



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 172 OF 2011

STEPHEN CHEBII CHEBOIWO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No.57 of 2011 Republic vs Stephen Chebii Cheboiwo in the Resident Magistrate’s Court at Eldama Ravine by M. Kasera, Senior Resident Magistrate on 8th August 2011)

JUDGMENT

1. The appellant was convicted on a felony of causing grievous harm contrary to section 234 of the Penal Code. He was sentenced to 15 years imprisonment. The appellant has appealed against his conviction and sentence.
2. The particulars of the charge were as follows: That on 25th November 2010 at Kamar village, Mogotio District, the appellant caused grievous harm to Tereki Chesire.
3. The petition of appeal raises four grounds. They can be condensed into three: First, that the charge was not proved beyond reasonable doubt; secondly, that the evidence at the trial was inconsistent, contradictory, or insufficient to found the charge; and, thirdly, that the sentence handed down was too harsh in the circumstances.
4. At the hearing of this appeal, the appellant relied on his written submissions filed on 21st February 2013. He said he had nothing to add. In the course of those remarks, I noted that the appellant was hard of hearing. He had raised that matter in the lower court. He submitted that due to that disability, he did not properly follow the proceedings in the lower court. The appellant also sought to rely on amended grounds of appeal filed with his submissions. I however noted from the record that *no* leave was granted by the Court. Accordingly, the amended grounds are incompetent for offending section 350 of the Criminal Procedure Code.
5. The State has contested the appeal. The case for the State is that the evidence tendered at the trial was inconsistent with the innocence of the appellant. The State submitted that the appellant went into hiding after committing the offence; he was arrested hiding under the seat of a bus. Regarding identification of the appellant, the State submitted that there was positive identification by PW1, PW2 and PW3 who were the appellant’s neighbours. In the circumstances, this was a case of recognition. The injuries to the complainant were established by medical evidence. It was thus submitted that the defence put forth was untenable. In a nutshell, the State submitted that all the key ingredients of the charge were proved beyond reasonable doubt. Regarding sentence, the State submitted that the punishment fitted the crime and was in any event very lenient
6. This is a first appeal to the High Court. I am required to re-evaluate all the evidence on record and to draw my own conclusions. In doing so, I have been careful because I have neither seen nor heard the witnesses. See *Njoroge v Republic* [1987] KLR 99, *Okeno v Republic* [1972] EA 32,

Kariuki Karanja v Republic [1986] KLR 190, *Felix Kanda v Republic Eldoret*, High Court Criminal Appeal 177 of 2011 [2013] eKLR, *Paul Ekwam Orenge v Republic Eldoret*, High Court Criminal Appeal 36 of 2011 (unreported).

7. The appellant stated that he did not follow the proceedings in the lower court as he is partially deaf. I have studied the record. The plea was taken on 18th January 2011. The court noted as follows:

“Accused partially deaf. Charges written down in Kiswahili [to appellant] who reads and replies; it is not true”.

8. A plea of not guilty was entered. Bail was set at Ksh 50,000 with one surety of a similar amount or cash equivalent. On 21st February 2011, the court ordered for a medical check-up on the appellant. Upon perusal of a report by Dr. Njau, it was established that the appellant was mentally *sound* but had a *hearing* problem. The court, just like on the date of the plea, accommodated the appellant. The record shows the appellant participated actively at his trial and cross-examined *all* the five prosecution witnesses. On 14th July 2011, the appellant testified in his defence. The appellant cannot thus be heard to say that he never understood the proceedings at his trial.
9. On the night of 25th November 2010, at about 1.30 a.m, the complainant was asleep in her house. It was a single room. Her husband (PW2) and two young children were there. They had not locked the door. Someone entered and cut her with a panga on the jaw, neck and fingers. She identified the person as the appellant. She knew him very well. There was moonlight. The complainant and the children raised an alarm. Her husband fought with the appellant and rescued her. Her husband snatched the panga from the appellant. PW2 fetched a motor vehicle that took his wife to hospital at Mogotio. PW5, Rosleen Nyagol, a clinical officer, produced the P3 form. She testified that the complainant had deep cuts on the lips, neck and left forearm; the age of the injuries was five hours and the degree was grievous harm.
10. PW2 said he flashed a torch at the appellant. There was also moonlight. He said he clearly recognized him. The appellant is his neighbour. The appellant was wearing a white shirt and a woolen cap but had not covered his face. He wrestled with him and took away the panga. The panga was taken to the police. The bloodstained panga was produced in evidence by PW4, a police constable named Abdille. The appellant disappeared after the incident until PW2 traced him at Mogotio. PW2 said the appellant may have had disagreements with PW2’s nephews but there was no grudge between the appellant and PW1. PW3, a nephew to PW2, responded to the alarm raised by PW1 and the children. He lived 50 metres away. He was a neighbor to the appellant. He flashed a torch. He saw the appellant running away. At that point, the appellant was about 7 metres away. PW3 conceded they had had disagreements with the appellant. They had appeared before the local chief for arbitration three times. PW3 and police constable Abdille (PW4) arrested the appellant who was hiding under the seat of a bus at Mogotio.
11. From that evidence, I have reached the same conclusion as the learned trial Magistrate that the appellant was known to PW1, PW2 and PW3. He was their neighbour. On the material night, there was moonlight. PW1 said she recognized the appellant. He was wearing a white shirt. PW2 flashed his torch at the appellant and clearly recognized him. He wrestled him for some time and took away the panga. PW3 also flashed his spotlight on the appellant who was 7 metres away and escaping from the complainant’s house. The evidence of all the prosecution witnesses was thus consistent. This was clearly a case of recognition.
12. Evidence of recognition is generally more reliable than identification of a stranger, but mistakes may sometimes be made by witnesses. In *Wamunga v Republic* [1989] KLR 424, the Court of Appeal held as follows-

“It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.”

13. The lighting conditions from the moon and the torches were sufficient in a case of recognition. PW2 and the appellant fought for a while. Considering that PW1, PW2 and PW3 knew the

appellant, I am satisfied that the conditions of identification were favourable. See Abdalla Bin Wendo v Republic [1953] EACA 166, Joseph Ngumbao Nzalo v Republic [1991] 2 KAR 212, Obwana and others v. Uganda [2009] 2 EA 333 at 337, Richard Kinyuru and another v Republic Nairobi, High Court Criminal Appeal 290 of 2009 [2012]eKLR, Salim Swaleh Mapinga v Republic [2013] eKLR.

14. I have also considered the defence proffered by the appellant at his trial. It was very brief. He stated as follows:

“I do not know anything about this case. I was in Mau harvesting maize. I came home in January 2011. I was arrested by police in Mogotio. I was kept in the cells. I was arrested on 17.1.2011. On 18.1.2011 I was brought to court. Charge was read out to me. On 16.5.2011 T C [PW1] came to court. T sister is my father’s mother. She said I cut her and she saw me. The husband also said I cut the wife. I do not know anything about this case”

15. The learned trial Magistrate found that *“the evidence by the accused has failed to raise any doubt on the prosecution’s evidence...the prosecution has proved its case beyond reasonable doubt”*. I agree with those findings. The appellant was placed squarely at the *locus in quo*. He was positively identified by PW1, and PW2 as the person who cut the complainant with a panga. He was seen taking off and identified by PW3. The conditions of identification were favourable and amounted to evidence of recognition. The appellant disappeared from the area until January the next year. When he was arrested, he was hiding under the seat of the bus. That conduct is largely inconsistent with his *innocence*.

16. The injuries to the complainant amounted to grievous harm. Grievous harm under section 4 of the Penal Code means *“any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so 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”*. I find that all the key ingredients of the offence were well established.

17. The appellant raised an *alibi* that he was away in Mau harvesting maize. When *alibi* evidence is proffered, the prosecution is obligated to investigate it. The appellant had not given any notice that he would raise it. It was being set up well after the close of the prosecution’s case. It was thus open to the trial court to weigh it against the evidence already tendered. See Wang’ombe v Republic [1976-80] KLR 1683. When juxtaposed against the compelling evidence of PW1 and PW2, it is clear that the *alibi* set up was a red herring. The appellant was positively recognized as the assailant by PW1, PW2 and PW3. PW4 produced the bloodstained panga at the trial. There were no grudges between PW1, PW2 and the appellant. There was thus no reason put forward to frame up the appellant. On the totality of the evidence, I do not believe the appellant’s defence or *alibi*. On the contrary, I find that all the evidence pointed *strongly* to the *guilt* of the appellant. That said, the burden of proof, subject to section 111 of the Evidence Act, rested entirely with the prosecution. I have not seen anything to suggest the learned trial Magistrate shifted the onus of proof to the appellant.

18. Section 234 of the Penal code provides that a person who commits grievous harm is liable to *life* imprisonment. The appellant was imprisoned for only 15 years. Considering the nature of injuries to the complainant, it was a very lenient sentence. The upshot is that there are no grounds to disturb the findings of the learned trial Magistrate. I uphold the conviction and sentence. The entire appeal is hereby dismissed. It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 28th day of November 2013

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

Mr.....for the appellant.

Mr.....for the State.

Mr..... Court Clerk.