REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 203 OF 2014

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 204 OF 2014

(From original conviction and sentence in Criminal Case No. 363 of 2012

of the Principal Magistrate's Court at Kitui, Hon. B. M. Kimemia – P. M.)

DICKSON MWENDWA.....1ST APPELLANT

MWENDWA MWANIKI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellants, Dickson Mwendwa and Mwendwa Mwaniki were charged with the offence of grievous harm contrary to Section 234 of the Penal Code.

The particulars of offence being that the Appellants on the 23rd day of June 2012 at about 6.00 p.m. at Nyuani Village, Kangi sub-location, Kakeani Location in Kitui County, jointly unlawfully did grievous harm to M M.

2. When the Appellants were arraigned before the trial court, they pleaded not guilty. The case proceeded to a full trial.

3. The prosecution case was that at the material time, the complainant, M M, a 14 year-old boy was at his grandmother's house. The grandmother had travelled to Nairobi leaving him in the house. The 1st Appellant and 2nd Appellant who are relatives of the complainant came to the house. They accused the complainant of having stolen some maize from the grandmother's house. The 1st Appellant tied up the complainant's hands at the back then beat him on the thighs with a whip. The 1st Appellant then took the complainant to his house where he continued beating him up with a whip and a belt. The 1st Appellant then locked the complainant in his house and called the 2nd Appellant. The 2nd Appellant was instructed by the 1st Appellant to get fuel to burn a thief. The 2nd Appellant removed paraffin from a lamp which was on a table in 1st Appellant's house and poured it on the T-shirt that the complainant was wearing and

set it on fire using a match box and a piece of paper. The complainant was burnt on the left arm, chest and shoulder. The ropes that had been used to tie the complainant's hands got burnt and broke off. The 2nd Appellant stood at the door to prevent him from running away. The complainant removed the burning T-shirt and threw it at the 1st Appellant. In the process the complainant managed to escape and ran home.

4. The following day the complainant's father PW2 M K reported the matter to the Assistant Chief. The 1st and 2nd Appellant were arrested. The complainant was issued with a P3 form and treated at Muthale District Hospital where he was admitted for one month. PW3 Dr. Nyachae Alice who treated the complainant classified the degree of injury as grievous harm.

5. The 1st Appellant, Dickson Mwendwa in his defence denied the charge. He termed this case as a frame-up. The 1st Appellant further stated that the complainant came to their home and broke in alleging to have been left there to care for it.

6. The 2nd Appellant, Mwendwa Mwaniki stated that on the material date he was at work between 7 – 5 p.m.. He then went to visit some neighbours then went home at about 7.00 p.m. That the following day he was arrested for an offence that he did not commit. He saw this case as a frame up by the complainant's father after he failed to give him construction work.

7. The trial magistrate found the prosecution case proved beyond any reasonable doubts. The 1st and 2nd Appellant were convicted and sentenced to serve life imprisonment. The 1st and 2nd Appellant were aggrieved by both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:

a. That the charge sheet was defective.

b. That the prosecution evidence was insufficient and full of inconsistencies.

c. That the defence case was disregarded.

d. That the appellant's mitigation was disregarded and the maximum sentence imposed.

8. During the hearing of their appeals, the two appeals were consolidated and heard as one.

This being the 1st appellate court, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – *See* **Okeno –vs- Republic (1972) EA 32**.

9. The complainant's evidence is that of recognition in broad daylight. According to the complainant's evidence, the Appellants are his relatives and neighbours. There was therefore no possibility of mistaken identity. The beating started at about 2.00 p.m. and it was already dark when the complainant managed to escape. The complainant identified in court his burnt T-shirt and the lamp that the paraffin was removed from. The complainant maintained his evidence during cross-examination.

10. It is noted that the complainant's age was given as 14 years old. The complainant was not a child of tender years. Section 2 of the Children Act defines a child of tender years as a child of under the age of ten years.

The complainant gave sworn evidence. The lack of corroboration was not fatal to the prosecution case. As stated by the Court of Appeal in the case of **NICHOLAS MUTURI CHIANDE V R [2014] eKLR:**

> ***"Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness, but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification ...."***.

The contention by the Appellants that the complainant's evidence required corroboration therefore has no merits.

11. PW2 the complainant's father and PW3 Peter Kasumbi the Area Assistant Chief corroborated the complainant's injuries on the burns sustained by the complainant and the recovery of the lamp from the house of the 1st appellant's house.

12. The doctor gave evidence that established that the complainant had sustained burns on the shoulders, the chest and the left arm and suffered 12% 1st degree burns hence the degree of harm was classified as grievous.

13. The investigating officer PW5 Cpl. Charles Wahome confirmed that the report of the assault was made at Kabati Police Post. He produced the burnt T-shirt and the lamp as exhibits.

14. Although the 1st Appellant in his defence stated that this case was a frame up, no reasons were given why the prosecution witnesses would frame him up. The 2nd Appellant's defence that the complainant's father framed him up due to some differences over some work is also convincing. The issue of frame up appears to be an afterthought as it was not raised when the complainant's father testified and stated that he had no grudge with the 2nd Appellant. The *alibi* by the 2nd Appellant that he was at work during the day then went to visit a friend and went home at 7.00 p.m. is not convincing in view of the strong prosecution evidence. DW3 Lena Mwaniki the mother to the 2nd Appellant gave evidence that failed to exonerate any of the Appellants as she testified that she was not at home at the material time.

15. One of the grounds of appeal is that the charge sheet is defective. I have considered the charge sheet and seen no defects in the same. In their written submissions, the Appellants have not pointed out any defects in the charge sheet.

16. After evaluating the evidence on record afresh, I have found no reasons to differ with the findings of the trial magistrate on conviction. Taking into account the mitigation of the Appellants,I reduce the sentence of life imprisonment to sentence of ten (10) years imprisonment each.

Orders accordingly.

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B. THURANIRA JADEN

Dated and **delivered** at Kitui this 24th day of September **2015**

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B. THURANIRA JADEN

JUDGE