REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 87 AND 97 OF 2020

EMMANUEL MASIKA KHACHINJI.....1ST APPELLANT

COLLINS NYONGESA SIMIYU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence in Criminal Case Number 423 of 2019 in the Chief Magistrate's Court at Bungoma on 9/7/2020 – Hon. J. King'ori (CM))

JUDGMENT

1. The two Appellants herein were charged with the offence of grevious harm contrary to **section 234** of the **Penal Code**. The particulars were that on the 9th day of April, 2019 at Bombo Tano Village in Bungoma South Subcounty within Bungoma County, they jointly unlawfully did grievous harm to Maurice Kitui Chemiati.

2. In sum, the Prosecution's case was that on the material day at around 2.00 p.m., the Appellants and two others assaulted and grievously injured PW1, the Complainant. The Appellants are siblings and were charged together with their mother who was the 3rd accused person. One of their siblings, who was said to be the fourth assailant was never arrested and was therefore not charged alongside them. The Prosecution called five (5) witness to advance its case, amongst them the Complainant, two eye witnesses PW2 and PW3, the Clinician who examined the Complainant and filed the P3 form and the Investigating Officer. The Appellants gave sworn testimonies in their defence without calling any witnesses. At the end of the trial, the Appellants were convicted as charged and each sentenced to serve five (5) years' imprisonment. Being aggrieved by the decision of the trial court, the Appellants preferred the instant appeals.

3. The 1st Appellant appealed solely against the sentence meted against him on the grounds that the sentence was harsh and excessive. He stated that he was remorseful urging that the offence was not committed intentionally. That the Complainant had visited his home whereupon there ensued some misunderstanding coupled with some struggles during which time the Complainant's arm suffered some injuries. He said that he was a first offender and pleaded for a lenient sentence.

4. There is on record written submissions filed by the 1st Appellant on 9th July, 2021, which however deviate from the grounds in the memorandum of appeal. The submissions say nothing on sentence which is what the 1st Appellant sought to appeal against. As such, I will not consider them. The submissions are similar to those filed by the 2nd Appellant. Since both appeals arose from the decision in Criminal Case No. 423 of 2019 in the Chief Magistrate's Court at Bungoma, the 1st Appellant will not suffer any prejudice since I will, in this appeal, analyze the grounds advanced by the 2nd Appellant.

5. On his part, the 2nd Appellant appealed against both the conviction and sentence. He advanced five (5) grounds the gist of which were that the trial magistrate: conducted proceedings which violated his rights under the provisions of the Laws of Kenya, and were therefore null and void; based the decision on evidence full of contradictions; considered extraneous factors and favored the Prosecution in arriving at the verdict; and failed to analyse the evidence of the clinical officer whose evidence contradicted that of the Complainant.

6. To further advance his case, the 2nd Appellant filed written submissions on 9th July, 2021 in which he tackled the issues raised in his grounds of appeal and an additional one, namely that the charge sheet was defective.

7. The state opposed the appeal through written submissions filed by learned State Counsel Ms. Kaburu. In respect of the 1st Appellant, the State Counsel submitted that the sentence imposed upon the 1st Appellant was lenient considering the attack on PW1. This, she said, was in spite of the fact that the 1st Appellant was remorseful and a first offender. She asserted that despite allegations to the contrary, the 1st

Appellant intentionally attacked PW1 with the expected result of occasioning maximum injury to him. That the statement by the 1st Appellant that the injury to PW1's arm was as a result of a struggle was not only in contrast with his statement of being remorseful, but was also tantamount to him raising a denial which was never raised during the trial. Therefore, that the appeal should be dismissed and the sentence imposed upon the 1st Appellant upheld.

8. In respect of the 2nd Appellant, Ms. Kaburu submitted that the proceedings before the trial court were conducted within the law, and at no given time were the Appellant's rights violated. Further that in arriving at its decision, the trial court considered all the evidence adduced by both the Prosecution and the defence. The State Counsel asserted that the record showed that the evidence of PW1, PW2 and PW3 was consistent and unshakable on cross examination. That contrary to the assertions by the 2nd Appellant, the evidence of PW1 was not inconsistent with that of PW4 the Clinical Officer. She added that no extraordinary factors were considered, but rather the facts as adduced by the five (5) Prosecution witnesses who testified before the trial court. She urged the court to find that the appeal was lacking in merit and consequently dismiss it.

9. I will first deliberate on the grounds raised by the 2nd Appellant since they are in respect of the conviction and thereafter deliberate on the grounds raised by the 1st Appellant in respect of the sentence imposed upon him.

10. On arraignment, the Appellant drew attention to the date of arrest indicated on the charge sheet stating that while he was arrested on 24th June, 2019, he was not arraigned in court until 5th August, 2019. That by being arraigned in court later than the prescribed twenty-four (24) hour period, his rights under **Article 49(1)(f)** of the **Constitution** were violated.

11. The charge sheet does indeed indicate that the 2nd Appellant was arrested on 24th June, 2019 and that the date of apprehension to court was 5th August, 2019. An examination of the record reveals that the proceedings before the trial court in respect of the incident herein commenced on 23rd April, 2019. At that date however, it is only the 3rd Accused person, one Catherine Nafuna, who is stated to be the mother of the Appellants, who was arraigned in court for plea taking. Later on 27th June, 2019, the Prosecution informed the trial court that the accused had two other co-accused persons and there was need for consolidation. On 5th August, 2019, the Prosecution introduced a consolidated charge sheet and upon the charge and its elements thereof being explained, a plea of not guilty was entered for the 2nd Appellant and his co-accused persons.

12. It appears that prior to the presentation of the consolidated charge sheet, the accused persons had been charged individually for the same offence, as evinced by an individual charge sheet in respect of the 1st Appellant. There is however nothing on record in respect of the individual charges, if any, that had been preferred against the 2nd Appellant prior to the consolidation of the charges. The proceedings of 5th August, 2019 do however show that the hearing of the matter was adjourned on that date since the 2nd Appellant had a murder case before the High Court. Indeed, even the 2nd Appellant upon being cross-examined by the Prosecution confirmed that he was arrested for another offence, being murder. In his sworn testimony, the 2nd Appellant did state that he was arrested on 10th May, 2019.

13. The 2nd Appellant did not raise the issue of being arraigned in court outside the period prescribed under **Article 49(1)(f)** during the trial so that the Prosecution could explain what occasioned the delay, if at all there was indeed delay. It is therefore clear that the 2nd Appellant was charged vide another charge sheet before the one presented on 5th August, 2019 when the charges were consolidated.

14. Be that as it may, even if it were demonstrated that the 2nd Appellant was arraigned outside the constitutionally prescribed period, this would not be automatically fatal to the Prosecution's case. In **Evans Wamalwa Simiyu vs. Republic Criminal Appeal 118 of 2013 [2016] eKLR** the Court of Appeal stated that the correct position in law in this regard was set out in the case of **Julius Kamau Mbugua vs. Republic [2010] eKLR** where the court stated that the violation of the Appellant's right to be produced in court within twenty-four hours would not automatically result in his acquittal. Instead, the Appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights.

15. On whether or not the charge sheet was defective, the 2nd Appellant stated that the ingredients of the charge sheet did not contain the weapons, chemicals or anything that might have been used to cause harm to the Complainant. He asserted that for the offence of grievous harm, there ought to be a weapon(s) that might have been used to harm a complainant to show that grievous harm did indeed take place.

16. Section 134 of the **Criminal Procedure Code** states thus on framing of charges:

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

17. Section 137 of the **Criminal Procedure Code** further gives guidelines on framing of charges. They include *inter alia* that the charge is to commence with a statement of offence described briefly and in ordinary language and without necessarily stating all the elements of the offence but with reference to the section creating the offence.

18. In the instant case, the 2nd Appellant together with his co-accused persons faced a charge of the offence of grievous harm contrary to **section 234** of the **Penal Code**. The particulars further indicate to whom the grievous harm was occasioned. Despite the fact that the weapon used in inflicting the harm is not specified in the particulars, the record shows that the Prosecution led evidence in respect of the nature of the weapons used to prove that the offence was committed against the Complainant. The record further shows that the 2nd Appellant understood the offence with which he was charged, cross-examined Prosecution witnesses and even gave sworn testimony in his defence. Additionally, **section 137** of the **Criminal Procedure Code** is categorical that only particulars that are necessary are to be specified. In the instant case,

this was done. (See – **George Kioko Nzioka vs. Republic [2020] eKLR**).

19. The Appellant further urged that the prosecution evidence relied upon by the trial court was full of contradictions. In particular, that while PW4, the Clinician, testified that the Complainant was harmed using a blunt object, PW1 the Complainant narrated that he was cut using a panga. Further that while PW1 stated that he was attacked by three (3) men, the testimony of PW3 was that when he rushed to the scene he found three (3) men and a lady beating a man. He also urged the court to disregard the evidence of PW5 the Investigating Officer, whom he said used unreliable sources to prefer the charges against him.

20. The 2nd Appellant further contended that PW5 detained him without due cause, and carried out shallow investigations. He urged that from the testimonies of PW1, PW5 and DW3, it was evident that the incident occurred at a place where people indulged in locally brewed alcoholic drinks and the incident was therefore attributable to the influence of alcohol. That in any event, there were contradictions in respect of the identification of the assailants.

21. In respect of the testimonies of PW1 the Complainant and PW4 the Clinician, there are no apparent contradictions as alleged. While the testimony of PW1 was that he had been cut by a panga, the record shows that PW4 testified that the assault weapon was both sharp and blunt supporting the narrative that the Complainant was attacked using a panga and sticks.

22. Additionally, while the 2nd Appellant states that evidence in respect of the scene of the incident was contradictory, the record reveals otherwise. The incident took place by the roadside and the statement by the Complainant that he collapsed outside the house was in respect of his attempt to flee from the 2nd Appellant and his co-accused persons and into the home of one Teacher Patrick Wekesa. The record further shows that in stating that "*the incident had occurred as community policing and Police had been raiding the home of the suspects for changaa*" the Investigating Officer merely sought to explain what he had determined to have been the motive behind the attack on the Complainant. He went on to state that "*That was the reason that the 3 accused and the other not yet traced attacked and seriously injured the complainant using a panga, jembe sticks and a stone.*"

23. It is also evident from the testimonies of both PW1 and PW3 that there were four (4) assailants. PW1 did in fact make reference to four (4) and not three (3) assailants as alleged. This is evident from his testimony in examination in chief in which he narrated as follows:

> "…the 1st accused emerged from nappier grass by the roadside and grabbed me by the collar of my shirt…He then cut me on the head with a panga. I disengaged myself and fled into the home of Teacher Patrick Wekesa. The 2nd accused after me. He also emerged from the nappier grass and hit me on the head with a stick…While I tried to rise to my feet, I saw the 3rd accused had arrived with a stick. She attacked me with the stick on the back. …Another son of the 3rd accused aimed with a stick and joined in the assault."

24. It is therefore evident that the 2nd Appellant is merely referring to selective statements which read in isolation appear contradictory but which read in context by a wholesome reading of the testimonies of the witnesses who made them reveals no contradictions. The argument that the Prosecution evidence tendered by the Prosecution was riddled with contradictions is therefore unfounded.

25. While the 2nd Appellant states that the evidence on identification was contradictory, the record reveals that he was in fact positively identified and the evidence in this regard was, in the words of the trial court "overwhelming." The relevant part of the judgment of the trial court states:

> "Regarding the identity of the assailants there is absolutely no room for doubt. The evidence by the prosecution can only be called overwhelming. Firstly the incident occurred in broad daylight and at around 2.00 pm. The assailants were quite well known by the complainant. They themselves admitted to knowing the complainant who lives in their neighbourhood. The complainant therefore would not make a problem in identifying the assailants. He has no grudge with them to frame them. They equally state they have no grudges with the complainant who was at one time a benefactor to the 2nd accused as his employer. The evidence of the complainant is well corroborated by that of PW2 and PW3 who were the eye witnesses to the assault. In my assessment, they had no reason to lie against the accused and I saw no cause to disbelieve their evidence. They told the court the truth."

26. It therefore goes without saying that not only was the 2nd Appellant, who was the 1st accused person before the trial court positively identified, but also that the identification was by way of recognition as he was well known to the Complainant, PW2 and PW3. Indeed, even the 2nd Appellant in his sworn testimony confirmed that he knew the Complainant. I seek refuge in the decision in **Peter Musau vs. Republic [2008] eKLR**, where the Court of Appeal (Tunoi, Bosire & Onyango Otieno, JJ.A.) observed thus:

> **"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him, and thus to put a difference between recognition and identification of a stranger. He must show for example that the suspect had been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness in serving the suspect at the time of the offence, can recall very well having seen him before the incident in question."**

I am therefore satisfied that the 2nd Appellant was properly identified and that the evidence of identification, which was by recognition, was credible.

27. Additionally, I am satisfied that the prosecution led cogent evidence to demonstrate that the grievous harm was inflicted upon the Complainant and that it was the 2nd Appellant and his co-accused persons who inflicted the harm. Further that there was no lawful

justification for the harm inflicted upon the Complainant. Whereas the 2nd Appellant gave sworn testimony in his defence, his testimony only served as a mere denial and did not raise any doubt in the prosecution case. His testimony was that on the material day and time of the incident in question, he was not at Bombo Tano where the incident is said to have taken place. These were however mere allegations with no support for such assertions. His testimony did not therefore displace the evidence tendered by the Prosecution. In the end, I must conclude, as did the learned Trial Magistrate, that the Prosecution case was proved beyond reasonable doubt. The 2nd Appellant was therefore properly convicted.

28. On the question of sentence, the 1st Appellant asked for leniency citing the five (5) years' imprisonment a harsh and excessive sentence. He urged that he was not only remorseful but also a first offender. On his part, the 2nd Appellant urged the court to consider the time he spent in remand. As I have demonstrated elsewhere above, it was difficult for this court to make a finding in respect of the time spent in remand in respect of this offence since the 2nd Appellant was initially in remand for the offence of murder. The charge sheet in which he was initially charged prior to the consolidation of the charges herein was not on record.

29. Under **section 234** of the **Penal Code** under which the Appellants were charged, upon conviction, one is liable to imprisonment for life. I have considered the circumstances of this case and the injuries sustained by the Complainant, namely the loose upper incisors, cut wound on his head and a fractured hand.

30. The Appellants' plea in mitigation notwithstanding, I find that the sentence of five (5) years' imprisonment was appropriate. This is especially so in view of the Pre-Sentencing Reports prepared and filed upon an order of the trial court. Whereas the Probation Officer left it to the court to exercise its discretion in deciding the appropriate sentence, the report indicates that both the Complainant and the community members were opposed to a non-custodial sentence citing the Appellants as a threat not only to the victim but also to the community.

31. As the first appellate court, I was cognizant of my duty to subject the evidence adduced before the trial court to fresh analysis and re-evaluation bearing in mind that the duty of the first appellate court is not merely to scrutinize the evidence on record to see if there was some evidence to support the lower court's findings and conclusion. In **Kiilu and Anor vs. Republic [2005] 1 KLR pg 174**, the Court of Appeal (Tunoi, Waki & Onyango Otieno JJ.A.), held *inter alia* that:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions."**

32. Having subjected the evidence to a fresh and careful scrutiny, I must conclude, as did the trial court, that the Prosecution's case against the 2nd Appellant was proved beyond reasonable doubt. That the evidence adduced against the Appellants was sufficient and that the trial court evaluated it properly to reach its finding. The defenses of the Appellants did not go any length in denting the Prosecution's case. I also find that the sentence of five (5) years' imprisonment was appropriate in the circumstances.

33. In the end, I find that the appeals are without merit and are both therefore dismissed. I uphold both the conviction and sentence as determined and imposed by the trial court.

It is so ordered.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 10TH DAY OF NOVEMBER, 2021

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of…….1st Appellant in Person.

In the presence of…….2nd Appellant in Person.

In the presence of……State Counsel.