IN THE HIGH COURT

AT MIGORI

CRIMINAL APPEAL NO. 13 OF 2014

(FORMERLY KISII HCCRA NO. 77 OF 2013)

BETWEEN

SAMMY TURUKA NEGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 682 of 2012

at Principal Magistrate's Court at Kehancha, Hon. A. P. Ndege, Ag PM dated on 18th July 2013)

JUDGMENT

1. SAMMY TURUKA NEGA 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 particulars of the charge were that on 8th November 2012 at Isebania Township in Kuria West District Migori County, he did grievous harm to JMM. He was convicted and sentenced to serve 5 years imprisonment.

2. In the Petition of Appeal dated 31st July 2013, the appellant challenges the conviction and sentence on the following grounds;

i. *The Learned Trial Magistrate erred in Law and fact in convicting the appellant despite material contradictions and inconsistencies in the prosecution's case.*
ii. *The Learned Trial Magistrate erred in Law and fact by convicting the Appellant for a charge of causing grievous harm contrary to section 234 of the Penal Code despite the medical evidence availed to the contrary.*
iii. *The Learned Trial Magistrate erred in Law and fact by allowing production of the medical evidence by another person other than the maker thereof without a reasonable excuse.*
iv. *The Learned Trial Magistrate erred in Law and fact by allowing production of a photocopy of Medical treatment records without any lawful excuse.*
v. *The Learned Trial Magistrate erred in Law and fact by failing to consider the discrepancies in the medical records produced and the evidence tendered by the complainant and hence arrived at a harsh and excess punishment.*
vi. *The Learned Trial Magistrate erred in Law and fact by casually downplaying the discrepancy in PW2's testimony whereas he was the only alleged eye witness to the alleged incident.*
vii. *The Learned Trial Magistrate erred by handing down a sentence that was harsh and excessive in the circumstances.*

3. In his oral submissions, Mr. Abisai, counsel for the appellant, supplemented the grounds of appeal by urging that the evidence, particularly that of the injuries sustained by the complainant, was inconsistent and that the evidence of PW4, the clinical officer, could not be relied upon as he was not the medical officer who examined the complaint, PW1. Counsel argued that the medical report, the P3 form, could not be produced under **section 33** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** as the basis for its production had not been established. Counsel relied on the case of ***Boaz Owiti Okoth & Another v Republic*** **Homa Bay HCCR Appeal No. 3 of 2013[2014] eKLR** to support this proposition. He urged the Court to set aside the conviction on the basis of substantial contradictions to the evidence.

4. Ms. Owenga, counsel for the State, supported the appeal on the ground that the evidence of identification was sufficient to sustain the conviction. She noted that the appellant was known to PW1 and his evidence regarding the injuries was clear and precise. She submitted that the sentence was lawful and should be upheld.

5. The role of the first appellate Court is firmly established by precedent. Its duty is to examine and evaluate the facts and reach an independent determination having regard to the fact that it neither heard nor saw the witnesses testify (see ***Okeno v Republic*** **[1972] EA 32**).

6. The prosecution marshaled four witnesses to prove its case. PW1, the complainant, stated that he knew the appellant as they dealt in potatoes. He recalled that on 8th January 2012 at about 10.30 pm, the appellant called him to come to Breaking News Bar at Sirare where he was. When he reached there, the watchman opened the gate and appellant suddenly attacked him with a knife. He was injured in the forehead, chest and abdomen. He thereafter went to Isebania Police Station and reported the incident before proceeding to Isebania Sub-District Hospital. He was later issued with a P3 form.

7. PW2, recalled that on 8th January 2012, he was drinking with the appellant amongst other people at Breaking News Bar. He heard the appellant call PWI on phone to come to the Bar. A little while later, he heard screams. He went outside and found the appellant assaulting PW 1. He stated that he restrained the appellant from further assaulting PW 1. He stated that PW 1 was stabbed.

8. PW3, the investigating officer, stated that PW 1 reported the incident on 8th November 2011 at about 11.00 pm and returned on 19th November 2011. The appellant showed him the scar that dissected his body from the fore head to the abdomen. After completing investigations he charged the appellant.

9. PW4, a clinical officer, was called to produce the medical report, the P3 form. He stated that the PWI was treated by a doctor called 'Charles' who was on transfer. He produced the P3 form on the doctor's behalf.

10. The appellant elected to give sworn evidence when put on his defence. He admitted that he knew the appellant and that on the material day, after buying potatoes from the PW 1's brother, he organized to make payment in cash when he met PW 1 at Sunset Hotel, Sirare. He stated that PW 1 later called him at about 4 pm and they met at Chidira Bar where they drank some beer. He left at 5.00 pm.

11. Like the learned Magistrate, I find that there is sufficient evidence to demonstrate that PW 1 knew the appellant and that appellant assaulted PW 1. PW 2 witnessed the assault. PW 1 also immediately reported the assault which is confirmed by PW 3 thereby lending credence to PW 1's testimony. The defence that he was not present at Breaking News Bar is not credible. At least he admits he met PW 1 on the material date.

12. The key issue is whether, the complainant was injured as alleged. The evidence of injury consists of the testimony of PW 1, PW 2, PW 3 and the medical evidence of PW 4. The appellant's case is that evidence of injuries was inconsistent and that the medical report could not be relied upon.

13. PW 1 stated he was stabbed on the forehead, chest and abdomen. PW 2 stated that PW 1 was stabbed

although he did not state the extent of the injuries. PW 3 stated that he saw scars which dissected the complainant's body from the forehead to the abdomen. I do not find this evidence inconsistent as to the injuries. I find that the appellant was injured on the forehead, chest and abdomen.

14. I now turn to the issue of the treatment notes and P3 form. I agree with the appellant that the same could not be admitted in evidence under the provisions of **section 33** of the ***Evidence Act*** as the Learned Magistrate purported to do. In ***Boaz Owiti Okoth & Another v Republic*** **(supra)** the Court dealt with the issue of admissibility of documents without calling the maker as follows; *"[18] In order to admit a document without calling the maker under* ***section 33*** *of the* ***Evidence Act****, the prosecution must establish the conditions precedent outlined in the section, that is, the maker of the document is dead, cannot be found, is incapable of giving evidence or whose attendance cannot be procured without great delay or expense. I would hasten to add that admissibility is a threshold issue that must be determined before the document is admitted. It was therefore wrong for the learned magistrate to hold that issues of admission could be addressed or cured by cross-examination."*

15. Where the medical report is not admitted in evidence, it does not follow that the appellant is entitled to an acquittal. The issue to be proved is whether the complainant sustained injuries as a result of the assault. In ***John Oketch Abongo v Republic*** **KSM CA. Criminal Appeal NO. 4 of 2000 [2000]eKLR**, the Court of appeal dealt with this issue as follows; *"Whether or not grievous harm or any other harm is disclosed must be a matter for the Court to find from the evidence led and guided by the definition in the Penal Code. A Court will be assisted by medical evidence given in coming to the conclusion on the nature and classification of the injury. In many cases the Courts have accepted and gone by the findings and opinions in the medical evidence. But, in appropriate circumstances, the Court is at liberty to form its own opinion, having regard to the evidence before it as to the nature and classification of the injury."*

16. Even in the absence of the medical evidence, the fact that PW 1 was injured by the appellant was proved by the testimony of the witnesses. The lack of medical evidence only deprives the court of the opportunity of judging the nature and extent the injuries. PW 1, PW 2 and PW 3 did not describe, in detail, the nature and extent of injuries. It appears that the injuries were not so severe as the appellant was able to report the assault to police station immediately after the incident then proceed to hospital. I would classify the injury as ***"harm***" which in terms of **section 4** of the ***Penal Code*** means, *"bodily hurt, disease or disorder whether permanent or temporary."*

17. Accordingly I reduce the charge to one of assault causing actual bodily harm contrary to **section 251** of the ***Penal Code*** and convict him accordingly.

18. The maximum sentence under the law is five years imprisonment. From the evidence the assault was unprovoked. The appellant used a weapon. Having considered the circumstances of the offence, I sentence the appellant to 18 months imprisonment.

DATED and **DELIVERED** at **MIGORI** this 23rd day of September 2014.

D.S. MAJANJA

JUDGE

Mr Abisai instructed by Abisai and Company Advocates for the appellant.

Ms Owenga, Senior Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.