REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 4 OF 2014

BETWEEN

JOHN MBASA NYAKIMWI …….…...……... APPELLANT

AND

REPUBLIC …...…….…….. RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 124 of 2011 at Senior Resident Magistrate's Court at Kehancha, Hon. J Ndururi SRM dated on 15th December 2011)

JUDGMENT

1. In the subordinate court the appellant, **JOHN MBASA NYAKIMWI,** faced was charged with the offence of causing grievous harm contrary to **section 234** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The charge read follows:

   > *On 18th day of March 2011 at Gwikonge sub location in Kuria West District within Nyanza province (he) unlawfully did grievous harm to Rebecca Robi Nyakimwi by chopping off her left palm.*

2. He was tried, convicted and sentenced to 7 years in prison. He now appeals to this court on the following grounds as set out in the Petition of Appeal dated 22nd December 2011;

1. *The learned magistrate erred and misdirected himself in convicting the appellant on the charge of grievous harm when there was overwhelming evidence on the charge of affray.*
2. *The learned trial magistrate erred in law in convicting the appellant on the conflicting and contradicting evidence of (the) main prosecution witness on material aspects of the case.*
3. *The learned magistrate imposed a sentence which was manifestly harsh and excessive in the circumstances.*

3. During the hearing of the appeal, Mr. Soire, counsel for the appellant, abandoned ground 2 and argued ground 1 and 3. He submitted that there was overwhelming evidence that the complainant PW1 was injured and the totality of the evidence showed that the case arose from a land dispute and that the facts disclosed an offence of affray which should have been charged.

4. Ms Owenga, learned counsel for the State, supported the conviction on the ground that the evidence showed that PW1 was attacked and injured and that the facts constituting the offence

were proved beyond reasonable doubt.

5. As this is the first appeal, this court is enjoined to conduct an independent review of the evidence and reach an independent conclusion bearing in mind that it neither heard nor saw the witnesses testify (see ***Okeno v Republic*** **[1972] EA 32**).

6. The prosecution called 6 witnesses. PW1, the complainant, testified that on 18th March 2011 at about 7.30 AM she was in her shamba cultivating when the appellant came armed with a panga and cut off her left hand. He also cut her on the right hand and head. She started screaming attracting other people. PW2 recalled that he was at the shamba on that morning when the appellant came with a panga and cut PW1. He ran away screaming. PW4 recalled that on the fateful morning, she witnessed the appellant cut the complainant. She raised alarm and people came.

7. PW5 testified that he was at an adjourning shamba when he heard screams. He went there and found the appellant assaulting PW1. He had a jembe which he used to hit the appellant who ran away.

8. PW3, a clinical officer at Kuria District Hospital, confirmed that on 18th March 2011 he treated PW1 when she was brought to the hospital. He stated that the injuries were extensive and that he referred her to St Joseph Mission Hospital Migori for the amputated hand to be repaired. He confirmed that PW1 had a wound on the forehead, right side of the neck, soft tissue injuries on the right side of the chest and an amputated cut on the left hand with multiple cuts on the right hand. In the P3 form dated 29th March 2011, which he prepared, he assessed the injuries as "grievous harm."

9. PW6 the investigation officer recalled that PW2 and PW4 reported to Kehancha Police Station on 18th March 2011 at about 9.30 am that PW1 had been assaulted by the appellant and that she had been admitted to hospital. The accused later came to the police station to report that he had been assaulted by PW5. He investigated the complaint and later charged the appellant. He leant that PW5 injured the appellant while trying to rescue PW1.

10. The appellant was put on his defence and gave unsworn evidence. He testified that on 18th March 2011, he found PW2 and PW5 tilling his land. When he confronted them, he was hit with a panga. PW1 tried to separate them and in the process she was hit and fell down. He lost consciousness. He denied committing the offence. He stated that there was a land dispute.

11. From the evidence outlined above, it is clear that PW1 was assaulted by the appellant. The viscous attack was witnessed by PW2 and PW4. PW5 came and found the appellant assaulting PW1. The identity of the appellant and the offence were clearly proved by the prosecution and the learned magistrate was right to convict the appellant.

12. The injuries suffered by PW1 as a result of the attack were classified by PW3 as grievous. PW1's hand had to be amputated. The argument by the appellant that he ought to have been charged with affray cannot be entertained as the prosecution was able to prove the offence of causing grievous harm.

13. Furthermore, the discretion to prefer a charge is vested upon the Director of Public Prosecutions by **Article 157(6)(a)** of the Constitution. As long as there is sufficient evidence to prefer a charge and legal process is not being abused or the fundamental rights and freedoms of the person being threatened or violated, the court cannot interfere with that discretion. Where the charge is proved beyond reasonable doubt, the duty of the court is to convict the accused of the offence charged.

14. The first appellate court will only interfere with sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it

took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive (see ***Wanjema v Republic*** **[1971] EA 493**). The learned magistrate considered that the appellant was a first offender. He also considered that the act of the appellant led to the amputation of the complainant's hand. He imposed a sentence of seven years in prison.

15. I do not find any misdirection of the part of the learned magistrate. The attack by the appellant was totally unjustified. It was intentional, brutal and vicious in its nature. The maximum penalty for the offence prescribed under **section 234** of the ***Penal Code*** is life imprisonment. The sentence imposed is neither harsh nor excessive in the circumstances.

16. The conviction and sentence are affirmed. The appeal is dismissed.

DATED and DELIVERED at MIGORI this 15th August 2014

D.S. MAJANJA

JUDGE