REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NOS. 125 & 126 OF 2012

(CONSOLIDATED)

1. NICHOLAS MUTUNGA

2. DAVID MALONZA KAMETA…...................APPELLANTS

VERSUS

REPUBLIC…..RESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Senior Resident Magistrate's Court Criminal Case No.133 of 2012 by Hon. S.K. Mutai , on 12/9/2012)

JUDGMENT

1. **Nicholas Mutunga** (Appellant in HCCR. Appeal No. 125 of 2012) and **David Malonza Kameta** (Appellant in HCCR. Appeal No. 126 of 2012) now consolidated, were jointly charged with the offence of Grievous harm contrary to section 234 of the Penal Code. Particulars of the offence being that, on the 25th day of June, 2012 at about 7.00 p.m. At Windundu village, Ikanga location in Mutomo District within the Kitui County unlawfully did grievous harm to **Simon Mbuta Kivinda.**

2. They were tried, found guilty, convicted and sentenced to life imprisonment. Being dissatisfied by the conviction and sentence meted out, they have appealed on grounds that the trial magistrate erred and misdirected himself both in law and facts by:-

   Failing to find that the appellants had established a plausible defence; That they were not at the scene of the incident and hence were not the assailants; by failing to find that some of the prosecution witnesses corroborated the defence case on some material particulars hence the defence was credible; by failing to note and find that the evidence of the complainant did not support the charge of grievous harm; by meting out the maximum sentence provided by law an action that injudiciously fettered his wide discretion and policy of sentence that amounted to a violation of the appellants rights.

3. The case as presented by the prosecution was that PW1, **Simon Mbuta Kivinda** the complainant in the lower court was on the way home riding a bicycle when he encountered the appellants who assaulted him by cutting him with pangas occasioning him the grievous harm that he sustained. He ran home screaming. **PW3 Damaris Mwanzia** his daughter rushed to the gate. She saw two (2) people chasing after him armed with pangas. She recognized the 2nd appellant. It happened at 7.00 p.m. And there was moonlight. **PW4 Kyalo Kyule** on hearing screams ran to the

complainant and found him injured.

4. The complainant was taken to hospital and admitted for 5 days. He was treated. **PW2 Daniel Mulwa,** a clinical officer examining the complainant found him having sustained a deep cut wound on the back of the head, another deep cut wound on the left jaw and three (3) of his teeth were missing. The left thumb had dropped and the fingers had wounds. He formed an opinion that the degree of injury sustained was grievous harm. PW5 No. 92289 **P.C. Salaton Sironka** investigated the case, arrested the appellants and charged them.

5. In their defence the 1st appellant said on the fateful date he did not hear of what befell the complainant their neighbour. It was his evidence that he worked for one **Kilonzi Stephen,** making bricks until 5.00 p.m. In company of **Samuu Mwangangi** and **Athman** they stayed until 6.00 p.m. He denied having assaulted the complainant.

6. The 2nd appellant said he was at his butchery. He heard screams at 7.00 p.m. and he rushed to the home of **Peter Mauta** with his customers, **Ngavu** and **Mbila** to find the complainant already injured. He went back to his butchery. At about 9.30 p.m. His brother arrived while drunk. He closed down his business and they went to the complainant's home. Later on they were arrested.

7. They called witnesses. **DW3 Alfred Nzatu Kilonzo** said that he was with the 1st appellant taking alcohol at 6.00 p.m. On the 25th June 2012. They were together until 8.30 p.m. At **Peter Mauta's** place. That is one kilometre away.

8. **DW4 Mohammed Athumani Muliko** said that on the aforestated date he worked with the 1st appellant until 5.00 p.m. They left together for **Stephen Kilonzo's** place where they drank alcohol until 9.00 p.m.

9. **DW5 Nzavu Kilonzo** stated that he was at the 2nd appellant's hotel when he heard screams. In company of the 2nd appellant, they went to the complainant's homestead. They found the complainant having been tied with a piece of cloth. He was bleeding. **Mbila Mwandia** was already there.

10. **DW6 Mbila Mwandia** said that he was at the hotel eating. The 2nd appellant was at his butchery and hotel and he was the one cooking meat for him. When he heard screams with PW2, they rushed to **Peter Mauta's** home where they found the complainant bleeding. He had been tied on the neck with a piece of cloth. He had a cut wound.

11. This being the first appellate court, I do remind myself of the duty to carefully analyze and weigh any evidence adduced and to come to a conclusion on the same, bearing in mind that I did not see or hear the witnesses. (***See Njoroge versus Republic 1982 – 88. I KAR 134; Okeno versus Republic 1972 …)***

12. Evidence was adduced by the prosecution how the complainant encountered the two (2) appellants. As he rode the bicycle he met the 2nd appellant and passed him. He then met the 1st appellant who cut him with a panga on the head. He stopped the bicycle, kicked him but he cut him on the cheek, left thumb and a finger. The 2nd appellant then acted by cutting him on the left shoulder. He screamed, people answered his call of distress and his assailant ran away. It was his evidence that there was moonlight which enabled him to see.

13. PW3 who ran to the scene of the incident saw his two (2) attackers and recognized the 2nd appellant. The appellants gave an alibi defence and called witnesses to support their story of having not been at the scene. The trial court did consider the evidence tendered but was not convinced that it challenged the cogent evidence adduced by the prosecution. It was argued by the appellant's counsel that had the complainant recognized his assailants, nothing would have been easier than mentioning the people to those who went to rescue him.

14. PW3 was a daughter to the complainant who must have been aware of the dispute that existed between the two (2) families. The appellants are brothers. It was her evidence that on arrival at the scene of crime she saw two (2) people assaulting her father but she only recognized one, the 2nd appellant. Had she been dishonest she would have alleged that she recognized both. The fact that she stated what she perceived with her eyes suggests honesty on her part as a witness.

15. Although the appellants stated that they were innocent because they were elsewhere, PW4 an independent witness who administered first aid to the complainant said soon after the attack the complainant mentioned the names of the appellants. (See page 8 of proceedings). PW3 said the 2nd appellant went to the scene after her father had been bandaged while the 1st Appellant went to the scene after the father had been taken to hospital.

16.

16. A consideration of the evidence establishes the fact that the offence was committed at 7.00 p.m. All witnesses, the appellants inclusive do not dispute the fact that there was moonlight. These were people the complainant and PW3 knew very well. It was therefore not a question of identification but recognition. In the case of ***Anjononi versus Republic (1980) KLR 59***. It was held by the court of Appeal that recognition was more satisfactory, more assuring and more reliable than identification of a mere stranger.

17. The evidence on record of recognition of the appellants by the complainant was beyond doubt even if the appellants gave alibi defence. It therefore follows that the trial magistrate did not misdirect himself by believing the prosecution witnesses.

18. It was stated that the evidence adduced did not support the offence of grievous harm. Medical evidence adduced proves that the complainant sustained a deep cut would on the back of the head measuring 3 cm deep and 15 cm in length; deep cut would on the left jaw measuring 14 cm in length. 3 teeth were missing on the left jaw; a deep cut wound on the left shoulder region; left cut thumb that had dropped and a left finger with wounds. The degree of injury sustained was classified as grievous harm.

19. Grievous harm is defined by Section 4 of the Penal Code as 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 pertinent or serious injury to any external or internal organ, membrane or senses.

20. The injuries sustained were serious as stated. There was proof of the grievous harm suffered. Having re-evaluated the evidence on record, I find that the lower court did not misdirect itself in reaching its verdict. I therefore dismiss the appeal and uphold the conviction. Looking at the sentence imposed, the law provides for life imprisonment but the court had the discretion of taking into consideration circumstances of the case, the fact that the appellants were first offenders, they expressed remorse. In the premises I find the sentence imposed harsh. I therefore set aside the sentence reached and substitute it with a term of 5 years imprisonment.

21. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **9TH** day of **DECEMBER, 2013.**

L.N. MUTENDE

JUDGE