REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRA NO. 18 OF 2015

(Appeal arising from Hon. J. M. Mumnguti in Lamu Cr. Case No.574 of 2013)

FUAD ABDALLA ABOUD……………………...……APPELLANT

VRS

REPUBLIC…………………………………………RESPONDENT

JUDGMENT

The appellant was charged with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that the appellant on the 14/12/2013 at Faza village in Lamu East District within Lamu County, jointly with another not before court (Nadhiru Muhaj) willingfully and unlawfully did grevious harm to Athman Fadhau.

The appellant was convicted and sentenced to serve twenty years imprisonment. The grounds of appeal are:-

i. That the charge-sheet was defective.

ii. That the evidence on record relate to a charge of affray and not grievous harm.

iii. The prosecution evidence was incredible, hearsay, uncorroborated and did not support the charge.

iv. The evidence of a minor was admitted without corroboration.

v. The medical evidence did not support the charge and was produced by a clinical officer.

vi. Appellant's mitigation and defence were not considered.

vii. That the c ase was not proved beyond reasonable doubt and the conviction is against the weight of the evidence.

Mr. Wakehiu, counsel for the appellant submitted that the evidence on record relate to the offence of affray. The charge sheet was amended and the appellant was not given an opportunity to recall the witnesses who had already testified. Only one witness identified the appellant and he was a minor. It is also submitted that the medical evidence was inadequate and the injuries were quite minor. It is also submitted that the sentence is quite harsh and an option of a fine could have been adequate.

The State opposed the appeal. It is contended that the charge sheet was not defective as alleged. No defects have been identified. The evidence of the minor was corroborated by that the other witnesses. The appellant's defence was considered and that the non-compliance with section 214 of the Criminal Procedure Code did not cause any prejudice on the appellant. The evidence adduced sufficiently proved the charge and it was not a case of affray.

Before the trial court, six (6) witnesses testified for the prosecution. **PW1 Athman Fadhau** was the complainant. On 14/12/2014 at about 11.00 a.m he heard screams and on checking he found that his relative, Yassir Mohamed Omar had been cut with a panga on the neck. He lost consciousness and found himself at Langoni Hospital where he was admitted for nine (9) days. He was later issued with a P3 form. He knew the appellant very well. **PW2 Mulfadh Difa Fadhau** saw PW1 being hit with a stone on the head by Nathiru. He saw the appellant cut PW1 as he lay on the ground. PW2 was a standard 7 pupil. He ran away to inform his mother. **PW3 Copl Ali said Hanesa** went to arrest the appellant on the same day of 14/12/2014 from the appellant's cousin's home.

PW4, Copl Boniface Kinyua from Jaze Police Post investigated the case. Officers at the post heard screams near the police post. On checking out they found the two families, that of PW1 and the appellant fighting. They were hurling stones to each other. They separated them and were told the appellant had injured PW1 who had been taken to Langoni Hospital. Investigations revealed that PW1 was attacked about 100 metres from the police post. It was a revenge mission as PW1's relatives had attacked the appellant's relatives at a previous wedding. He investigated the case and had the appellant charged with the offence.

PW5, Daniel Chege was a clinical officer based at Faza Sub-district Hospital. He produced the P3 form that had been filled by Dr. Fred Mudangha of Langoni Nursing Home. The doctor is a Ugandan and had returned to his country. **PW6 Phyllis Murithi Muguro** was a clinical officer at Langoni Hospital. He confirmed that Dr. Fredrick Mudangha worked at the hospital and had left for his home country for good. He also confirmed that PW1 was treated at the hospital.

In his sworn defence, the appellant testified that on 14/12/2013, he was delivering water using his donkey at a construction site. He heard that his younger brother, Muhafi had fought with Yassir Mohamed Omar who is PW1's brother. He was told the two were at Faza Police Post. He decided to go there to check. While nearing the police post, he was confronted by six people who attacked him with sticks. It became a big fight. He took a piece of iron sheet and started flashing it to clear his way. Many people were baying for his blood. The police went =for his rescue and he was arrested. It is his evidence that Yasir had beaten his brother at a previous wedding and Muhafi was revenging. He named some of those who attacked him as Athman Fadhau (PW1), Fuad Basha and Shidi Wania. He fled to his auntie's house within the area. He was treated at Faza Hospital after he was arrested and the investigating officer took his treatment book.

The main issue for the court's determination is whether the appellant caused grievous harm to PW1. The incident took place during the day. PW1 sustained injuries and was admitted at Langoni Hospital for 9 days. PW1 knew the appellant very well. On his part, PW2 was present when PW1 was cut with a panga. He ran away to inform his mother.

The defence evidence I to the effect that he was attacked by the complainant and others. This evidence is more or less similar to PW5, the investigating officer. However, according to PW5, by the time they saw the two families fighting, the complainant had already been rashed to hospital. It was the attack on PW1 that caused the fight. This was a second attack as already Muhafi had attacked Yasi Mohamed Omar. It is not clear why the investigating officer did not mention anything about the first attack.

The evidence on record shows that the incident occurred near the Jaza Police Post. It was during the day. The parties know each other. The evidence is not that of afray but that of causing grievous harm. The evidence on afray was subsequent to the assault on PW1. The prosecution did prove that the appellant caused grevious harm to PW1.

The charge sheet was amended after PW1 and PW2 had testified. The amendment related to the particulars of the offence. The first charge sheet indicated that the appellant unlawfully assaulted Athman Fadhau thereby occasioning him actual bodily harm. The amended charge-sheet indicate that the appellant with another not before court caused grievous harm to Athman Fadhau.

Section 214 of the Criminal Procedure Code states as follows:

> ***"214. (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charges defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment if the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:***
>
> ***Provided that-***
>
> ***i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge:***
>
> ***ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.***
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> ***(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.***
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> ***(3) Where an alteration of a charge is made under sub-section (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary."***

Under the above section, the trial court is supposed to ensure that the accused takes a fresh plea. The accused ***"may"*** demand that the witnesses who had testified be recalled to adduce fresh evidence or for cross examination. It is the duty of the court to explain to the accused theexistence of such a right. The record shows that no explanation was given and the case proceeded normally. Counsel for the appellant cited the Case of **Benson Muia Selya V Republic, Machakos Criminal Appeal No.19 of 2013 [2014] eKLR** where a two judge bench dealt with the issue relating to section 214.

In the Case of **Yongo v Republic Criminal Appeal No.1 of 1993,** the Court of Appeal stated that when dealing with section 214, the trial court must record that it has complied with that section and the accused must be given an opportunity to further question the prosecution witness who would have already testified. Given the evidence herein, it is clear that there was no prejudice on the appellant. The amendment only brought in the other attacker who was not arrested and changed the wording of the particulars of the offence. There was no prejudice on the appellant.

The evidence of PW2 was corroborated by that of PW1 and the medical reports. The age of PW2 is not given and the fact that he was a standard seven pupil cannot be a conclusion that he was a minor. However, the complainant himself testified that he saw the appellant before his brother hit him with a stone. That evidence was sufficient. PW2's evidence is not the only evidence that led to the conviction. On the issue of the production of the medical evidence, there is no requirement that only medical Doctors should produce P3 forms. PW1 was seen by a medical doctor who had left the country.

The last issue is that of sentence. The appellant is serving twenty years imprisonment. PW1 appears to have fully recovered. He only has a scar on his neck. The circumstances of the case show that there was

animosity between the two families. The defence evidence is quite clear and in line with the evidence of the investigating officer. The appellant did not pick a panga and PW1. It is clear to me that there was an element of self defence. Although, it is clear that it is the appellant who cut PW1 with a sharp object, the circumstances of the case do not call for the 20 years prison sentence.

In the end, the appeal on conviction is disallowed. The sentence is hereby set aside and replaced with a fine of Ksh.20,000/= and in default to serve eight (8) months imprisonment.

Dated, signed and delivered at Malindi this 17th day of August, 2015.

SAID J. CHITEMBWE

JUDGE