



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NUMBER E140 OF 2021

BETWEEN

ISAAC MWENDA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in Githongo

Senior Principal Magistrate's Court Criminal No. E100 of 2020

by Hon. E.W.Ndegwa (SRM) on 02.08.2021)

JUDGMENT

The Trial

1. **ISAAC MWENDA (Appellant)** has filed this appeal against conviction and sentence on a charge of grievous harm contrary to section 234 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence were that:

On 25.10.2020 at about 1700 hrs at Kirigara village in Kirigara Location, Imenti Central Sub-County within Meru County unlawfully did grievous harm to Isabella Muthoni

Prosecution case

2. The prosecution called a total of four (4) witnesses in support of their case. The complainant recalled that on 25.10.2020, Appellant attacked her for no apparent reason knocking down her tooth and loosening 5 others. In cross-examination, complainant confirmed that this is the 3rd case she was having with the Appellant. The incident was witnessed by Richard Mwirigi who said he was walking on the same route as the complainant when Appellant emerged from a thicket and attacked her. Complainant was treated and examined by **Peter Mbogori** a clinical officer who found that she had bruises on nose and lower lip, one missing incisor and the lower incisor was loose. The witness prepared the P3 form **PEXH. 1** in which he assessed the degree of injury as grievous harm. Upon receiving complainant's report on 25.10.2020, PC Antony Changany, commenced investigations and subsequently arrested Appellant and caused him to be charged.

Defence case

3. In her defence, complainant denied the offence. He raised the defence of alibi and said he was at his farm in Isiolo on the day complainant who is his ex-wife was allegedly assaulted. He said he was framed by complainant in two other cases.

4. By a judgment dated 02nd August, 2021, Appellant was convicted and sentenced to serve 10 years' imprisonment.

The appeal

5. Aggrieved by the conviction and sentence, Appellant appealed mainly on grounds that:

1. The prosecution case was not proved
2. The defence was not given due consideration

Analysis and determination

6. This is the first appellate court; I am guided by the principles set out in the case **David Njuguna Wairimu V Republic [2010] eKLR** where the Court of Appeal stated:

“The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

7. The legal onus is always on the prosecution to prove its case beyond reasonable doubt (See **Ramanlal Trambakal Bhatt V Republic (1957) EA 332**. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions on behalf of both the state and the Respondent.

8. The complainant’s evidence that she was assaulted by PW3 so much so that even if there was a grudge between Appellant and the complainant, it has not been demonstrated that PW3 had any reason to give false evidence against the Appellant. Having said that, I find that the Appellant’s defence that he was not at the scene of crime has not shaken the well corroborated prosecution case.

9. As to whether the prosecution proved the charge of grievous harm, I have considered the provisions of Section 4 of the Penal Code which defines grievous harm as 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 to any permanent or serious injury to any external or internal organ, membrane or sense.

10. Contrary to the clinical officer that complainant lost a tooth, the treatment notes refer to a broken tooth. It has not been explained at what stage the broken tooth was lost and my finding is that complainant suffered a broken tooth, loose incisor and soft tissue injuries.

11. The extent of the injuries inflicted on the complainant which included a broken tooth among others leave no doubt in the mind of the court that the prosecution indeed proved that complainant suffered grievous harm.

12. Concerning the sentence, Section 234 of *the Act* provides that:

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

13. The words “*shall be liable*” in the context of Section 234 of *the Act* has the interpretation that unless a contrary intention appears, is the maximum penalty. This principle is contained in **Section 66 (1)** of the *Interpretation and General Provisions Act* (Cap 2 Laws of Kenya) which provides:

“Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed”.

14. The second observation is that the principle of law in **Section 66** aforesaid is entrenched in **Section 26** of the Penal Code which expressly authorizes a court to sentence the offender to a shorter term than the maximum provided by any written law and further authorizes the court to pass a sentence of a fine in addition to or in substitution for imprisonment except where the law provides for a minimum sentence of imprisonment.

15. In particular, **Section 26 (2)** and **(3)** of the Penal Code provides:

“(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term.

(3) A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment”.

16. There is however a proviso to **Section 26 (3)** that a fine cannot be substituted for imprisonment where the law concerned provides for a minimum sentence of imprisonment. **Section 28 (1) (a)** of the Penal Code provides that where the Court imposes a fine under any law but the law does not expressly provide for the amount of the fine that can be imposed, then, the amount of fine that may be imposed is unlimited but shall not be excessive.

17. From the language of **Section 26** and **28** of the Penal Code, it is clear that those are general provisions of law which apply not only to the offences prescribed in the Penal Code but also to offences under other written laws.

18. Whereas there is no dispute that complainant suffered harm, Appellant is a first offender. Generally, where a person is said to be

a **first time offender**, the court usually imposes a lesser **sentence** as opposed to if the accused was a repeat offender. This view is subject to the discretion of the court as other factors such as aggravating circumstances are put into consideration in deciding the appropriate sentence in the circumstances of each case.

19. The trial court in its discretion imposed a lawful 7-year sentence. The injuries were not aggravated and there being is no evidence of factors that militate against imposition of a fine, I find that this was a proper case that the trial court might have considered an option of a fine.

20. Consequently, I confirm the conviction but substitute the 7-year imprisonment term with a fine of **Kshs. 60,000/- (fifty thousand)** in default of which Appellant shall serve a **12 months' imprisonment term** from date of conviction on **02.08.2021**. It is so ordered.

DATED THIS 02ND DAY OF DECEMBER 2021

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Kinoti

Appellant - Present

For the State - Ms. Mwaniki