REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 33 OF 2015

BETWEEN

BERNARD OCHIENG OPIYO ….……..…….....…….
……..APPELLANT

AND

REPUBLIC ……..……
RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. B.R. Kipyegon, RM in Senior Resident Magistrates Court at Ndhiwa in Criminal Case No. 106 of 2015 dated 14th September 2015)

JUDGMENT

1. The appellant, **BERNARD OCHIENG OPIYO** was charged and convicted of the offence of causing grievous harm contrary to **section 234** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the charge were that on 14th April 2015 at Lower Kayambo of Ndhiwa District, Homa Bay County he unlawfully did grievous harm to **JACOB ONYANGO MAGOLO**. He was convicted and sentenced to 20 years imprisonment.

2. The facts emerging at the trial were that on 14th April 2015 at about 8 am, the complainant, PW 1, was preparing to burn some bricks when the appellant came and asked him why he had cut a tree on his father's property. PW 1 testified that the appellant suddenly moved close to him and cut him on the head unexpectedly. PW 2, who was present, testified that he was making bricks with PW 1 when the appellant came and cut PW 1 with a panga on the head. PW 1 fell and became unconscious and the appellant ran away. PW 1 was taken to Ndhiwa Hospital on a motorbike. His condition became serious and he was taken to Homa Bay County Hospital. He was later taken to Moi Referral Hospital in Eldoret where he was treated for about one and a half months.

3. After discharge, PW 1 was examined by the clinical officer, PW 4 who confirmed that he had sustained an assault on the head with a sharp object. According to the treatment summary, PW 1 had a deep cut wound on his head which resulted in bleeding in the brain and a fracture skull. The treatment included opening the skull and removing fragments. After examining PW 1, PW 4 classified the degree injury as maim.

4. The appellant in his unsworn statement denied the offence and stated that he was at home at the material time the offence was committed and he was arrested at home without being informed what happened.

5. The appellant appeals against the conviction on the grounds set out in the petition of appeal dated 5th October 2015. The appellant contends that the learned magistrate erred in convicting the appellant for the offence of grievous harm contrary to **section 234** of the ***Penal Code*** when the *actus reus* only disclosed the offence of assault causing actual bodily harm contrary to **section 251** of the ***Penal Code***.

6. In essence the appellant admits that he committed the act that led to the injury of the complainant but that the nature of the injuries disclosed the lesser offence of actual bodily harm. Mr Okoth, learned counsel for the appellant, contended that in fact, the appellant had pleaded guilty to the lesser offence but the charge was amended before the facts were read to him.

7. I have studied that proceedings and I find that the prosecution was entitled to amend or substitute the charges before the appellant was convicted. Under **section 214** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***, the plea of guilty did not preclude the prosecution from preferring a more serious charge before the facts were read to the accused. The nature of the injuries was clearly described by PW 1. In the P3 form he recorded that PW 1 had a deep cut wound on the head and that CT Scan showed haermorragic contusion.

8. Harm and Grievous harm is defined under **section 4** of the ***Penal Code*** as follows;

   *"**grievous harm"** means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.*

   ***"harm"** means any bodily hurt, disease or disorder whether permanent or temporary.*

9. The complainant suffered serious head injuries. A skull fracture is an injury that, *"seriously injures … health."* I am therefore satisfied from the evidence that the injuries sustained by PW 1 fell within the definition of grievous harm.

10. The appellant also appeals on the ground that the learned magistrate did not record the language in which the proceedings were conducted although the appellant had at the time of the plea stated that he understands *Dholuo*. In ***John Kamau Githuku & Another v Republic*** **CA Criminal Appeal No. 229 of 2008 [2011]eKLR**, the Court of Appeal held that where it was found that if the accused participates after taking of plea, it is indicative of him understanding the charges against him. Further in ***George Mbugua Thiong'o v Republic*** **Criminal Appeal No. 302 of 2007 [2013]eKLR** the Court held that;

    [F]or the court to nullify proceedings on account of ….[the] language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial.

11. I agree with the respondent this ground does not have any basis as the proceedings are clear that at all times the same court clerk who read to the accused the charges in *Dholuo* was present. The accused never raised the issue and he actively participated in the proceedings by cross-examining witnesses and giving his own unsworn statement.

12. As regards the sentence, the appellant contends that the sentence was excessive. Counsel for the appellant urged that according to the birth certificate the appellant was born on 16th June 1999 making his 16 years old at the time he committed the offence. Counsel therefore argued that he ought to have been treated as a child offender as provided under the ***Children Act***. Mr Oluoch, learned counsel for the respondent, rebuffed the evidence of the birth certificate contending that it was not part of the record and it could not have been admitted as evidence in the appeal unless an application for admission of fresh evidence was filed and allowed.

13. I am constrained to agree with the respondent that the appellant's birth certificate was not part of the record and could not be admitted unless the appellant complied with the provisions of **section 358** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** regarding the admission of fresh evidence on appeal. On the other hand , this court is alive to the fact that if must always act in the best interests of a child in accordance with **Article 52** of the ***Constitution*** and **section 4** of the ***Children Act***. I have looked at the birth certificate and I find as a fact that it was issued on 6th October 2015. This was after the conviction and sentence and also after the appeal was filed.

14. The issue of age was not raised at the trial court and during the sentencing phase. The learned magistrate called for a Probation Officer's report. According to that report, the appellant was aged 19 years. The report states that the appellant was born in the year 1996. In compiling the report the probation officer stated that he conducted interviews with the accused, area chief, police officers and several community members. The entire report is favourable to the appellant and if indeed the appellant was below 18 years this would have easily emerged from the interviews conducted. I therefore reject any suggestion that the appellant was a child. I also reject the birth certificate.

15. As to whether the sentence was excessive, I am alive to the general principle that the appellate court should only intervene in the sentence where the subordinate court disregarded a material fact, or considered irrelevant factor or that the sentence was manifestly harsh or excessive as to constitute an error of principle (see ***Ogolla s/o Owuora v R*** **[1954] EA 270** and ***Macharia v R*** **[2003] 2 EA 559**).

16. While the evidence is that the assault was deliberate and the resultant injuries serious, the sentence of 20 years imprisonment was on the higher side given the age of the accused, the fact that he was a first offender and that he was remorseful. I have also taken into account sentences imposed in similar circumstances and the need to ensure consistency in sentencing (see ***Steven Omondi v Republic*** **HB HCCRA No. 93 of 2014 [2014]eKLR,** ***John Kasya & Another v Republic*** **MKS HCCRA No. 169 & 182 of 2008 [2014]eKLR,** ***Violet Mulayi v Republic*** **KKG HCCRA No. 115 of 2005[2007]eKLR**). I therefore set aside the sentence and substitute it with a sentence of 5 years imprisonment.

17. Accordingly the conviction is affirmed. The sentence is reduced to 5 years imprisonment.

DATED and DELIVERED at HOMA BAY this 17th day of November 2015.

D.S. MAJANJA

JUDGE

Mr Okoth instructed by G. S. Okoth and Company Advocates for the appellant.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.