



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. E014 OF 2020**

**GAHIYE KEINAN OMAR.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. This is an appeal arising from the judgement of Principal Magistrate, Amos Makoross in Wajir Criminal Case No. 508 of 2018 where the Appellant Gahiye Keinan Omar faced the offence of committing grievous harm contrary to Section 234 of the Penal Code.

The particulars of the offence were that on the 14<sup>th</sup> day of November, 2018 at Wajir G.K Prison he unlawfully caused grievous harm to Adow Adam Omar.

2. After a full trial, the Appellant was found guilty of the offence, convicted and sentenced to 4 years imprisonment.

3. Being dissatisfied by the conviction and sentence, the Appellant moved this court on grounds follows;

- **The trial magistrate erred by failing to observe the elements that constitute grievous harm.**
- **The trial court failed to observe Section 124 of the Evidence Act.**
- **The prosecution evidence failed to prove the case beyond unreasonable doubt and**
- **The trial magistrate refuted the defence.**

4. The appeal was canvassed by way of written submissions as follows;

**Appellant's submissions**

Crucial witnesses who were near the scene did not testify. The evidence before court was contradictory. The incident allegedly took place at 11.00 A.M. yet PW1 testified that the report of the incident was made at the police at the same time;11.00 A.M. The case was framed in order to fix the accused for unknown reasons.

**Respondent's Submissions**

The Complainant gave a good account of how on the 14<sup>th</sup> of November, 2018, the Appellant who had asked him to bring fire from the kitchen, which he refused attacked and punched him severally which resulted in multiple fractures on the complainant's mandible region. The prosecution called the Clinical Officer who examined the Complainant and who testified that the Complainant received two distinct fractures as exhibited by an x-ray. The said officer assessed the injuries as grievous.

Further the Complainant's evidence was corroborated by PW1 and 2. It was further the State's contention that the evidence placed before court was beyond all reasonable doubt.

5. The Prosecution case is that the Appellant had a disagreement with the Complainant and he attacked the Complainant by raining blows on his jaws.

PW1 a Corporal at the Prison witnessed the altercation between the Appellant and PW3, when he saw the 2 the Appellant was on top of the Complainant. He further witnessed the Complainant bleeding and he escorted him to the police and later to hospital.

6. PW2, who was also in prison at the time witnessed the attack. He vividly described how the Appellant approached the Complainant, punched him severally and how the Complainant fell down and who was bleeding profusely.

7. The Complainant gave evidence as PW3, he recalled that on the material day the Appellant asked him to avail fire from the kitchen as the Complainant worked in the kitchen. He declined and the Appellant abused him and there was an exchange. He reported the matter to the Prison Warden which angered the Appellant. At meal time the Appellant found him standing and punched him severally. The Complainant received injuries and was treated at Garissa Provincial Hospital and Kenyatta National Hospital. He denied the allegation by the Appellant that he slipped and hurt himself. He denied having provoked the Appellant.

8. PW4 Sergeant Kennedy Kwatenge was the Investigating Officer. During his investigations he found the Complainant with a swollen face. He learnt that the Complainant had reported the Appellant who as a result assaulted him. The Complainant was taken to Garissa and Kenyatta hospital respectively for treatment as a result of injuries he sustained. On receipt of medical reports, recording of witness statement he decided to charge the Appellant.

9. PW5, Robert Otieno Ogalo is the Clinical Officer who filled the Complainant's P3 Form. He works at Wajir Referral Hospital. At examination, he stated that the Complainant had history of assault by a fellow prisoner. He was swollen and painful to touch. An X-ray showed fracture of the mandible at 2 distinct areas; one at the left corner side of the pre-molar and the other between the last 2 premolars on either side of the jaw. The abdomen was tender and he assessed the injuries as grievous.

10. At the close of the Prosecution Case, the Appellant was found to have a case to answer and was placed on his defence. He chose to give unsworn statement.

11. It was his defence that he had no disagreement with the complainant. He left to get food, saw the Complainant approach him, when the Complainant slipped and fell and thereafter alleged that he had hit him. He asserted further that the Prison officers had a grudge against him.

12. The duty of this court is to consider the evidence a fresh in order to arrive at an independent opinion upon examining and analyzing the same. See **Okeno Vs Republic (1972) E.A.**

13. Evidence on record which is not challenged is that the Complainant sustained injures to both sides of his jaw requiring him to be attended at Garissa and Kenyatta National Hospital. At the time of giving evidence, he informed the court that he was yet to fully recover.

14. In analyzing evidence on both sides, the court formed the opinion that, if indeed the Complainant slipped and fell the injury would not have been on both sides of his jaw. The court is inclined to believe the evidence of PW3 that he was attacked by the Appellant and punched severally thus sustaining the injuries. PW1 and PW2 were eye witnesses to the incident. Indeed, PW5 examined the Complainant and testified to the serious injuries sustained.

15. The Appellant alluded to the fact that the Prison Officers have a grudge against him. However, he did not expound on this. He also alluded to the fact that he did not differ with the Complainant. Neither did he say that the other witnesses had a grudge with him.

16. The court therefore does not believe that 5 people colluded and framed the accused.

The court finds the evidence that the Appellant assaulted the Complainant causing his grievous harm was proved beyond all reasonable doubt and concurs with the conviction.

The court also finds the sentence meted out to have been more than reasonable.

17. Consequently, the court does not find merit in the Appeal it is therefore dismissed.

**DATED, DELIVERED AND SIGNED THIS 16<sup>TH</sup> DAY OF SEPTEMBER 2021**

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**ALI- ARONI**

**JUDGE**