

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 251 OF 2012

CHRISPINUS MATOFALI APPELLANT

V E R S U S

REPUBLIC RESPONDENT

J U D G M E N T

The appellant was charged with offence of grievous harm contrary to **Section 234** of the **Penal Code**. The particulars of the offence are that the appellant on the 9.11.2011 at Lunavere village in Kakamega South District within Western Province unlawful did grievous harm to **ALEXANDER NDUSI**. The appellant was convicted and sentenced to serve four (4) years imprisonment. The grounds of appeal are that the appellant is remorseful and the sentence is excessive.

During the hearing of the appeal the appellant submitted that he has learnt a lesson and seeks the court's leniency. He has a brother who is seven years old and he is living with his old grandfather. Mr. Oroni, learned State Counsel opposed the appeal. Counsel submitted that the appellant assaulted his grandfather who suffered slurred speech. The conviction was proper.

The record of the trial court shows that five witnesses testified. **PW1 ALEXANDER NDUSI MAKENA** was the complainant. His evidence is that the appellant is his grandson. On the 9.11.2011 at 10.00 p.m. he was in his house with his wife (PW4) when the appellant knocked the door. The door was opened and the appellant asked the complainant why he had not brought back the appellant's grandmother who had deserted the complainant. The appellant picked a piece of firewood and hit PW4. While the complainant was trying to intervene he was hit on the head and he fell down and became unconscious. When he regained consciousness he found himself at the Moi Teaching and Referral Hospital where he was admitted for eight days. He was later discharged and had his P3 form filled at the Kakamega Provincial Hospital. Because of the assault he suffered paralysis on the right side of his body and the injuries affected his speech.

PW2 BERTHA OTIENO, is a clinical officer at the Kakamega Provincial Hospital. She produced the P3 form which indicates that the complainant suffered a fracture of the skull with depression and did undergo a surgery. The injuries were classified as grievous harm. **PW3 SILVANUS NDUSI MAHERO** is the village elder and a brother to PW1. He was informed of the incident by PW4 on the 10.11.2011. He saw PW1 when he was released from hospital. He assisted in arresting the appellant. PW4 is the wife of PW1. Her evidence is similar to that of PW1. According to her PW1 was in a comma for a week and some days. When he became conscious he could not talk well and his right side of the body is paralyzed. **PW5 PC JOHNSON LICHOHE** was based at the Isulu police patrol base. On the 10.11.2011 he was at the office when PW3 and PW4 took the appellant to the station. He was informed that the appellant had assaulted PW4's husband who had been taken to hospital. PW5 investigated the matter and caused the appellant to be charged.

In his sworn defence, the appellant testified that the complainant is his grandfather. On the material day he returned home in the evening from work and PW4 called him indicating that PW1 wanted to talk to him. He went to PW1's place and he informed him that he wanted to sell part of the appellant's land so that he could buy the appellant a motorcycle to use as a boda boda. The appellant objected to the idea and PW1 became harsh. The appellant left and while heading to his house PW1 followed him and held his shirt at the neck. The complainant slipped and fell on some bricks thereby injuring himself. PW4 screamed alleging that the appellant had injured PW1. The appellant went to report to the police and he

was told to wait until a complaint was made. The following day the village elder took him back to the police and he was arrested.

The prosecution evidence did establish that PW1 sustained serious injuries. The main issue for determination is whether it is the appellant who caused the injuries. It is the evidence of PW1 and PW4 that it is the appellant who assaulted the complainant using a piece of firewood. On the other hand the appellant testified that the complainant slipped and fell. The parties herein live in the same compound and know each other. It is the evidence of PW1 that there was a lamp and it is the appellant who knocked the door and the same was opened. The appellant assaulted him. I am satisfied that it is the appellant who assaulted the complainant. The appellant's defence does not raise doubt on the prosecution evidence. I do find that the conviction was proper.

With regard to sentence, the complainant sustained very serious injuries. The sentence of four years imprisonment is quite fair and I will leave it intact.

In the end the appeal lacks merit and the same is hereby disallowed.

Delivered, dated and signed at Kakamega this 20th day of December 2013

SAID J. CHITEMBWE

J U D G E