



**IN THE HIGH COURT AT MIGORI**

**CRIMINAL APPEAL NO. 58 OF 2014**

**(FORMERLY KISII HCCRA NO. 62 OF 2013)**

**BETWEEN**

**GEORGE MARWA MWIKABE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No. 52 of 2012 at Principal Magistrate's Court at Kehancha, Hon. A. P. Ndege, Ag PM dated on 9<sup>th</sup> July 2013)***

**JUDGMENT**

1. **GEORGE MARWA MWIKABE** was charged with the offence of causing actual bodily harm contrary to **section 251** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the charge were that on 8<sup>th</sup> December 2011 at [Particulars Withheld] in Kuria East District, Migori County, he unlawfully assaulted MN thereby occasioning her actual bodily harm. He was convicted and sentenced to serve 5 years imprisonment.
2. In the petition of appeal dated filed on 19<sup>th</sup> July 2013, the appellant contests the conviction and sentence on the ground that there was no proper investigation, that the complaint was motivated by a grudge as the complainant was his former wife, that there were contradictions in the evidence and that the prosecution did not prove the case against him.
3. Ms Owenga, counsel for the State, supported the conviction on the ground that there was sufficient to sustain the conviction. She submitted that the sentence was lawful and should be upheld.
4. 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***).
5. The prosecution marshaled 5 witnesses to prove its case. PW1, MNM, was at some point the appellant's wife. She testified that on 8<sup>th</sup> December 2011 she was fetching vegetables from the garden when she emerged from the nearby maize farm armed with a stick running towards her. She started running while screaming but the appellant caught up with and beat her with a stick till it broke. He also slapped and kicked her. She fell down. She suffered bruises on the right shoulder and right knee. She testified that PW 2 came and called a boda boda which took her to Ntitaru Hospital where she was treated and she later reported the matter at Ntitaru Police Station. PW 2, PW 1's sister in law, was in her house and at about 10.00 am she heard some screams. When she went out of the gate she saw the appellant going away. She identified the person crying as PW 1.

- She found her lying down next to her place. PW 1 told her that the appellant had assaulted her and she had been injured on the right shoulder, elbow and lower limbs. She called her in-law who came and took PW 1 to Ntitaru Hospital while she went to report to Ntitaru Police Station.
6. PW 3, a clinical officer at Ntitaru Hospital, attended to PW 1 on 8<sup>th</sup> December 2011. He prepared treatment notes. When he examined her she did not have torn or stained clothes. He noted that PW 1 has a swollen right shoulder joint and some bruises. He confirmed that he filled the P3 form after 5 days on 13<sup>th</sup> December 2011.
  7. PW 4, an administration police officer arrested the appellant on 28<sup>th</sup> January 2012 at around 7 am after being given the arrest order from Ntitaru Police Station. He denied that he had a grudge with the appellant although he had arrested the appellant before. PW 5, a police constable from Ntitaru Police Station, testified that on 8<sup>th</sup> December 2011 at about 4.30, PW 1 came to the police station and reported that she was assaulted by the appellant. He carried out investigations, issued the P3 form and caused the appellant to be arrested and charged.
  8. The appellant elected to give sworn evidence when put on his defence. He stated that PW 1 was his wife at some point and this was the second time she was framing him with charges in order to destroy his life and cripple him financially. DW2, an AP officer, recalled that on 28<sup>th</sup> December 2013, he woke up at 3.00 am to go and arrest the appellant. He was in the company of another officer and they arrested him and took him to Ntitaru Police Station.
  9. The issue before the court was whether the appellant assaulted PW 1. The testimony of PW 1 was clear as to what happened on the material date. The incident happened in broad daylight and she knew the appellant. Her testimony was corroborated by PW 2 who heard her scream and who saw the appellant running away. The injuries sustained by PW 1 were confirmed by PW 3 who treated her on the same day and issued the P3 form. The report of the assault was made to PW 5 on the day of the assault.
  10. The appellant's defence to the charge was that complaint was as a result of a grudge. It is apparent from the evidence that the appellant and PW 1 did have past problems with PW 1 notwithstanding these problems, the evidence of the prosecution consistent and credible and proved that the appellant assaulted PW 1.
  11. The appellant submits that the prosecution evidence was inconsistent and full of contradictions and exaggerations but as I have outlined above the material evidence by the prosecution proved the offence. Any contradictions were minor and not material to the prosecution case.
  12. As regards the sentence, the maximum sentence for causing actual bodily harm contrary to **section 251** of the **Penal Code** is five years imprisonment. In order to impose the maximum sentence, learned magistrate relied on the fact that the appellant was facing the third conviction, that the offence related to the same issue, that is the marriage between him and the appellant, that the complainant deserved a peaceful life, that the accused did not demonstrate remorse even after conviction and the fact that gender based violence was rampant within the region.
  13. The imposition of a sentence is an exercise of judicial discretion by the trial court and that the appellate court should only interfere if the trial court failed to take into account relevant factors, took into account an irrelevant factors or that in all circumstances the sentence was harsh and excessive (see **Wanjema v R [1971] EA 493**).
  14. In this case, the learned magistrate relied on three previous convictions to support the sentence. However, the convictions were not proved by providing the relevant records to show that the appellant was convicted. I adopt the sentiments of Lesiit J., in **Abdi Ahmed v Republic Meru HCCA No. 87 of 2010 (Unreported)** where she stated;

*With due respect to the learned magistrate the way to receive a previous record of an accused person was not followed. In such a case the prosecution is required to adduce proof of previous conviction by producing a certificate from the Central Bureau of Criminal Records as proof of the conviction. In the bare minimum the prosecution could provide the case number and the court in which the accused person was convicted and if possible cause it to be availed to the court. In either case the court is expected to put the record to the accused person and require him to admit or deny the same. In the instant case neither a certificate of previous records nor a conviction nor the court and criminal case number in which the Appellant was convicted were given. The prosecution did not therefore establish that the Appellant was ever convicted of any offence prior to the one on record.”*

15.A previous conviction can only be proved by a proper record, nothing else can suffice. In the circumstances, the sentence of 5 years cannot be supported. The appellant must therefore be treated as a first offender. I however note that the assault was unprovoked and there was evidence that the appellant has ungovernable tempers and has in the past assaulted the complainant. The appellant deserved a custodial sentence. I therefore set aside the term of five years imprisonment and reduce the same to 2 years imprisonment.

16.I affirm the conviction. The appeal succeeds only to the extent that the sentence is reduced to 2 years imprisonment. The balance of the term shall however be served under community service. The appellant shall therefore be set free unless otherwise lawfully held.

**DATED and DELIVERED at MIGORI this 21<sup>st</sup> day of November 2014.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

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