REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.72 OF 2011

JOHN WAWERU WANJOHI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(From original conviction and sentence in CMCR Case No.225 of 2010 – a decision

by B. KITUYI, Resident Magistrate)

JUDGMENT

The appellant JOHN WAWERU WANJOHI was convicted on a charge of grievous harm contrary to **Section 234 Penal Code** and sentenced to life imprisonment.

The case against him was that on 24/12/2009 at KIBENDERA village in Nyandarua District, Central Province, he did grievous harm to Hannah Wangare Wainaina.

The appellant denied the offence and prosecution called a total of 7 witnesses whilst appellant was the only defence witness.

The complainant **A W (PW1)** told the trial court that the appellant was her husband, having married in 1999, but as of 24/12/2009, they had separated. She was on her way to the market at about 5.00 a.m. when the appellant emerged from the bushes, carrying a panga in his left hand. He cut her on the face and nose, leaving a big scar on both sites. At the time of the incident PW1 was accompanied by two children i.e., her son D and her neighbour' son, S. As a consequence, she lost three teeth and had 30 stitches sutured on the injured site. All her upper teeth became loose and she was admitted at Nakuru Provincial General Hospital for a week. She did not know the reason for the attack.

On cross-examination PW1 stated that there was little light at the time of attack, as she was going to the market early. The appellant first spoke to the children then spoke to PW1 telling her he would take her to hospital. She further stated that appellant had been to her house on 23/12/2009, and knew that she would be going to market the next day. She had chased him away on the evening of 23/12/2009. Apparently from 22/12/2009 the appellant had been going to PW1 mother's house appealing for a reunion but PW1 rejected that overture.

Samson Gatonya (PW2) who had accompanied PW1 that early morning confirmed that appellant suddenly appeared from the bushes with a panga and cut PW1 on the face. He heard the appellant speaking, telling PW1 to go to hospital. PW2 knew the appellant very well because he was a neighbour.

He clarified to court that:-

> **"It was his voice that make (sic) me recognise it was him even though it was dark."**

The other prosecution witness D (PW3) aged 10 gave similar evidence to PW1, PW3. He confirmed that:-

> **"We reached the bushes, then suddenly I saw my father, we walked with him a little then suddenly I saw he had cut my mother with a panga on the face."**

According to PW3 there was some moonlight and he could see that the appellant had a panga in his hand. The appellant then said he wanted to take PW1 to hospital but she refused. On cross-examination he denied suggestions that the appellant spent the night in his mother's (PW1) house.

PW4 (John Ndungu Muia) was woken up from his sleep at 5.30 a.m. and informed him that a lady had been cut at the gate. His house is near the road. He went to the gate and found PW1 lying down. PW3 told him that his father was behind the mischief and PW3 noticed that she was bleeding a lot on her face which had a deep wound.

PW5 A N (PW1's mother) told the trial magistrate that appellant had a troubled marriage with her daughter. On 24/12/2009, at about 6.00 a.m. PW2 went to her house and informed her that PW1 was being killed. She accompanied PW2 to the scene where he had left PW1 and found her surrounded by many people – she had a cut on her face and PW5 was informed the appellant was the culprit. It was her evidence that for the 10 years she had known appellant, he and PW1 were perpetually fighting, separating then re-uniting.

P.C. Peter Owino (PW6) who arrested appellant from the group of people who brought him recovered a panga and sword from him which the crowd handed over to him saying appellant had them.

PW7 (Isaac Gitonga) is the clinical officer who examined PW1 and filled her P3 form. He assessed degree of injury as harm because her teeth were shaking and she had a deep cut measuring about 3cm. PW7 was of the opinion that the probable weapon used to inflict the injuries was a sharp object.

In his sworn defence appellant claimed to have left the house on 24/12/2012 early in the morning using a bicycle. He wanted to check on some land they had cultivated in Nyahururu. He never met the complainant thereafter and was surprised to be confronted on 10/1/2010; by his brother and PW1 claiming he had inflicted injuries on the former.

He maintained that he had been living with the complainant and only left her that morning of 24/12/2009. He denied having quarrelled with her. He also disowned the weapons which were presented to police as the ones likely to have been used in the attack, saying they belonged to one Paul Waweru Ndungu.

The trial magistrate found that indeed PW1 had been injured and rejected the appellant's alibi defence saying it was too weak because he had never raised it during cross-examination of all the prosecution witnesses. What is more, 3 people saw him injuring PW1, one of them being his own son.

The appellant challenges the findings on grounds that:-

1. The charge sheet was defective.

2. The evidence adduced was insufficient, uncorroborated and PW1's evidence was contradicting.

3. Hid defence was rejected without any cogent reason.

4. The sentence was harsh and severe.

5. He was kept in custody for over 24 hours.

In his written submissions, the appellant contends that the charge sheet was defective because the particulars referred to HWW and yet in her particulars of address on the same charge sheet she is referred to as HWW and the court record referred to AW

Miss Karoki on behalf of the State submitted that the variance in names was immaterial is easily curable under **Section 382 Criminal Procedure Code** and caused no prejudice to the appellant.

Section 382 Criminal Procedure Code provides as follows:-

> **"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 on 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 or justice.**
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> **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."**

Of significance is the fact that the same individual who is referred to by the different names maintained one status – that she had been married to the appellant – so they could have been no mistaking as to who the reference was being made to both in the charge sheet and evidence of the witnesses.

My finding on this limb is that the defect referred to does not go to the root of the matter and occasion no prejudice to the appellant. It is indeed curable under Section 382 Criminal Procedure Code.

The appellant also submits that the evidence by prosecution witnesses was inconsistent and lacked corroboration. This he bases on the evidence of PW1 who said that after the attack, she went into the house and slept, yet both PW3 and PW4 say PW1 slept at the gate and even PW5 said she found PW1 lying at the gate.

Another contradiction is that whereas PW1 claimed to have been taken to hospital using a motor vehicle, all the other witnesses said she was carried on a motorcycle.

Further that whereas PW1 claimed to have had 30 stitches on the injury site, the clinical officer made no such reference, saying she received blood and antibiotics.

He also argues that whereas PW1 and PW3 claimed to have seen and identified him, PW2 said he could not see the attacker because it was dark, but recognised his voice.

In response, the State Counsel submits that the evidence was very consistent and the P3 form only indicated the degree of injury, not the treatment received. With the greatest of respect to counsel, I disagree, paragraph 4 of the P3 form provides for treatment if any treatment received prior to examination, it clearly shows that the complainant was given antibiotics, analgesics, haematonics and admitted in hospital. Certainly there is no mention of stitching 30 stitches. However in my view, what is of significance is not so much the type of treatment received but the fact that there were injuries, the nature and degree of the injuries. That is well covered in the P3 form and the fact that no mention was made of the stitches in the medical examination form is not fatal to the prosecution case.

As to whether the complainant slept at the gate or inside her house after the attack, or whether she was taken to hospital by car or using a motorcycle, did not in any manner affect the material particulars of the prosecution case, which basically was that the appellant attacked and seriously injured her. The fact of her injury remained undisputed.

As regards the issue of identification, the State Counsel submitted that although the offence was at 5.00 a.m., PW1 recognised and identified the appellant because he even spoke, and there could be no mistaking because they had been married for 10 years.

Further, the appellant knew that PW1 was going to the market the following day, having visited her the day before, although she chased him away in the evening. She pointed out that the presence of appellant at the scene was confirmed by PW2 who was a neighbour and who heard him tell PW1 to go to hospital. Counsel stresses on the significance of his evidence saying he is the appellant's son and had no reason whatsoever to frame up his father.

The appellant argued that there ought to have been an identification parade conducted. I think that would have been a total mockery, after all, the witnesses were people who knew him so well and some were related to him. I am certain that if an identification parade had been conducted, then his complaint would now be that witnesses were people who knew him.

Certainly the offence took place at 5.00 a.m. when ordinarily it would be dark, except for the period when the sun is in the tropic and light comes up very early. According to PW3 it was dark, but according to PW3 there was some moonlight. It would certainly be difficult at that hour, without proper determination of the lighting condition to make a conclusion that visual identification as favourable. However, this was not limited to visual identification only, all the witnesses recognised the appellant by his voice. He was not a stranger to them, he had lived and interacted with them, and at least for PW1 and PW3, as late as the eve of the attack. There could be no mistaking. All the witnesses were consistent as to what the appellant said after the attack, i.e. offering to take PW1 to hospital. I am satisfied that appellant was properly identified.

Another limb of the appellant's submission is that the trial was conducted in a language which he did not understand, having been forced to proceed in Kiswahili and that when he tried to plead to the trial magistrate to allow him use vernacular, she insisted that he used the national language.

The State Counsel's response to this is that the appellant never raised the issue of language during trial. The appellant cross-examined witnesses in Kiswahili and even gave evidence for his defence in Kiswahili. I have indeed gone through the record, there is nothing to suggest that appellant did not understand the language used. Even if it was to be argued that perhaps the trial magistrate deliberately omitted recording his request, the record shows detailed cross-examination, detailed evidence in defence and answers in cross-examination, which persuade me that the appellant knew and understood exactly what was going on. The response elicited from his questions on cross-examination and his statement of defence were not a departure from the evidence presented in court and I am persuaded that his claims about language barrier are merely stage managed to hoodwink the court. I reject that line of submission.

Consequently my finding is that the conviction was safe and I uphold it.

With regard to sentence, the State Counsel submitted that the same was rather harsh and urged the court to exercise its discretion. The offence attracts a maximum sentence of life imprisonment, taking into account the extent of the injuries and their nature, the fact that prosecution informed the court that appellant was a first offender, then I think that the life imprisonment was rather harsh and to that extent I will interfere with the sentence by setting it aside and substituting it with a term of 10 years imprisonment which runs from the date of conviction. The appeal otherwise stands dismissed.

Delivered and dated this 29th day of April, 2013 at Nakuru.

H.A. OMONDI

JUDGE