REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 318 OF 2013

CONSOLIDATED WITH

CRIMINAL APPEAL NOS. 319, 320 AND 321 OF 2013

KILONZI THOMAS NGUI.....1ST APPELLANT

STEPHEN BWANA KILONZI.....2ND APPELLANT

SILVESTER KINYALILI KILONZO.....3RD APPELLANT

JAMES MWEMA MUTINDA.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Senior

Principal Magistrate's Court Criminal Case No.187 of 2012 by

Hon. A. G. Kibiru PM on 21/10/2013)

J U D G M E N T

1. Kilonzi Thomas Ngui, Stephen Bwana Kilonzi, Sylvester Kinyalili Kilonzo, James Mwema Mutinda hereafter; the 1st, 2nd, 3rd and 4th appellants respectively were jointly charged with the offence of causing grievous harm contrary to **Section 234** of the **Penal Code**. Particulars of the offence being that on the **22nd** day of **March 2012** at about **7.00 a.m.** at **Kunda Kindu stage**, in **Kitui County**, jointly did grievous harm to **Stephen Nthambu Mutisya**.

2. Having denied the charge, the appellants were tried, convicted and each sentenced to ten (**10) years imprisonment.**

3. Being aggrieved by the conviction and sentence they appealed on grounds that the learned trial magistrate erred in law when: he arrived at a finding that the prosecution had proved the case when evidence on record does not support such a finding; he dismissed the appellant's defence as a mere denial; he admitted the doctor's evidence without subjecting it to judicial test; he failed to determine the issue of law in his judgment; he failed to follow procedure that has emerged through custom and usage in criminal

trials, which error and/or defect in procedure prejudiced the appellant; he relied on the prosecution's discredited, incredible and contradictory evidence to convict the appellants; and the sentence meted out was excessive in the circumstances of the case.

4. The facts of the case were that, the 1st appellant is a grandson to PW1 **Stephen Nthambu Mutisya,** the complainant, while the 2nd, 3rd and 4th appellants are his nephews. There was a funeral at their home. On the **22nd March 2012** after the burial the appellants accused the complainant of being a witch (warlock). They compelled him to **Mutomo** where he was to take an oath **(ngata)**. They went to **Kunda Kindu** stage. PW1 excused himself to have his cell phone charged. After a while as he picked his cell phone the 1st appellant held his coat from behind accusing him of wanting to run away. As he turned the 3rd appellant hit him with a fist on the chin and kicked him on the chest. He fell down. The 2nd appellant hit his mouth with an object. He lost **four (4)** teeth. The rest joined them and assaulted him. He was rescued by PW2, **Henry Mwanzia Mutua** and PW3, **John Musila Musyoki** who found the appellants assaulting him. He reported the matter to the police. He was issued with a P3 form. He sought treatment at **Kitui District Hospital.** The P3 form was filled. He returned it to the police station. The appellants who had been arrested were charged.

5. When put on their defence the appellants denied the charges. The 1st appellant stated that after the burial they had a family meeting. The complainant who was the master of ceremony declared that he required the 2nd appellant to take an oath (**Ngata).** The 3rd and 4th appellants were to escort him. On arrival at Kitui they missed a motor-vehicle. PW1 rang home asking for more money. He was entrusted with the money which he delivered to the complainant. He left with another. All over a sudden he heard screams. He went back to find the complainant being beaten by a mob.

6. The 2nd appellant stated that the burial was of his eldest child. He was accused of having caused the death of the child. PW1 told his family that he was to take an oath **(Ngata).** He was taken to **Kunda Kindu.** At 6.30 a.m. he was made to board a motor-vehicle. The complainant ran way. An hour later he was taken back to the motor-vehicle having been assaulted.

7. The 3rd appellant stated that he was identified by the complainant to escort the 2nd appellant to take an oath. After the complainant caused more money to be availed, they entered the motor-vehicle. PW1 ran away. Members of public chased after him. They rescued him.

8. The 4th appellant said he was sent to take money that was required. PW1 attempted to run away. He was beaten up. He acted by rescuing him.

9. The appeal was canvassed by way of written submissions. I have considered evidence adduced at trial and rival submissions of the defence and state counsels.

10. This being the first appellate court, its duty is to subject evidence on record to a fresh review and scrutiny and come to its own conclusions bearing in mind, however, that it did not see or hear witnesses testify. (***See Okeno versus Republic [1972] E.A. 32).***

11. It is argued that the injuries indicated on the P3 form did not amount to grievous harm, therefore, it was improper for the court to convict the appellants of the offence as charged. The complainant PW1 stated that he was hit on the mouth and he lost four teeth (one of them was produced in evidence.) PW5 **Dr. Patrick Mutuku** examined him at the stage of filling the P3 form. He relied on a treatment card that was also adduced in evidence (Exhibit 2). He stated that the complainant had sustained an injury on the left eye, the left sub-orbital region was swollen, the upper lip of his mouth was swollen and four (4) frontal teeth had come off – they were missing from the upper jaw. His neck was painful and he had a swollen forearm. He assessed the injuries sustained as maim.

12. Section 4 of the **Penal Code** describes grievous harm as:-

"means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense".

13. The complainant having lost four teeth deprived him of the use of the same; he was disfigured permanently. This was indeed grievous harm.

14. The court was asked to interrogate entries on the treatment card and reach a conclusion that the assault was alleged to have been committed some **30 days** before the commission thereof. The last entry on the card having been indicated as dated **23rd February 2012.** A perusal of page 1 of the medical card shows that it was dated **23rd March 2012.** There is a stamp impression of the date impressed thereon. This means that the patient (complainant PW1) was seen at **Kitui District Hospital** on the **23rd March 2012.** The only logical inference that can be drawn is that the author of the last entry made an error.

15. It is argued that the age of injuries sustained was indicated as 1½ hours at the time of filling the P3 form on the **10th April 2012.** This was a suggestion that the injuries were sustained on the **10th April 2012.** This would have prompted the trial magistrate to give the appellants a benefit of doubt.

16. PW5 relied upon treatment notes made on the **23rd March 2012.** Looking at the content of the medical card the history given was that the complainant was assaulted

'by persons known to him today at around 7.00 a.m. in Kunda Kindu market..."

The issue was not raised at trial to enable the witness clarify the same but it is clearly indicated reference was made to the treatment notes which are specific as to the time the injury was sustained.

17. The evidence adduced by the prosecution that the complainant was assaulted on the **22nd** day **of March 2012** at about 7.00 a.m. is not challenged by the defence. The appellants admitted that indeed the complainant was assaulted but they denied having been the assailants. The learned trial magistrate therefore did not misdirect himself by reaching a finding that indeed the complainant was assaulted. Although forensic evidence was not adduced to prove that the tooth identified in court is indeed the one the complainant lost, evidence adduced that he lost **four (4) teeth** as a result of the thorough beating is not challenged.

18. The court, therefore, has to address the issue whether the appellants herein were the complainant's assailants.

19. The complainant was a relative of the appellants. These were persons well known to him. He described what each one of them did. His evidence was corroborated by that of PW2 and PW3. PW2 confirmed that he indeed found the complainant having been injured but he saw the 2nd and 4th appellants "***pulling him into the motor-vehicle".*** PW3 saw people assaulting the complainant. He stated thus:

"I saw...Accused 3(3rd Appellant) hit PW1 with a boot. Accused 4 (4th appellant) and accused 5 were the ones who tore PW1's Bible...Accused 1 and 2 were holding PW1's hands and the three accuseds were beating him. ...Accused 3 kicked PW1 on the mouth with a boot as he tried to make a call telling him it was not time for calls."

20. It was alleged that it was the complainant who instigated people to have the 2nd appellant take a traditional oath as opposed to his allegation that he was being compelled to do so. In dismissing the defence the learned trial magistrate stated that the evidence adduced could not add up to the allegations.

21. A re-consideration of the events that unfolded would suggest that the appellants herein were forcing the complainant into doing some act. When he tried to escape from them by alleging that he was charging his cell phone they moved to compel him to reach their ultimate destination. This was doing an unlawful act and in the process they developed a common intention of assaulting him which resulted into

his sustaining grievous harm. Therefore, although only one of them kicked him whereby his teeth came out, all of them having hit him were deemed to have occasioned the injury he sustained of maim. ***(See Section 21 of the Penal Code.)***

22. In the result, it is evident that evidence adduced by the prosecution was sufficient to prove the case against all the four (4) appellants. I, therefore, confirm the conviction.

23. On sentence meted out, it is settled law that an appellate court will not interfere with sentence of a trial court unless there is an error in principle made by the court (**See Kamya Johnson Wavamuno versus Uganda, Criminal Appeal No. 16 of 2000).** The appellants were sentenced to **10 years imprisonment.**

24. A trial court would be expected to consider the seriousness of the offence, the personal circumstances of the offender and the purpose of the sentence imposed. In mitigation the appellants 2 – 4 stated that they had dependants. It was only the 1st appellant who was not remorseful. He had nothing to state. The court ought to have considered the personal circumstances of the 2nd appellant who had just buried a child and the fact that the co-appellants must have empathized with him leading to the commission of the offence. This would have even called for a non-custodial sentence. In the premises I find reason to interfere with the sentences imposed which was excessive in the circumstances. I, therefore, alter the sentence imposed by setting it aside. The appellants have been in jail for a period of **fourteen months**. I reduce the sentence to the term served.

25. It is so ordered.

DATED, SIGNED and **DELIVERED** at **KITUI** this **10TH** day of **DECEMBER, 2014.**

L.N. MUTENDE

JUDGE