REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO 44 OF 2013

(Appeal from the original conviction and sentence by the Principal Magistrate (Linus Kassan, PM) in the Criminal Case No. 414 at the Wajir Senior Resident Magistrate's Court.)

ABDULLAHI MOHAMED SHABELLO……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGEMENT

Background

Abdullahi Mohamed Shabello, the appellant, was charged before the Wajir Senior Resident Magistrate's Court with causing grievous harm contrary to section 234 of the Penal Code. It was alleged that on 26th August 2012 at Baraza Park area in Wajir East District, Wajir County, unlawfully did maim Khalif Shalow Sarat. After taking the evidence of three witnesses for the prosecution and the evidence of the appellant, the trial magistrate found the charge proved beyond reasonable doubt, convicted and sentenced the appellant to five years imprisonment.

The facts

Khalif Shalow Sarat, PW2, was watching soccer on DSTV at Baraza Park in Wajir on 26th August 2012 when the appellant attacked him and stabbed him on the neck with a knife. The hall belonged to one Katoo and the time was midnight. The appellant is alleged to have entered the hall and snatch the groundnuts and the sugar from PW2 and told him to go outside. PW2 refused because he had paid for the DSTV. The appellant then attacked him and stabbed him on the neck. PW2 was assisted to hospital where he was admitted.

The injuries suffered by PW2 were confirmed by George Thiong'o the clinical officer, PW1, who told the court that PW2 was unconscious and had lost a lot of blood; that PW2 had to undergo blood transfusion and was admitted for three days; that PW2 had a deep cut on the posterior side of the neck. The degree of injury was classified as maim.

Petition of appeal

By a petition of appeal amended on 12th February 2014 the appellant has listed six grounds of appeal which I have summarized as follows:

i. The charge is defective.

ii. The mode of arrest was not established.
iii. The case was not investigated.
iv. The evidence is contradictory and inconsistent.
v. Crucial witnesses were left out.
vi. The language of the court is not recorded and there was no interpreter.
vii. The sentences ought to have run concurrently.

Appellant's submissions

The appellant has submitted that the charge does not indicate the nature of the offence and does not give the date the offence was reported and entered in the Occurrence Book and that the charge sheet does not indicate whether the offence was committed intentionally; that the investigating officer did not disclose how the appellant was arrested and by whom; that the complainant did not identify the assailant since he fell down unconscious; that Robo Hashim who is alleged to have been present was not summoned as a witness; the prosecution failed to produce Robo Hashim and Ashow Mohamed Yusuf as witnesses; that the doctor testified in English and there was no interpretation; that the appellant did not understand the proceedings and therefore could not cross examine the witnesses.

Respondent's submissions

The respondent has opposed this appeal. Learned state counsel has submitted that the charge has all the necessary particulars as to inform the appellant what he was charged with; that the charge was in compliance with section 134 of the Criminal Procedure Code; that the appellant understood the charges and was not prejudiced in any way; that if there are any defects, these are curable under section 382 of the Criminal Procedure Code.

It is further submitted that PW2 did not treat the appellant but had learned that he was admitted in hospital and besides, PW2 did not know who had stabbed the complainant; that the appellant is incorrectly analyzing the evidence; that the evidence of PW3 is clear as to who arrested the appellant; that the appellant was positively identified by the complainant as there was sufficient light; that the appellant was known to the complainant before the date in question and that no particular number of witnesses are required to prove a fact (**section 143 Evidence Act).**

Counsel further submitted that there are no contradictions in the evidence and if any exist, they do not go to the root of this case; the record of the lower court shows that Kiswahili was used. Counsel urged the court to enhance the sentence to life imprisonment because the trial magistrate imposed an illegal sentence under section 354 (3) of the Criminal Procedure Code.

Determination

I have critically read the charge sheet. It bears the OB No. OB26/30/8/12; Police Case No. 531/191/12 and date to Court 17/9/12. The charge is grievous harm the particulars are given. The appellant is misleading this court in alleging that these details are missing. In my view, the charge contains a statement of specific offence and necessary particulars for giving reasonable information as to the nature of the offence charged. The charge is drawn in compliance with section 134 of the Criminal Procedure Code.

In respect to the manner in which the appellant was arrested, Police Constable Raphael Mwaka, PW3, testified that on 28th August 2012 he learned that the complainant was admitted at Wajir District Hospital with serious injuries after having been stabbed. PW3 went to the hospital and confirmed that the complainant had a stab wound at the back of his neck. The complainant informed him that Shabello (the appellant) had stabbed him on 26th August 2012. PW3 told the court that he arrested the appellant at Wajir District Hospital where the appellant had been admitted following an assault. I find the allegation that the evidence does not show who arrested the appellant and how he was arrested without substance. I also find the allegation that no investigations were carried out without basis. The assault on the complainant was reported to the police after which PW3 visited the complainant in hospital. The

complainant informed him that the appellant had assaulted him. The appellant was arrested from hospital where he had been admitted. It was not a case that required other investigations other than to take down the complaint, trace and arrest the assailant, trace and record statement of witnesses and prefer charges against the assailant. This was done and therefore this allegation has no basis.

On the issue of contradictory evidence, the only witness who was at the scene is the complainant, PW2. He narrated how the appellant attacked him. The appellant was known to PW2 before the night of the attack. He was cross examined at length by the appellant but his evidence was not shaken. The other witnesses, the police officer, PW3 and the clinical officer, PW1, were not at the scene. PW3 confirms seeing stab wound on PW2's neck. PW1 clinically confirmed that PW2 had deep cut on the back of the neck and that he had lost a lot of blood leading to transfusion of blood. He also confirmed that PW2 was admitted in hospital for three days.

My careful examination and evaluation of this evidence reveals no contradictions or inconsistencies. PW1 admitted to finding the appellant admitted in hospital. He however testified that he did not treat the appellant. This ground has not basis.

On crucial witnesses being left out, I agree with learned counsel for the respondent that under section 143 of the Evidence Act no particular number of witnesses is required to prove a fact. The lower court was satisfied with the evidence of PW2 which he described as credible.

On my part, I have analyzed the evidence of PW2 and that of the appellant. He claims the complainant is the one who attacked him with others. He denied having been at the scene. I am alive to the fact that the evidence on what happened was given by a single witness. The record of the lower court indicates that the other witness was not traced and that he had been threated. These allegations were not proved but record shows one Ashow Mohamed Yussuf was bonded to attend court but failed. The prosecutor sought warrant of arrest against the witness but finally this witness could not be traced.

This court has cautioned itself on dangers involved in relying on evidence of a single witness. I did not have the benefit of observing PW2 testify but I will go by what the trial magistrate stated that PW2 seemed to be a credible witness. I have read his evidence carefully both in chief and in cross examination. I find nothing to make me doubt that he had fabricated the case against the appellant. He was cross examined in detail but he did not change his evidence or contradict himself. Having cautioned I hereby find the evidence of PW2 credible.

On the issue of the language of the court, I have read the record of the lower court. It shows that the charges were read and explained to the appellant in Kiswahili. PW1 testified in English but the cross examination was conducted in Kiswahili. The other witnesses spoke in Kiswahili. The language used by the appellant to testify is not indicated but this court has no reason to believe he used any other language other than Kiswahili. After the prosecutor closed his case, the trial magistrate explained the requirements of section 211 CPC to the appellant in Kiswahili. There is no basis in claiming that the language of the court was not recorded or that the appellant was not availed an interpreter.

I however note that the appellant told the court that he would give a sworn statement and call one Noor Abdirizak as a witness. On the day of his defence, he testified without taking oath and closed his case without calling his witness. The appellant has not raised any issue with this and therefore this court has not reason to doubt that he chose to testify without taking oath and to close his case without calling his witness.

On the sentence, the appellant is seeking that the sentence in Criminal Case No. 414 of 2010 ought to run concurrently with the sentence in Criminal Case No. 410 of 2010. In both cases the appellant faced similar charges of grievous harm but the offences were committed on different dates to two different complainants. In **Elias Abdi Osman v. Republic [2006] eKLR**, the court stated that:

> **"It has been repeatedly said that where a person commits more than one offence at the same time and in the same transaction, concurrent sentences of imprisonment should be**

imposed…… In the instance case, the complainants were assaulted by the appellant at the same time and at the same *locus in quo*. Accordingly the learned magistrate in sentencing the appellant on each count ought to have ordered that the sentences imposed do run concurrently". (See **Republic v. Sowedi Mukasa (1945) 13 EACA 97**).

Concurrent sentences are exclusively awarded for related offences (**see Musa S/O Bakari v. Republic (1968) HCD (Tanzania) No. 239**).

In this matter the offences were committed on two different dates to two different persons but are related in similarity. The appellant was awarded five years in each case and the trial magistrate ordered that the sentences should run consecutively. The learned state counsel has urged this court to enhance the sentence because the lower court made errors in sentencing.

The sentence under section 234 of the Penal Code is life imprisonment. In my view and going by decided cases on the issue, this is the maximum sentence and the court can give a lesser sentence.

The Court of Appeal in **Criminal Appeal No. 479 of 2007 Daniel Kyalo Muema v. R (2009) eKLR** cited with approval **Section 66 (1)** of the *Interpretation and General Provisions Act* (Cap 2 Laws of Kenya) which provides as follows:

"Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed".

Section 26 (2) and (3) of the Penal Code seems to capture the spirit of the above section when it provides:

"(2) Save as may be expressly provided by the law under which the offence concerned in punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term.

(3) A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment".

In view of this the trial magistrate is not in error in sentencing the appellant to five years imprisonment in this case and in Criminal Case No. 410 of 2012. The sentence is not harsh. I have no reason to interfere with it.

In conclusion, the appeal has not merit. The evidence proves that the appellant committed this offence as reasoned in this judgment. The appeal is hereby dismissed. It is so ordered.

Dated, signed and delivered on 7th April 2014.

S.N.MUTUKU

JUDGE