REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal Case 91 of 2006

PETER NGATIA MUHORO……...……..APPELLANT

VERSUS

REPUBLIC…….……..RESPONDENT

(Appeal against Conviction and Sentence in the Senior Resident Magistrate's Court at Nanyuki in Criminal Case No. 341 of 2004 dated 28th July 2005 by E. G. Mbaya, Senior Resident Magistrate)

JUDGMENT

PETER NGATIA MUHORO hereinafter referred to as the Appellant, was charged with the offence of GRIEVOUS HARM CONTRARY TO *SECTION 234* OF THE PENAL CODE, in that on 3rd February, 2004 at Wamura Trading Centre in Laikipia within Rift Valley Province, unlawfully did grievous harm to **JOSEPH NDIRANGU GITARI.** The Appellant pleaded not guilty to the charge and his trial ensued in the Senior Resident Magistrate's Court at Nanyuki. The prosecution called a total of four (4) witnesses and their story was as follows albeit in a nutshell.

Joseph Ndirangu, P.W. 1, the Complainant herein stated that on 3rd February, 2004 he went to Wamura Shopping Centre to look for the Appellant who owed him Kshs.200/=. For four (4) years the Appellant had been unable to repay the debt. He found the Appellant in a bar playing pool. He called him out. P.W. 1 was in the company of Christopher Muriuki. The three of them, i.e. Appellant, P.W. 1 and P.W. 2 went outside the bar. P.W. 1 then demanded his money from the Appellant. Apparently the Appellant was not amused and told P.W. 1 that he should not have asked him for money in the presence of a young man meaning P.W. 2. He then beat up P.W. 1 until he fell down unconscious. When he regained consciousness he proceeded home and he was then taken to Nyeri Provincial Hospital by Joseph Waruhiu, P.W. 3. He was treated by Dr. Muchiri, a dental surgeon, who classified the degree of injuries sustained by P.W. 1 as grievous harm. Subsequently the Appellant was arrested by A.P.C. Samuel Kasefi (P.W. 4) and charged.

Put on his defence, the Appellant elected to give an unsworn statement of defence and called one witness. He stated that he did not injure P.W. 1 and that perhaps P.W. 1 may have fallen down on his own. His witness, **ISAAC MAINA** stated that he was with the Appellant in the bar on the material day. At 9.00 p.m. he saw P.W. 1 and the Appellant outside the bar and after a short while they came back into the bar quarrelling. He confirmed that he did not see P.W. 1 with any injuries on his mouth.

Having gone through the evidence on record the learned Magistrate was convinced that the Appellant

caused the Complainant the injuries complained of. Accordingly he proceeded to convict him whereupon he sentenced the Appellant to two years imprisonment. In convicting the Appellant, the learned trial Magistrate stated *inter alia* as follows:

"……***The complainant appeared an honest and truthful witness and so was P.W. 2, P.W. 4 and P.W. 5. The evidence of P.W. 1 and P.W.2 is consistent with P.3 form. The P.3 form produced by P.W. 5 confirmed the complainant sustained injuries. P.W. 2 confirmed the complainant called accused from the bar and then went outside. I do not see any reason why the prosecution witnesses would lie. Accused gave a very shallow defence. The only thing he said to Complainant must have fallen. Such a defence cannot be believed by anyone. Accused is found guilty and he is convicted under Section 234 of the Penal Code as charged."***

The Appellant felt dissatisfied with both conviction and sentence. He thus preferred this appeal through **Messrs Wambugu Mureithi & co. Advocates**. He set out five grounds of appeal to wit; that the learned Senior Resident Magistrate erred in law and facts in not resolving the doubts occasioned by the contradiction between the evidence of PW. 1 and P.W. 2 in favour of the Appellant, that the learned Magistrate failed to note that the eye witness had failed to note the injuries complained of, that the medical officer did not establish the probable cause of the injuries and the age of the injuries, that in placing the Appellant on his defence, the learned Magistrate had not considered all the evidence adduced and finally that the learned trial magistrate failed to consider all the evidence on record.

When the appeal was called out for hearing, the Appellant was present. However, his counsel was absent. At the request of the Appellant, the appeal was placed aside to be heard last when he expected that by then his lawyer would have pitched tent. Come 11.30 a.m. and his lawyer was nowhere to be seen. It was then that the Appellant applied to be allowed to prosecute the appeal in person and dispense with the services of his lawyer. The Appellant's request was granted and he proceeded to prosecute the appeal in person.

In support of the appeal, the Appellant submitted that he was not satisfied with the conviction. That the evidence led against him was not given by those who were present. That there were no other witnesses in the bar. That he never disappeared from the scene. Finally he submitted that the Complainant was a person well known to him as he was a neighbour.

MR. ORINDA, Learned Senior Principal State Counsel, conceded to the appeal but in a rather roundabout way. He submitted that the judgment was too short and could not have considered all possibilities. That the defence was not considered. The Appellant was known to the Complainant. The only mistake perhaps that the Complainant made was to demand his debt from the Appellant in front of a young man who testified as P.W. 2. Finally Mr. Orinda submitted that the judgment was not sufficient to have evaluated the two sides of the story and to arrive at a decision as which side ought to be believed. Finally Counsel pointed out that this Court was however, disadvantaged with regard to the demeanour of witnesses.

As the hearing of the appeal progressed, this Court took the trouble to warn the Appellant that in the event that the appeal is dismissed, this Court would be minded to enhance the sentence imposed as the one imposed was too lenient considering nature and extent of the injuries sustained by the Complainant. The Appellant having noted the Court's sentiments nevertheless elected to pursue the appeal.

As this is a first appeal, the Appellant is entitled to expect that I shall re-evaluate the evidence on record afresh and arrive at my own conclusions in the matter but giving allowance for the fact that the trial Court had the advantage of seeing and hearing witnesses – See **OKENO V REPUBLIC (1972) E.A. 32.** I must therefore examine the evidence relating to the Appellant and how the trial Court treated such evidence.

It is common ground that the Appellant and the Complainant met on the material day. It is also common ground that the Complainant sustained injuries to his mouth leading to the loss of two teeth. According to the Complainant, the loss of the teeth was as a result of being punched on the mouth severally by the Appellant after he demanded Kshs.200/= that the Appellant had owed him for over four years. However,

according to the Appellant, the Complainant must have lost the teeth after he fell. These are two versions of the events that the Learned Magistrate was called upon to decide. He chose to believe the events of the day as narrated by the Complainant and his witnesses. Why? Because the Complainant and his witnesses were found to be honest and truthful witnesses. This is a finding on the credibility and demeanour of witnesses. An appellate court will normally not interfere with such findings by trial Court which are based on the credibility of witnesses unless no reasonable tribunal would make such findings or if it is shown that there existed errors of law. From the record before me, I cannot say that in coming to that finding, the Court acted unreasonably or made an error of law. Mr. Orinda was cognisant of this fact when in his submission, he pointed out that much as he was conceding to the appeal, this Court could be disadvantaged as regards the finding on the demeanour of witnesses. The Learned Magistrate having carefully observed the witnesses as they testified was best placed to assess their credibility and honesty. I do not have that advantage. I therefore choose to believe the Learned Magistrate's findings on the demeanour of the witnesses.

The Appellant stated that the Complainant must have sustained the injuries when he fell. However, there was no evidence that the Complainant ever fell. The Appellant and his witnesses never testified that they saw the Appellant fall. What the Appellant was doing is to ask the Court to act on conjecture and speculation. Indeed even the Appellant's own witness conceded that he did not know what happened between the Appellant and the Complainant when they went outside the bar. He also did not know whether the Appellant assaulted the Complainant whilst they were outside the bar. On the other hand, the Complainant stated that it was the Appellant who punched him severally on the mouth. He gave reason why the Appellant assaulted him. That he had embarrassed him by asking for his debt in the presence of a young man (P.W. 2). P.W. 2's testimony was consistent with that of the Complainant. I do not see any reason why P.W. 2 would falsely testify against the Appellant. There was nothing that would have benefited P.W. 2 by falsely testifying against the Appellant.

The Complainant's evidence and that of P.W. 2 received further boost from the evidence of P.W. 4, Dr. Muchiri, a Dental Surgeon. He attended to the Complainant on the same day of assault and filled P3 form which he tendered in evidence and which I have perused. He confirmed that when he attended to him, the Complainant had a swollen upper lip and two of his teeth were missing and most of his front teeth were mobile. He indicated in the P 3 form that the probable type of weapon causing injury was a blunt object and that the approximate age of injuries was 12 hours. These findings by the Doctor answers the Appellant complaint in ground three of the Appellant's "memorandum" of appeal (It should be Petition of appeal) that the Learned Magistrate erred in not noting that the medical officer did not establish the probable cause of the injury and also the age of the injury.

In my view, much as the judgment was terse and short, it was a well considered judgment contrary to the submission of the learned Senior principal State Counsel. It is not a standard requirement that a judgment must necessarily be lengthy so as to capture the issues at hand. All that *Section 169* of the Criminal Procedure Code requires is that a judgment should contain points for determination, the decision thereon and the reasons for the decision. There is no set formula as to how the judgment should be crafted. Suffice to say that a careful perusal of the instant judgment, leaves no one in doubt that it is substantially in compliance with the requirements of *Section 169* of the Criminal procedure. The defence was appropriately considered and dismissed as shallow. This again is contrary to the submissions of Mr. Orinda that the defence was not considered at all. Indeed the Learned Magistrate evaluated the two sides of the story and chose to believe the story of the Complainant. I have no quarrel with that finding. Even if that was not the case, as a first appellate Court, it is up to me to consider the evidence afresh and reach my own decision as to the guilt or otherwise of the appellant. In my view the totality of the evidence points irresistibly to the Appellant in the commission of the offence. The Appellant owed the Complainant some money. When he demanded for the same in the presence of a young man (P.W. 2) the Appellant felt offended and hence resorted to punching the Complainant. Embarrassment alone should not be the reason for the Appellant to assault the Complainant so seriously as to result in the Complainant losing two teeth. I do not believe the story of the Appellant that the Complainant fell down thereby causing himself those injuries. I also do not believe that the Complainant may have caused himself those injuries so as to fix the Appellant over his debt.

The Appellant has talked about contradiction in the evidence of P.W. 1 and P.W. 2. I do not discern any such contradictions. If anything their evidence was consistent.

All in all, I am unable to agree with the reasons advanced by the Learned Senior Principal State Counsel in conceding to the appeal. In the result and from what I have stated above, I find that that this appeal lacks merit and cannot stand. It is dismissed in its entirety.

With regard to sentence, and as I have said elsewhere in this judgment, the sentence imposed was too lenient considering the injuries sustained by the Complainant as a result of the Appellant's actions. The Complainant has lost permanently two teeth. The remaining ones are loose. His disfigurement is thus permanent. A sentence of two years imprisonment would appear to be too lenient in the circumstances considering that the offence charged carried a maximum sentence of life imprisonment. I am constrained to interfere with the same. *Section 354 (3) (II)* allows me to do so. **Accordingly and without interfering with the conviction, I would enhance the sentence of imprisonment from two years to six years imprisonment effective from the date of conviction and without taking into account the period that the Appellant has been on bail pending appeal. Those shall be the orders of this Court in this appeal.**

Dated and delivered at Nyeri this 29th day of January 2009.

M. S. A. MAKHANDIA

JUDGE