REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 282 of 2006

RICHARD KIPKOSKEI KORIR……..……...APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(From original conviction and sentence of the Resident Magistrate's Court at Eldama Ravine in Criminal Case No. 351 of 2006 – M. Machage [R.M.])

JUDGMENT

The appellant, Richard Kipkoskei Korir was charged with the offence of Grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that on the 12th February 2006 at Chemoson village in Koibatek District, the appellant unlawfully did grievous harm to Richard Kiplimo Kimeto. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to serve three years imprisonment with hard labour. The appellant was aggrieved by his conviction and sentence and appealed to this court.

In his petition of appeal, the appellant raised six grounds of appeal challenging the decision of the trial magistrate in convicting him. The said grounds of appeal may be summarised as thus; he was aggrieved that he had been convicted in the absence of any incriminating evidence adduced by the prosecution witnesses. He was further aggrieved that the trial magistrate had relied on unsatisfactory circumstantial evidence to convict him. He faulted the trial magistrate for convicting him against the weight of evidence and further after ignoring the evidence that the appellant had adduced in his defence. He was finally aggrieved that the trial magistrate had sentenced him to serve a custodial sentence that was harsh and excessive in the circumstances.

At the hearing of the appeal, Mr. Nyagaka for the appellant reiterated the contents of the petition of appeal. He submitted that the incident where the complainant was allegedly assaulted by the appellant occurred when the complainant was drunk. He urged the court to ignore the evidence of PW2. He maintained that the said witness was not present when the incident occurred. He submitted that the court should not believe the testimony of the complainant because he was drunk at the time of the incident. He explained that the appellant was also intoxicated at the time of the incident. He complained that the trial magistrate did not consider the fact that the appellant was exonerated from the offence by his intoxication. He relied on **Section 13(4)** of the **Penal Code** in support of his submission. He maintained that prosecution had not established that the appellant had the intention to injure or cause grievous harm to the complainant. He further submitted that the proceedings before the trial court were unprocedural since the language of the court was indicated. He complained that the charge brought against the appellant was defective since the word '*grevious*' harm appeared in the charge sheet instead of '*grievous*' harm. He urged the court to consider the totality of the evidence adduced, and allow the appeal.

Mr. Mugambi for the State opposed the appeal. He submitted that the defence of intoxication was not available to the appellant particularly when it was established that the intoxication was self induced. He further submitted that the appellant had not established that he was intoxicated to the extent that he was not aware of what he was doing at the time of the incident. He maintained that the charge brought against the appellant was proper and had been proved by evidence of the prosecution witnesses to the required standard of proof beyond reasonable doubt. He urged the court not to disturb the finding of the trial

magistrate both on conviction and sentence.

This being a first appeal, this court is mandated to re-evaluate and to re-consider the evidence adduced in the trial before the magistrate's court so as to reach its own independent determination whether or not to uphold the conviction. In reaching its determination, this court is required to put in mind that it neither saw nor heard the witnesses as they testified and therefore cannot make any finding as regard the demeanour of witnesses (*See* **Okeno –vs- Republic [1972] E.A. 32**). The issue for determination by this court is whether the prosecution established to the required standard of proof beyond reasonable doubt that it was the appellant who caused grievous harm to the complainant.

The facts of this case are more or less not in dispute. The complainant PW1 Richard K. Kimeto, on the 12th February 2006 at 7.00 p.m., went a house of a neighbour where traditional liquor (*busaa*) was being sold. The appellant was also present at the house drinking the traditional brew. A disagreement arose between the complainant and a woman whom he claimed to be his brother's wife. The complainant slapped the woman. The appellant intervened. He assaulted the complainant with kicks and punches. The appellant assaulted the complainant to the extent that the complainant lost consciousness.

The appellant was seen by PW2 Harun Kipchumba assaulting the complainant. PW2 testified that he saw the appellant stomp at the complainant while he was lying on the ground. The complainant was taken to hospital where, according to him, he regained consciousness. He was admitted at the hospital for a month. According to the P3 form which was produced in evidence by PW5, James Bett a Clinical officer based at Eldama Ravine District Hospital, the appellant sustained multiple injuries to his head. The said injuries did not result in any neurological deficiency. As a result of the assault, the complainant developed urinal incontinence. The doctor who examined the complainant was of the opinion that the complainant had not fully recovered from the injuries that he had sustained on the day of his examination *i.e*. on the 21st March 2006.

I have carefully re-evaluated the evidence adduced before the trial magistrate in light of the submissions made before me on this appeal. The appellant complained that the charge which was brought against him was defective because the word used in the charge was unknown in the English language. He complained that instead of the word '*grievous*' harm being used, the word '*grevious*' harm was used. It was clear to this court that the appellant was not prejudiced by the improper use of the term 'grievous' harm. The appellant understood the charge that he was facing. He ably defended himself in the trial before the magistrate's court. I think the mistake in the use of the word '*grevious*' harm in the charge can be corrected by the application of **Section 382** of the **Criminal Procedure Code**. I therefore hold that the ground of appeal must fail. It is dismissed.

The other issue that the appellant raised was in regard to what he considers to be his defence when he claimed that he ought to have exonerated from the crime because of his intoxication. He relied on **Section 13(4)** of the **Penal Code**. According to **Section 13(2)** of the **Penal Code**, the defence of intoxication shall be available to an accused person if he establishes that at the time of commission of the offence he was so intoxicated that he did not know that he had committed the act or that he did not know that he had committed a wrongful act. In the present case, it was clear that the appellant assaulted the complainant when he intervened after the appellant had slapped a woman who was in their company. The appellant knew what he was doing. He was not intoxicated to the extent that he did not know that he was causing injury to the complainant. The trial court believed the testimony of PW2 who testified that he saw the appellant stomping on the complainant who was lying prostrate on the ground. I find no merit with the grounds advanced by the appellant in support of his appeal against conviction. I dismiss his appeal on conviction. The trial magistrate properly evaluated the evidence and reached the proper decision finding the appellant guilty as charged.

On sentence, the appellant was sentenced to serve three years imprisonment. He was sentenced to serve the custodial sentence on the 4th December 2006. The appellant served two months imprisonment before he was released on bail pending the hearing of this appeal. Taking into consideration the injuries that the complainant sustained, this court is of the view that the sentence of three years imprisonment that was imposed by the trial magistrate was excessive in the circumstances. I will therefore favourably consider

the plea by the appellant for reduction of sentence. I have considered the period that the appellant served before he was released on bail pending appeal. I therefore set aside the sentence of the trial magistrate and substitute it with an appropriate sentence of this court. The appellant is hereby sentenced to serve ten (**10**) months imprisonment. The said sentence shall take effect from the date of this judgment.

It is so ordered.

DATED at NAKURU this 17th day of December 2007

L. KIMARU

JUDGE