



IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 67 OF 2014

(FORMERLY KISII HCCRA NO. 44 OF 2014)

BETWEEN

JOSEPH MAHENDE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 117 of 2013 at Principal Magistrate's Court at Kehancha, Hon. C. M. Kamau, Ag SRM dated on 24th April 2014)

JUDGMENT

1. **JOSEPH MAHENDE** 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 28th August 2012 at Taranganya area in Kuria West District within Migori County, he did grievous harm to PM by fracturing his skull. He was convicted and sentenced to serve 20 years imprisonment.
2. In the petition of appeal lodged on 16th May 2014, the appellant challenges the conviction and sentence on several grounds which may be summarized as follows; that the learned magistrate medical evidence erred by convicting the appellant without considering the medical history of the complainant, the learned magistrate failed to take into account the medical findings in light of the length and lapse of time between the incident, the time of filing the medical report and the age of injuries which caused a miscarriage of justice, that the learned magistrate failed to consider the defence of alibi and that he failed to afford the appellant the opportunity to call his witnesses.
3. Ms Owenga, counsel for the State, supported the appeal on the ground that the evidence was sufficient to sustain the conviction. She noted that the appellant was known to PW 1 and his evidence regarding the injuries was clear and precise. 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 6 witnesses to prove its case. PW 1, the complainant, testified that on 28th August 2012 at around 10.00 am he was assaulted by the appellant who is his uncle. The appellant had accused him of burning charcoal. He was beaten using a fimbo and as a result he suffered head injuries for which he was treated at various hospitals. The learned magistrate noted

that at the time of the hearing he could only walk with assistance and his cognitive abilities were impaired.

6. PW 2 who was PW 1's father witnessed the assault. He stated that he saw the appellant and PW 1 quarrelling. The appellant hit PW 1 with a stick on the head. PW 3, a brother to PW 2, also witnessed the assault on that morning. He was attracted by the noise as he was coming from church and he saw the appellant, who was armed with a fimbo, hit the PW 1 on the head several times.
7. PW 4 testified that he was at Kehancha Police Station on 30th April 2013 when PW 2 came to follow up a case he had reported on 16th April 2013. He carried out investigation and issued an arrest order for the appellant on 30th April 2013. PW 6 testified that she was the police officer who effected the arrest order issued by PW 4 and arrested him on 1st May 2013.
8. PW 5, a registered clinical officer, testified that he examined PW 1 when he first came to hospital on 29th August 2012 for the first time. At the material time he had head injuries. He ordered a CT Scan. He saw PW 1 on 28th January 2012 examined him and treated him. He produced a P3 form which was filled out and signed on 28th April 2013.
9. The appellant elected to give an unsworn statement when put on his defence. He stated that on the date he was alleged to have assaulted the complainant he was not at home. He further stated he did not get along with PW2 and PW 3 hence the charges against him were fabricated as the brothers wanted his land.
10. The appellant called two witnesses. DW 2, his wife, stated that the appellant, PW 1 and PW 2 did not get along well and that the charges were fabricated. She said her husband was not present when the assault took place. In cross-examination the appellant stated that PW 1 was normal and started to get sick.
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 and PW 3 witnessed the assault. They also positively recognized the appellant as they knew him and the incident took place at day time. They all confirmed that the PW 1 was hit on the head with a fimbo.
12. The appellant submits that the trial court did not take into account the time the offence was committed, when it was reported and the time the P3 form was prepared which all go to support his case that the case against him was fabricated. According to the P3 Form, the report of the offence was made on 28th August 2012. PW 5 first treated the PW 1 on 29th August 2012, a day after the incident and he confirmed that he had suffered head injuries. This is supported by the initial treatment notes. These all point to and support the prosecution case that the assault took place on 28th August 2012. The preparation of the P3 form by PW 5 after 8 months is clearly accounted for by the fact that PW 1 had been undergoing treatment.
13. In light of the prosecution evidence, the appellant's defence of alibi could not stand scrutiny. His defence was very general; he did not state where he was on the date and time when the assault took place. DW 2, his wife did not state where the appellant was on the material date and time. The contention that he was not given the opportunity to call further witnesses is not borne out by the proceedings which show that he was given the opportunity to call his witnesses. After DW 2 testified he closed his case.
14. Although, the appellant stated in his defence that the case against him was fabricated as a result of a land dispute, he did not put any question to PW 2 and PW 3 to suggest that there was a land dispute and that the case was fabricated when given an opportunity to cross-examine them. I therefore, find that the charge against the appellant was not fabricated.

15. Finally, I am satisfied the injuries suffered by the appellant were as a result of an assault by the appellant. The assault led to severe head trauma which caused PW 1 to undergo treatment at various hospitals. There is no evidence that the appellant suffered from a previous ailment. The appellant did not put any questions to PW 2 and PW 3 to suggest that PW 1 suffered from an ailment before the assault. The charge sheet stated that the complainant sustained a skull fracture. However, the evidence on PW 5 does not disclose that he sustained a fracture. I do not think the failure to prove a fracture of the skull was fatal to the charge as it is an error curable under **section 382** of the **Criminal Procedure Code** which provides;

382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

16. The injuries sustained by the complainant were classified by PW 5 as grievous harm and the appellant was properly convicted.

17. As regards the sentence, the maximum sentence under the law is life imprisonment. In his sentencing notes the learned magistrate noted that the injury inflicted was serious as to suggest that the assault was aggravated and which resulted in health complication for the complainant. That even though the other members of the family were ready for reconciliation, PW 2 was not prepared to forgive him. He also stated that the circumstances required a deterrent sentence.

18. From the evidence, I note that PW 2 and PW 3 were involved in a quarrel. This is a factor that ought to have taken into account as a mitigating factor. In the result I reduce the sentence to 15 years imprisonment. Save to that extent, the conviction is affirmed and the appeal is dismissed.

DATED and DELIVERED at MIGORI this 21st 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.