REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 8 OF 2020

TIMOTHY NDWIGA NYAGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

A. Introduction

1. The appellant herein was on the 25th February, 2019 charged with the offence of grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence are that on the 8th day of February, 2019 at Kiriari market in Embu North sub-county within Embu County unlawfully did grievous harm to Kinyua Njeru.

2. He was convicted and sentenced to serve a period of five years imprisonment. That sentence is the subject of the appeal herein as the accused/appellant was dissatisfied with the conviction and the sentence. In the petition of appeal filed on 22nd June, 2020, the appellant has listed six grounds of appeal as hereunder;

> ***1)*** *That the learned magistrate erred in law and in fact and seriously misdirected himself when in his judgment he concluded that the appellant was guilty of the offence of causing grievous harm contrary to Section 234 of the Penal Code yet the charge sheet did not disclose any offence.*
>
> ***2)*** *The learned magistrate erred in law and in fact by failing to appreciate that the offence was not proved beyond reasonable doubt.*
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> ***3)*** *The learned magistrate erred in law and in fact by sentencing the appellant to 5 years imprisonment which sentence was excessive considering the appellant's mitigation and the report by the probation officer that he filed in court which clearly recommended a non-custodial sentence.*
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> ***4)*** *The learned magistrate erred in law and in fact by failing to realize that there were material contradictions in the evidence by the prosecution witness thereby arriving at a wrong conclusion.*
>
> ***5)*** *The learned magistrate erred in law and in fact when he concluded on 9th December, 2019 that the appellant had not regretted his actions and was not remorseful thereby contradicting his earlier finding on 18th November, 2019 whereby he had held that the appellant was remorseful.*
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> ***6)*** *The learned trial magistrate erred in law and in fact when he convicted the appellant and sentenced him to 5 years imprisonment against the weight of the evidence.*

3. The appeal was disposed of by way of written submissions. In his submissions, the appellant submitted that the charge sheet did not disclose any offence in that the particulars of the offence did not say what kind of grievous harm was done to the complainant. That, the learned magistrate seriously misdirected himself when he failed to appreciate the fact that the offence was not proved beyond any reasonable doubt in that there were material contradictions in the evidence of the prosecution witnesses and in particular the evidence of PW1, PW3 and that of PW4.

4. It was further submitted that the learned magistrate erred by sentencing the appellant to five years imprisonment which sentence was excessive considering that the probation officer had in his report, recommended a non-custodial sentence. Further that, the learned magistrate was biased against the appellant when he came to the conclusion that the appellant had not regretted his actions and was not remorseful which contradicted his earlier conclusion when the court had stated that the appellant appeared remorseful.

5. On the part of the respondent, it was submitted that the prosecution did establish a *prima facie* case against the appellant. That failure to

include the particular parts of the body that sustained grievous harm does not render the charge sheet fatally defective. According to the counsel for the respondent, the omission creates a defect that is curable under Section 382 of the Criminal Procedure Code as the appellant has not disclosed how the omission prejudiced him or how it offended his right to a fair trial as envisaged under Article 50 of the Constitution. Reference was made to Section 4 of the Penal Code as to the definition of "grievous harm". Further that, the evidence of prosecution witnesses was clearly consistent and well corroborated and urged the court to evaluate the inconsistences in the testimonies of the prosecution witnesses based on the principles laid out in the case of **Joseph Maina Mwangi versus Republic [2000] eKLR** and maintained that the evidence adduced by the prosecution clearly discloses the offence of grievous harm.

6. On whether the sentence was excessive, the respondent submitted that the sentence meted out is appropriate and the same is commensurate with the nature and gravity of the crime and the manner in which it was committed considering that the offence that the appellant was charged with, carries a maximum of life imprisonment and therefore, the sentence meted upon the appellant was reasonable and justifiable in the circumstances.

7. The court has considered the submissions by both parties.

8. This being the first appellate court, its duty is stipulated in **Okeno Vs Republic [1972] EA 32** which is to subject the evidence on record to a fresh and exhaustive examination so as to arrive at an independent decision but giving allowance for the fact that the court did not have the advantage of hearing and seeing the witnesses testify.

9. The court has re-evaluated the evidence as its required of it as above. In support of the charge, the prosecution called five (5) witnesses. According to the complainant who testified as PW1; on the 8/02/2019 at Kiriari market, the appellant herein approached and grabbed his collar demanding for his macadamia nuts. He started hitting him with blows and stones till he fell down and while on the ground he trampled on him.

10. PW2 came to his rescue and he got a chance to escape and as he escaped, he met with PW3 whom he told what had happened to him. PW3 prevailed upon him to return to where the appellant was, and PW3 tried to find out why the appellant was assaulting him. The appellant left on his motor bike. The complainant (PW1) proceeded to Karau police post and made a report and he was referred to hospital for treatment. According to PW1, he lost two teeth and his ears were injured.

11. The evidence of PW1 was collaborated by that of PW2 who witnessed the assault and by PW3. The two witnesses confirmed that PW1 was bleeding from the mouth and he is said to have lost two teeth.

12. Humphrey Mwenda a clinical officer at Embu Level 5 Hospital gave evidence as PW4. He examined PW1 and found him to have had a broken upper tooth which was uprooted. He had head and ear ache as a result of injuries inflicted on the 8th February, 2019. The weapon used was a blunt object (fist) and the degree of injury was assessed as grievous harm.

13. In his defence, the appellant denied having committed the offence. It was his evidence that he had engaged the complainant to harvest macadamia nuts for him when he sold them to his sister and upon realising what the complainant had done, he refused to pay him and it is then that the complainant fabricated the charges to blackmail him and extort money from him.

14. The appellant herein was charged with the offence of grievous harm. The same is defined in Section 4 of the Penal Code as follow;

> **"grievous harm"** *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 permanent or serious injury to any external or internal organ, membrane or sense.***

15. Section 234 of the Penal Code provides that;

> ***Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.***

16. From the evidence on record, though the appellant denied having committed the offence, it is clear that the appellant and the complainant were known to each other before the alleged incident. Secondly, the incident took place during the day and PW2 witnessed the same first hand. The appellant was also known to PW2.

17. PW2 told the court that it was the appellant who started assaulting the complainant with blows and stones and when he fell down, the appellant sat on him. He restrained the appellant and it was then that the complainant got a chance to escape. He saw the complainant bleeding from the mouth. Later, the complainant returned with his sister PW3 and he alleged to have lost two teeth due to the assault. PW3 while walking home from work found the complainant lying down while bleeding from the mouth; she returned him to the scene where they found the appellant herein. At the time, the complainant was bleeding from the mouth and had lost two teeth.

18. PW4 filed the P3 form for the complainant and upon examining him, his 1st incisor was cracked and the 2nd one was uprooted. The ear was sore on touching and he assessed the degree as grievous harm.

19. The appellant's defence was a mere denial while the prosecution's evidence was overwhelming. It is my considered view that the prosecution was able to prove the case beyond any reasonable doubt.

20. On the alleged contradictions by the prosecution witnesses, it is true that there was contradiction in the evidence adduced by PW1, PW2, and PW3. For example, PW1 told the court that as he escaped from the scene of the assault he met his sister PW3 but in her testimony PW3

told the court that while she was on her way home she found PW1 lying down and he was bleeding.

21. In his testimony, PW4 stated that he found PW1's 1st incisor tooth cracked and the 2nd one was uprooted whereas PW1 in his evidence stated that he lost two teeth and that those teeth remained at the scene. It is my considered view that the discrepancies are not fundamental as to cause prejudice to the appellant and therefore they are inconsequential to the conviction and the sentence.

22. As rightly submitted by the respondent, in any trial, there are bound to be discrepancies and the appellate court in considering these discrepancies must be guided by the wording of Section 382 of the Criminal Procedure Code on whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and the sentence. (see **Joseph Maina Mwangi Vs Republic [2000] eKLR).**

23. On the other ground of appeal to the effect that the charge sheet did not disclose the offence, it is my view that the appellant did not suffer any prejudice as a result of non-disclosure of the parts of the body that the complainant was injured. In any case, that ought to have been raised before the trial court at the time of taking the plea and not at this stage. It is too late in the day to raise the issue.

24. On whether the sentence was excessive and for failure by the trial court to consider the probation officer's report, I note the circumstances under which the offence was committed and the injuries that the complainant sustained. The court has also noted the contents of the probation officers report.

25. In view of the above, I find that the sentence meted out on the appellant was excessive. I hereby reduce the sentence to the period already served and order that he be released forthwith unless otherwise lawfully held.

26. It is so *ordered.*

DELIVERED, DATED AND SIGNED AT EMBU THIS 10TH DAY OF MARCH, 2021.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent