REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 98 OF 2015

(CORAM: HON. J. A. MAKAU – JUDGE)

CHARLES SEDA OTIENO…..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

***(Being an appeal against the conviction & sentence in Criminal Case No. 632 of 2013 in Bondo Law Court before Hon. M. M. NAFULA – S.R.M.*)**

JUDGMENT

1.The appellant CHARLES SEDA OTIENO and another were charged with the offence of grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence are that on 2nd June 2013 at around 1.00 p.m. at Gobei village, Ajigo sub-location in Bondo District within Siaya County, jointly and unlawfully did grievous harm to Fredrick Okoth Onyango.

2.The complainant Fredrick Okoth Onyango testified that on 2.11.2013 at 1.00 p.m. he was at home with his dad (PW2) when he heard dogs barking. That he took spotlight and went outside following the dog, then whenreached at a certain placed where the dog was barking out loudly he put on the spotlight and saw accused person who he testified he knew and they all come from Gobei. That when PW1 saw the two accused they were walking PW1 stood and the 2nd accused person (not party in the appeal) asked him why he was looking at them. That the 1st accused (Appellant in this appeal) removed a panga from his trouser, the 2nd accused tripped him and PW1 fell down. The 1st accused then cut PW1 at his left eye with the panga. PW1 screamed for help and his father PW2 came to his assistance. PW1 lost consciousness and later found himself at Bondo District Hospital. He identified treatment chit as MF1 – 1. PW1 was transferred to Kisumu for further treatment at New Nyanza Provincial Hospital. That when he was discharged he made a report at Lwak Kotiende Police Station. He was issued with P.3 Form MF1 – 2 and subsequently recorded his statement at Lwala Kotiende Police Station. During cross-examination by 1st Accused PW1 he states the incident took place at midnight. That when he saw the 1st accused he was shocked and that PW1 had a spotlight. That 1st accused had a black troser which had stripes and PW1 was able to identify him. PW1 did not describe how the 2nd accused was dressed.

3. PW2 Joseph Onyango Ombok testified that on 2.11.2014 at 1.00 a.m. he heard dogs barking and PW1 who was studying went outside. That PW2 subsequently went out and saw PW1 who had been cut on the face. That he saw both accused persons running away who he stated he knew as PW2 and accused came from same area. PW2 then took PW1 to Lwala Kotiende Police Station reported the matter and PW1 was taken to Bondo District Hospital, where he was treated and referred to Russia Hospital. PW2

then recorded his statement at Lwala Kotiende Police Station. During cross-examination PW2 testified that he reported the matter to Police Station on 2.11.2013 at midnight that PW2 testified they screamed and people come to the scene but they did not find the 1st appellant PW2 testified he saw the accused running away with the aid of torch light. PW2 testified the 2nd accused was his nephew and was wearing a jacket on that he did not see the 2nd accused's face.

4. PW3 No. 62604 Cpl. Geoffrey Ngarira testified that on 2.11.2013 while at LwalaKotiende Police Station he received a report that there was someone who had been brought to the Police Station having been assaulted. That as the person was seriously injured he escorted him to Bondo District Hospital where he was admitted and later referred to Kisumu Hospital. That PW1 was issued with P.3. Form. He testified the degree of injury was classified as harm. That later on PW1 informed PW3 that the 1st accused had been arrested at Usenge Police Station that PW1 lead PW2 to the home of the 2nd accused and he was arrested and the two were charged with the offence of grievous harm. During cross-examination testified the complainant was assaulted on 2.11.2013. PW3 testified PW1 told him he was attacked by two people at midnight.

5. PW4 Japheth Oduor testified that he is a Clinical Officer at Bondo District Hospital.That on 2.11.2013 that PW1 was brought in unconscious state. His clothes had been soaked in blood from a cut wound on the head. That his eye was maimed. That approximate age of injury was 130 days Pw4 produced P.3. Form as exhibit. He stated the injury was caused by sharp object.

6. The appellant when put on his defence opted to give sworn statement and opted to call no witness. The appellant testified on 2.11.2014, at 1.00 p.m. he was in cells and that he had been arrested and arraigned in Court for charges of attempted robbery. That when he entered cells he found the 2nd accused in cells. That he was produced later in Court and the charge was read to him. He denied the charge because he was in jail. That he knows nothing about this case.

7.The trial Magistrate evaluated the prosecution evidence and convicted the appellant but acquitted the 2nd accused for the offence of grievous harm and sentenced the appellant to serve 20 years imprisonment in convicting the appellant the trial Court expressed itself as follows:-

> **"PW2 confirmed that he saw both accused persons running away from the scene. It is clearly evident that PW1 was able to identify the 1st accused person to have been the person who cut him using a panga on his left eye ----------, I find that the prosecution proved their charges as against the 1st accused person beyond any reasonable doubt as required by law and I find him to be guilty and I shall convict him accordingly. On the same breath, the prosecution failed to prove their charges as against the 2nd accused person beyond any reasonable doubt. I gave him a benefit of doubt and acquitted him under Section 215 of the C.P.C."**

8. Aggrieved by the decision of the trial Court the appellant lodged the appeal raising the following grounds.:-

> ***"(a) That he was charged with the offence of grievous harm contrary to Section 234 of the Penal Code.***
>
> ***(b)That he pleaded not guilty to the offence and upon the same, he was denied bond/bail contrary to article 49 (h) of the Constitution of Kenya.***
>
> ***(c)That the trial Magistrate erred in law and facts by denying him the right to a fair trial Contrary to Article 50 of the Constitution of Kenya.***
>
> **(d) That the trial magistrate erred in law and facts in convicting me on a defaulted charge sheet later forcing amendment.**
>
> ***(e) That the trial Court willfully tried him while accepting instruments of unfairness hence resulted into total infringement of his right.***

(f) That he was sentenced on aspects of unfair opinion of the magistrate foe the benefit of doubt, the trial magistrate tried him for her own opinion.

(g) That the trial magistrate had personal interest in this particular case therefore unfair ruling.

Reasons Wherefore:- the appeal be allowed, convictions quashed and sentence set aside.

9.This is the first appeal from conviction and sentence. I am therefore the first appellate Court and I am guided by the principles enunciated in the case of **Okeno V R. [1972] E.A. 3**2 where the Court of Appeal set out the duty of the first appellate Court in the following terms:-

"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh an exhaustive examination. [Pandya vs. Republic (1957) EA 336] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] E.A. 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then cand it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of herring and seeing and witnesses, (See Peter V. Sunday Post, [1958] E.A. 424.)"

10. At the hearing of the appeal, learned Advocate Mr. Nyawiri appeared for the appellant while M/s. Odumba Learned State Counsel appeared for the State.

11. The Learned Advocate for the appellant emphasized that the key issues in this appeal relates to insufficient evidence that could not sustain conviction as it did not meet the threshold required in criminal cases, thus proving case beyond rreasonable doubt; that there were the discrepancies which were so glaring that they could not be ignored; that the prosecution 's evidence was incredible and could not be relied upon to sustain convictions and that the conditions were not conducive for favorable identification and that the trial Court failed to test the evidence on recognition and determine whether the prevailing conditions were conducive to an identification that was free from error. That the appellant was not properly identified and lastly that the appellant's defence was ignored.

12.The Appellant's Counsel contended that the date of the offence stated in the charge sheet this 2nd June, 2013 is different from the evidence of PW1 who stated the date was 2.11.2013 and DW1 states that it was on 2.11.2014; submitting the discrepancy is so glaring such that it cannot be ignored as it is a difference of 5½ months. He termed PW1 as untrustworthy witness submitting his evidence should not have been relied upon pointing out his testimony in chief was different from the evidence on cross-examination. In support of that proposition the Counsel referred to the case of **Kinuthia V Republic [2003] KLR 55** where Court of Appeal sitting at Mombasa held:

"In a criminal case a witness should not create an impression in the mind of the Court that he is not a straight forward person.If a witness raises suspicion about his trustworthiness or does or say something which indicates that he is a person of doubtful integrity he will be deemed unreliable which makes it unsafe to accept his evidence."

13.The Counsel submitted further that PW2 averred he saw both accused running away at 1.00 a.m. when it was dark yet he did not state how far he was and what enabled him to see the two running away. That no description of the people was given. That it is not clear when PW1 put on the light to be able to see the assailants and what part of the assailant the torch light was shone on the person and from what distance. That intensity of the torch light, mode of the spot light, and how long it was on was not disclosed. The Appellant's Counsel submitted that the trial Court ought to have considered that. The Counsel relied on the case of **Norman Ambich Miero & Another V. R. Cr. A No. 279 of 2005** (C.A. At Nairobi where the Court of Appeal addressed itself as follows:-

"The two prosecution witnesses also did not give the description of the appellants such as their names or physical features when the first report was made to the police. This was important because the whole case was based on evidence of identification through recognition. The complainant was attacked suddenly, she called out for Mwangi, and when he appeared, the two assailants took off and disappeared in two different directions. Another important factor that was not taken into account by the two Courts below is that when the complainant was attacked, it was raining and her eye glasses fell down."

"***It is trite that identification by recognition is more reliable because it is based on the witness' familiarity with the assailant. IN the case of WAMUNYU VS R [1989] KLR 424, it was held that:-***

> **"1.** ***Where the only evidence against a defendant is evidence 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 possibility of error before it can safely make it the basis of a conviction.***
>
> ***"2. Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made."***

The Counsel also relied on the case of **John Murithi Nyagah V. R. Cr. A. No. 201/2007 (C.A.) Nairobi)** where the Court addressed itself thus:-

> ***"The only evidence before the Court on the basis of which the trial Court convicted the appellant was by the complainant. Evidence of a single identifying witness especially where the conditions for positive identification are difficult must be tested with the greatest care especially where the life of an accused person is at stake and the predecessor of this Court in the case of Abdala bin Wendo and Another V.R. [1953] 20 EACA 166, held that what is needed in such circumstances is "other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, though based on the testimony of a single witness, can safely be accepted as free from the possibility of error."***

14. The Counsel concluded that how the trial Court considered the above guiding principles in a case of recognition and/or identification it would have found the conditions were not favourable for correct identification, submitting the PW1 and PW2 did not give description of the appellant and how they knew him and identification of the appellant by type of clothes the person seen by PW1 and PW2 wearing were not sufficient identification.

15. This is further Appellant's Counsel submission that appellant and another were jointly charged with an offence which they were alleged to have committed jointly. He referred to the charge sheet in support of his submission and in framing the issues for determination he urged the trial Court misrepresented the issues before the Court and ended up doing injustice by giving the appellant's co-accused benefit of doubt which should have been extended to the appellant. The Learned Counsel termed the trial Court's action as a gross misdirection. On the appellants defence he submitted the trial Court erred in law by ignoring the appellant's defence.

16.The State in opposing the appeal submitted that as regard defence the appellant talked of events of 2.11.2014 whereas the offence occurred on 2.11.2013 urging that it was upon the appellant to prove his allegations and he had the opportunity to produce the occurrence book but did not do so on issue of joint intention the Counsel submitted the evidence on record clearly points that the assault was committed by the appellant and the Court correctly framed the issues as it did as the offence was that of grievous harm. The Counsel referred to definition of grievous harm and maim. The Learned Counsel submitted the prosecution proved the appellant is the one who inflicted the injury.

17. On identification and/or recognition of the appellant the Learned State Counsel submitted both PW1 and PW2 knew the appellant and the 2nd accused as both came from same place, Gobei, that PW1 and

PW2 gave description of how the appellant was dressed and there was conversation between complainant and 2nd accused. That PW1's spotlight had new batteries, and as PW1 knew the appellant there was no need of giving the description of the appellant.

18. On issue of discrepancies on dates as stated in the charge sheet and the evidence of the witness, the State Counsel submitted that all stated dates by all witnesses were consistent as of 2.11.2013 as opposed that date of the charge sheet dated 2.6.2013 adding the correct date are inconsistent with the evidence on record. On the sentence the Counsel submitted its proper and legal. On appellant's list of authorities the state Counsel submitted that they are irrelevant as they were dealing with cases of robbery with violence and not grievous harm and should be disregarded. She prayed the appeal to be dismissed.

19. The critical and major issue for my consideration in this appeal is whether there are glaring discrepancies in the lower Court proceedings with charge sheet and whether PW1's and PW2's evidence creates a suspicion about their trustworthiness whether their evidence should be taken as true. The other issue for consideration is whether PW1 and PW2's recognized the appellant and whether there is evidence to the required standard to prove positive recognition of the appellant by PW1 and PW2. The other issue for consideration is whether the appellant and 2nd accused having been charged jointly with a common offence, whether the Court was justified in treating the two differently on the Judgment and lastly whether the appellant's defence was ignored.

20. In the case of **Morris Gikundi Kamunde V. Republic Cr. A. No. 332 of 2012** the Court of Appeal addressed itself as follows:-

> *"A critical issue for our consideration is whether PW1 and PW3 recognized the appellant. Is there evidence to prove positive recognition of the appellant by PW1 and PW3?* ***In Wamunga vs. Republic, (1989) KLR 424,*** *it was stated that where the only evidence against a defendant is evidence of recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of the recognition were favorable and free from possibility of error before it can safely make it the basis of a conviction.* ***In Simiyu & Another -v- R. (2005) 1 KLR 192,*** *it was stated there is no better mode of identification than by name and when a name is not given, then there is a challenge on the quality of identification and a great danger on mistaken identity arises. The case of* ***R -v- Alexander Mutwiri Rutere alias Sanda & Others, (2006) eKLR,*** *states that if a witness is known to an accused but no name is given to the police, then giving the name subsequently is either an afterthought or the evidence given is not reliable. In the instant case, we note that the two Courts below did not take into account the dicta in* ***Simiyu & Another -v- R.*** *(2005) 1 KLR 192 and Lesaran -v- R (1988) KLR 783"*

21. In the instant case plea was taken on 1.7.2014. The particulars of the date of the offence on the charge sheet is 2.6.2013, though it appears initially it was 2.6.2014. There is an alteration which is not countersigned nor is there evidence on Court proceedings of the same having been sought to be changed from 2.6.2014 to 2.6.2014. PW1 gives the date of commission of the offence as 2.11.2013 at 1 p.m. whereas PW2 gives the date of the offence as 2.11.2014 at 1.00 a.m. but in cross-examination its only the appellant who changed the date to be 2.11.2013 at midnight. PW3 gave the date as 2.11.2013. Whereas PW4 gave the date as 2.11.2013. The date given by PW1 as date of commission of the offence and time of 2.11.2013 is in inconsistent with date and time given by PW2 of 2.11.2014 at 1.00 a.m. PW1 talks of the events a year before the date given by PW2. PW1 takes of theof the offence having been committed at 1 p.m. whereas PW2 talks of 1 a.m. PW3 and PW4 who were not at the scene talks of the offence having been committed on 2.11.2013. The evidence of PW1, is contradicted by PW2. The evidence of PW1 and PW2 is inconsistent. The evidence of PW1, PW2, PW3 and PW4 is contradictory and inconsistent on the charge sheet the prosecution which preferred the charge against the appellant were aware all the time of the particulars of the charge and the witnesses statements. They had opportunity to apply to amend the charge but did not do so.

22. I have carefully considered the contents of the charge sheet and the evidence of prosecution witnesses especially PW1 and PW2 who claim to have been at the scene of crime that evidence is incapable and cannot be reconciled. There are discrepancies which are so glaring that ignoring the same Court would

not be serving justice to the accused person who is entitled under Article 50 (1) (2) (b) of this constitution of Kenya 2010 is entitled to a fair trial. Article 50 (1) (2), (b) of the constitution provides:-

> ***"(50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.***
>
> ***(2) Every accused person has the right to a fair trial, which includes the right:-***
>
> ***(b) to be informed of the charge, with sufficient detail to answer it:"***

I find the prosecution by informing the appellant of a different dates in the charge sheet failed to comply with article 50 of the constitution of Kenya 2010 and the evidence by PW1 and PW2 created a suspicion that they were not trustworthy witnesses. I have carefully considered the evidence of PW1 and PW2 as regards the date the offence is said to have occurred and the time and in view of the glaring discrepancies I find the same should not be taken as true as one cannot tell of events taking place during daytime while the other telling of midnight of over a gap of one year.

23. PW1 and PW2 in the instant case testified that the appellant and his co-accused were known to them as they were all from Gobei area. That after the attack of PW1 by the appellant and another PW2 came to his rescue. That PW1 and PW2 said the appellant cut PW1 on his face with a panga. PW2 saw accused ran away. That PW1 and PW2 screamed and people came to their help but did not find the appellant and his co-accused. PW2 to PW1 to Lwala Kotiende Police Station and reported the matter. PW1 after discharge from hospital also recorded statements with Police.

24. I have perused the lower Court proceedings and I find no where in the first report has the Police or any other person or people who came for rescue of PW1 and PW2 when PW1 and PW2 stated the names of the attackers though they knew the appellant and his co-accused that they were attacked by them. PW3 testified that he received a report of a person who had been brought to Police having been assaulted and stated he later recorded statement. PW3 No. 62604 Cpl Geoffrey Ngarira did not mention anywhere in his statement or made reference to Occurrence Book that the complainant or PW2 gave him a description or names of the attackers. PW1 and PW2 in their evidence testified they knew the attackers by the appellant and co-accused also PW2 claimed was his nephew, but in their initial report on statements did not give the appellant's name and that of PW2's nephew PW2 did not even give the names of the attackers to the people who came to their rescue immediately after the attack.

25.The witness who knows the attacker is always expected to immediately give his name in the first report to the Police. In the **Case of George Bundi M'rimberia V. R. Criminal Appeal No. 352 of 2006** it was stated a more serious aspect arises when a witness fails to mention the name of an assailant at the earliest opportunity as this can weaken the evidence. It is my considered view the failure by PW1 and PW2 to give names of the assailants or where they work or reside and their relationship makes their evidence weak and unreliable. There is no reasons why PW1 and PW2 did not give names of the assailants or where they work or reside and their relationship makes their evidence weak and unreliable. There is no reason why PW1 and PW2 did not give appellant's name being person known to them according to the evidence as was stated in the case of **Moses Munya Mucheru V. R. Criminal Appeal No. 63 Of 1987 And In Lasamu V 1988 KLR 783** where it was emphasized that where identification is based on recognition by reason of long acquittance, there is no better mode of identification that by name.

26. According to PW1 the offence was committed at 1 p.m. whereas by PW2 it was committed at midnight, that if I were to take PW1's evidence that the offence was committed at 1.00 p.m. there was no need of spotlight and he had stated as the offence was committed during day time. I will nevertheless consider if offence was committed at night whether the conditions were conducive for favourable recognition free from error. PW1 testified he was able to see and recognize his attacker by and of spotlight. PW2 did not state what enabled him to see the attackers the Court witness determining the issue of identification by way of recognition, should consider several factors that guide Court as clearly enunciated in the case of **R V Turnbull & Others [1976] & ALLER 546**. For instance, a Court must

consider several factors as the distance between witnesses and the suspect when he heard him under observations. The length of time the witness saw the suspect, and the lapse of time between the date of the offence and the time witness identified the suspect at Police.

In this case PW1 and PW2 talked of a spotlight whose mode and size was not stated. The intensity of the light was not disclosed nor the period the assailant was under PW1 and PW2's observation PW2 saw two suspects running away. The part on which the spotlight was shone on body of the assailants was not disclosed. The distance between PW1 and PW2 from the suspect was not stated. The above evidence was important as the whole case was based on identification through recognition. The attack was sudden and there is no mention of the appellant having uttered any word by which he could be identified though voice identification in trial Court failed to state what account that when PW1 was attacked PW2 was in the house and did not witness the attack.

27.The appellant state co-accused were jointly charged with an offence of grievous harm Contrary to **Section 234 of the Penal Code**. Section 21 of the Penal Code Provides:

> ***"(21) When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence. "***

In the first case the two accused persons had formed a common intention to prosecute on unlawful purpose in conjunction with one another. The evidence is clear on the role plagued by each of the suspect to carry out their common intention to prosecute an unlawful purpose. That is to the common interest there and in prosecution of such purpose on defence is committed it matters not what role each individual carried out or found to carry out. The trial Court fall into an error when it framed issue which would each of the suspect to carry out then common intention to prosecute an unlawful purpose. That is to say as the common interest in these and in prosecution of such purpose on offence is committed it matters not what role each individual carried out or found to carry out. The trial Court fall into an error when it framed issue which would – the two as if they had no common interest or to prosecute on unlawful purpose, then if the trial Court found there was no sufficient evidence to commit the 2nd accused with the offence then same benefits of doubt aught to have been extended to the appellant. The Court was in error in treating the the two accused persons it with a commons offence differently.

28. The appellant gave defence before the trial Court. The Court in analysis and evaluation of the prosecution's case ignored to evaluate the appellant's defence and came to its conclusions on the same. That was an error on part of the trial Court; however, the appellant wasn't by prejudice because this Court is given to evaluate the same and come to its conclusion. The appellant's defence is that of alibi. The same was not raised at the earliest opportunity but when the appellant was put on its defence. PW1's, PW2's, PW3's and PW4's evidence was not challenged through cross-examination. The date given in appellant's defence of 2.11.2014 is given the commission of the offence. The date has no reference in the date of the commission of the offence. To form the defence to be a disconnect to the charge however in a criminal case the accused is not required to prove his defence of alibi is true it is for the prosecution to rebut the same. Further the accused has no obligation to prove his innocence. I think I have the conditions were not favourable for reliable conviction and proper recognition of the appellant. In totality and in view of my findings hereinabove be guided by the decision of **Simiyu and Another V. R. (Supra)** I hold the convection of the appellant is and unsatisfactory. Thereby set it aside the conviction and sentence meted upon the appellant to and/or Charles Seda found which on the appellant's defence I will leave it at that point.

The upshot is that I find merits in this appeal as there were many discrepancies and inconsistencies which created suspicious about the trustworthiness of PW1 and PW2 for evidence to be taken as true and that Otieno be and is hereby set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 18 DAY OF NOVEMBER, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 18TH DAY OF NOVEMBER, 2015.

In the presence of**:**

Mr. Ombati State Counsel – present

Appellant – Present

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akida

J. A. MAKAU

JUDGE