offence took place between 6:00 p.m. and 6:30 p.m. PW1's evidence was clear and consistent that the appellant and Samson jointly assaulted him. He knew them. He reported the matter to the police at about 6:30 p.m. the same day. The P3 form confirmed that the complainant sustained *grievous harm* from the assault.

15. I am alive that the appellant claimed there was a dispute between him and the complainant over some land. That assertion is not true. The complainant said his land was Nandi/Serem/539. He had a title deed. The land the appellant was referring to was Nandi/Serem/664. But even assuming the appellant was right, the land dispute would not justify the assault on the complainant. I am not satisfied that the complainant framed up the appellant. I do not see how the complainant could have faked such serious injuries. In a word, the defence tendered by the appellant was feeble and unbelievable.

16. I have not seen any cogent evidence to suggest that PW1 was of unsound mind. I also remain alive that under section 143 of the Evidence Act, no particular number of witnesses is necessary to establish a fact. See *Joseph Njuguna Mwaura and others v Republic* Court of Appeal Criminal appeal 5 of 2008 [2013] eKLR, *Bernard Kiprotich Kamama v Republic*, High Court, Eldoret, Criminal Appeal 123 of 2010 [2013] eKLR. True, the investigating officer was not called. True, the maker of the P3 form was not called. Regarding the latter I have found that the original P3 form was properly produced in evidence by PW2 on behalf of Newton Bakhuya. There was no departure from the rules of evidence. The evidence produced was sufficient to sustain the charge.

17. In this case, I am satisfied that the prosecution discharged its legal burden of proof. See *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166. I have reached the conclusion that the appellant attacked the complainant. The totality of the evidence proved the culpability of the appellant for the offence of causing grievous harm.

18. That takes me to the sentence. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

> *"The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may……(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or….. "*

19. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

> *"The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors. …The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirely before settling for any given sentence."*

20. The charge facing the appellant was a *felony*. Section 234 of the Penal Code provides that any person who commits grievous harm to another is guilty of a felony and is liable to imprisonment for *life*. Considering the savage attack and the violence meted out on the complainant, the sentence of seven years was appropriate.

21. The upshot is that the appeal is devoid of merit. It is hereby dismissed. It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 18th day of June 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

The appellant in person.

Ms. R.N. Karanja for the State.

Mr. J. Kemboi, Court Clerk.