REPUBLIC OF KENYA

INT HE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 241 OF 2009

HENRY KIRIMI KANYAURA......................................APPLICANT

Versus

REPUBLIC...RESPONDENT

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JUDGMENT

INTRODUCTION

The Charge

[1] The Appellant was charged with Grievous Harm Contrary to Section 234 of the Penal Code. On 22/3/2009 at Munitho village of Kangere Sub-location in Meru Central District he unlawfully hit Nicholas Karani in the mouth with a stone thereby causing total loss of ten teeth. The Offence was committed at 1.30am (at night). He was convicted and sentenced to life imprisonment.

The Appeal and Appellant's Submissions

[2] That conviction and sentenced grieved the Appellant that he filed this appeal. The grounds of the appeal are, that:

(a) The sentence was expressive;

(b) The conviction was based on contradictory and uncorroborated evidence by PW1 and PW2 and PW3; and

(c) The Trial Court ignored the fact that there was an outstanding grudge among the Appellant, PW1 and PW2.

[3] He filed written submission and also made oral submissions. First, he claimed that the case he faced in the trial court was a fabrication. He supported that view by the fact that PW1 went to the hospital without an abstract from the Meru police station. Second, PW1 contradicted himself that he went to Meru hospital and also Nkubu Hospital. Third, that the trial magistrate did not consider that there was an outstanding grudge among him, the complainant and PW2. Fourth, there was not a single member of public who was called as witness. Fifth, that the stone which was allegedly used to hit PW1 was not produced in court. Sixth, there was no tooth that was produced as exhibit in court. And last but not least, his mitigation was not considered.

The Prosecution Opposed Appeal

[4] M/s Mwangi argued the case for the State and opposed the Appeal. The submitted that there was sufficient evidence to support the conviction. The appellant was the person who hit PW2 with a stone. The Appellant was the uncle to PW1 and so he knew him well. There was enough light to have identified the Appellant.

[5] She argued further that the appellant put up an alibi which he could not substantiate. He could not even state the name of the lodging he claims to have slept in at the time. She posited an additional argument; that the Appellant was not remorseful at all during the sentencing and he was not even remorseful during the appeal. His appeal should be dismissed.

COURT'S DETERMINATION

[6] The law ordains the appellate court to re-evaluate the evidence as tendered and come to its own conclusions. See **OKENO V R**. PW1 testified that he was hit in the mouth with a stone by the Appellant at 1.30 am in the night. He had gone to enquire from the Appellant why he was making noise at night. The answer he received was an assault in his mouth. PW1 lost 10 teeth as a result. PW1 was helped by the Appellant's step mother and a Mr. Maurice Gitonga after he had been assaulted. PW1 told the trial court that there was electric light at the time and he saw the Appellant hit him. PW1 described the electric light as the security light installed in the compound. PW2 supported the evidence of PW1 and confirmed there was electric light (security light) by which she saw the Appellant at the scene during the commission of the offence. She did not, however, witness the Appellant hitting PW1.

[7] PW3 recorded statements and issued PW1 with a P3 Form. He had the Appellant arraigned in court.

[8] The Appellant raised an alibi. The law on alibi is clear. See **KIBALE V UGANDA [1999] 1 EA 148** and **SAID V REPUBLIC.** In the last case, the rule was laid that;

> *An alibi raises a specific defence and an Appellant person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is reasonable.*

See also **COURT OF APPEAL AT MOMBASA CRIMINAL APPEAL NO 50 OF 2007ALI MLAKO MWERO V REPUBLIC-**It quoted the rule as laid down in the **SAID** case above.

An alibi is a specific defence. It must be clearly and specifically stated by the Appellant. It does not entail a destination at large. In the present case, the Appellant could not clearly state the actual lodging accommodation he alleged to have been sleeping in at the night of the alleged offence. There are many lodging accommodations in Maua, and without specifying the particular lodging he spent the night, it would be too onerous to expect the prosecution to dislodge the so called alibi. That claim did not constitute an alibi in law which the prosecution could be obligated in law to check and unravel. That issue is settled as such.

[9] The only person who identified the Appellant as the person who assaulted PW1 was PW1 himself. It is the only evidence of identification by recognition on which the Appellant was convicted. The law is that the court, before convicting on the evidence of identification by a single witness, should warn itself of the possibility of mistake on the part of the witness. The trial court should carefully evaluate such evidence with utmost thoroughness in order for it to be satisfied that it is safe to convict. It should, therefore, consider any other independent evidence on the matter. See ***ABDALA BIN WENDO V R [1989] KLR 424,*** and ***R V Turnbull (1976) 3 All ER 549.*** There are a great many decisions of the Court of Appeal on this issue which I need not

multiply.

[10] PW1 knew the Appellant and so recognized him at the time of the offence. He said there was electric light which he described as security light. The light enabled PW1 to clearly see the Appellant. The Appellant was PW1's uncle and so there is no possibility of being mistaken. PW1 approached the Appellant to find out why the Appellant was shouting and that is when he was hit on the mouth. PW2 confirmed there was light and she also described it as security lights. With that light, PW2 also saw the Appellant at the scene. The evidence of PWI and PW2 placed the Appellant at the scene of crime. The evidence of identification by PW1 is, thus, properly reinforced by that of PW2 which placed the Appellant at the scene of crime. I am convinced the Appellant was properly identified as the person who hit PW1 causing grievous harm on him. I do not see any possibility of a mistake attending the evidence of PW1 as to the person who hit him.

[11] PW4 was the doctor who, upon examination confirmed that PW1 suffered a deep cut on upper lip and lost 10 teeth. He classified the injuries as “maim”. He filled in the P3 Form on the information in the treatment notes from Meru District Hospital and on his own examination of PW1. He produced the P3 Form as an exhibit. Medical evidence showed that PW1 suffered a deep cut on the upper lip and as a result he lost 10 teeth. Although the stone was not produced, there was sufficient evidence by PW4 that the probable type of weapon causing the injury was a blunt object. That evidence is clear and uncontroverted that the Appellant caused grievous harm to PW1.

[12] The evidence as re-evaluated by this court lead to only one and inescapable conclusion that the Appellant caused grievous harm to PW1. For those reason, I find that the prosecution proved its case beyond any reasonable doubt. I uphold the conviction by the trial court.

On Sentence

[13] Except the sentence of life imprisonment was excessive in the circumstances. I recognize it is the direction of the trial court to pass the sentence it deems appropriate. But, at the risk of repeating the obvious, the discretion should be exercised judicially and upon defined legal principles. The trial Court was preoccupied with lack of remorse on the part of the Appellant until it did not consider the fact that the Appellant was a first offender which it should have specifically considered as a mitigating factor in sentencing. That is an error in principle that entitles the appellate court to interfere with the discretion by the trial court in sentencing. Ground 2 of the petition of Appeal, therefore, succeeds. Accordingly, I hereby substitute the sentence of life imprisonment for term of imprisonment for 20 years. The Appellant is sentenced to suffer imprisonment for 20 years from the time of conviction by the trial court. Order accordingly.

Dated, signed and delivered in open court at Meru this 23rd day of October, 2013

F. GIKONYO

JUDGE