IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 194 OF 2019

CORAM: D.S. MAJANJA J.

BETWEEN

ANDREW KOBIA KIMUMU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. G. Sogomo, SRM dated 17th April 2019 at the Magistrate's Court at Tigania in Criminal Case No. 94 of 2013)

JUDGMENT

1. The appellant, **ANDREW KOBIA KIMUMU,** was charged, convicted and sentenced to 20 years' imprisonment with hard labour for causing grievous harm contrary to **section 234** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The charge was that on 25th January 2013 at Mwanika Village, Athwana Location in Tigania West District within Meru County, he unlawfully caused grievous harm to JACOB KIMATHI MUKIRA by cutting him severally with a panga on the head and hands.

2. This being a first appeal, it is the duty of this court to re-evaluate the evidence adduced so as to reach its own independent conclusion as to whether to uphold the appellant's conviction bearing in mind that it neither heard nor saw the witnesses testify (see ***Njoroge v Republic* [1987] KLR 19**). Consequently, I shall briefly outline the testimony of the witnesses as it emerged at the trial.

3. The complainant, PW 1, recalled that on the night of 24th January 2013 at about 11.50pm, he was patrolling his miraa farm when he heard two people, one of whom he recognised as the appellant who was his neighbour. The two men went to the neighbours place to take chang'aa. He went to the house where he saw the appellant and the other person they had been with together with a lady by the name Jennifer. He greeted them but they did not respond. The appellant instead called him a dog and asked him to leave. As he left, he felt someone push him and before he could turn he was cut on the head and hand by the appellant. He asked the appellant why he was cutting him. The appellant told him that he should die. He fell down and saw the appellant at the door with a panga. He cried for help causing many villagers to come and save him. He was taken to hospital where he was admitted for 3 days. He later reported the matter to the police.

4. Rose Mukira, PW 2, recalled that she heard people screaming that PW 1 had been cut by the appellant. She proceeded to where PW 1 was. His clothes were blood soaked. He was rushed to hospital. While PW 1 was in hospital, she went to report the matter to the police station. She stated that the appellant was arrested in her presence after about 2 days.

5. The clinical officer who attended to PW 1 on the day he was injured, Geoffrey Muthomi, PW 3, produced the P3 medical form. He testified that PW 1 was admitted at Kiirua Mission Hospital for 3 days following cut wound injuries on the head, left upper elbow and right hand involving the small and ring fingers. He classified the injuries as grievous harm.

6. The investigating officer, PC Moses Gangre, PW 4, testified that PW 1 was brought to Tigania Police Station by his relatives. He was bleeding profusely. PW 1 stated that he had been assaulted by the appellant while at a chang'aa den. He recorded statements and later arrested the appellant.

7. When placed on his defence, the appellant elected to make an unsworn statement but later declined to make his defence.

8. The issue in this appeal is whether the appellant committed the offence of grievous harm. In his petition of appeal, further grounds of appeal and written submissions, the appellant complained that he was convicted on the basis of the evidence of a single witness in circumstances that were not favourable for positive identification.

9. The appellant cited several cases among them ***Wamunga v Republic* [1989] KLR 424**, ***Ogeto v Republic* [2004] KLR 19** and ***Roria v Republic* [1967] EA 583** where the superior courts have enjoined the court to examine evidence of identification carefully to avoid a case of

mistaken identity. These cases are the progeny of ***Abdalla Bin Wendo & another v Republic*** **[1953] 20 EACA 166**, where the Court of Appeal for Eastern Africa had the following to say on the question of identification;

> *Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness, but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions following a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.*

10. This case was not a case where the appellant and PW 1 were strangers to each other. They were both neighbours and knew each other hence this was a case of recognition. In ***Anjononi & Others v Republic*** **[1980] KLR 59**, the Court of Appeal held that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger. It emphasized though that the circumstances must also be examined carefully as mistakes may also be made.

11. PW 1 narrated how he heard the appellant and his friend in his shamba and followed them to the chang'aa den. There was a lantern lamp in the house and he greeted the appellant and his friend. The appellant abused him and attacked him and he was able to see the appellant with a panga when he fell. When cross-examined, on this issue, PW 1 stated that, *"There was a lantern lamp at the home. The light was enough as the room was small. I stood at the door. I saw the accused get out of the home and suddenly attack me."* The light from the lantern, the small room, the proximity of the parties to each other and interaction between them and the consequent attack couple with the parties' familiarity are all factors that I find are favourable for positive identification. These circumstances negative any notion of mistaken identity. The prosecution case was further buttressed by the fact that the incident was reported to the police on the very night and the appellant was named as the assailant.

12. The appellant suggested that essential witnesses including the person at the chang'aa den were not called as witnesses. **Section 143** of ***Evidence Act (Chapter 80 of the Laws of Kenya)*** provides:

> *143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.*

The general principle was expressed by the court on ***Keter v Republic*** **[2007] 1 EA 135** that, *"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."* However, in certain circumstances, the court may draw an adverse inference if the prosecution fails to call a witness who was necessary and essential.

13. It was suggested to PW 1 in cross-examination that Jennifer Nkirote, the owner of the chang'aa den, ought to have been called. PW 1 stated in cross-examination that she recorded a statement and that he assisted the police to bond the witness but she stated that the appellant asked her not to come to court. PW 4 confirmed that the said Nkirote recorded a statement in which she admitted that the appellant and respondent were at her place and that they argued and that the respondent was also cut. She however stated that she did not see the appellant with any weapon. She however stated the assault took place outside. In my view, the testimony of PW 1 is sufficient to support the prosecution's case and there is no reason to reject his evidence on the basis that the chang'aa den owner may not have seen the appellant assault PW 1.

14. Since the appellant elected to remain silent, I am convinced that the prosecution proved that the appellant is the person who assaulted PW 1 and caused him serious cut injuries that were properly classified as grievous harm.

15. The maximum sentence for grievous harm is life imprisonment and the court may, depending on the circumstances of each case, impose an appropriate sentence within those limits. This court's jurisdiction to review the sentence is circumscribed. It has jurisdiction to interfere with a sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive (see ***Wanjema v Republic*** **[1971] EA 493**).

16. While the offence and resulting injuries were serious and the court was entitled to impose a custodial sentence, I find the sentence of 20 years' imprisonment with hard labour is illegal as there is no provision that prescribes *"hard labour"* under **section 234** of the ***Penal Code***.

17. Considering the sentence imposed for murder and robbery with violence which invariably involves an element of grievous harm. The duty of the court is also to maintain consistency in sentences imposed for similar offences. Having regard to the facts of the case, I am constrained to quash the sentence of 20 years' imprisonment with hard labour and substitute it with a sentence of 5 years' imprisonment.

18. I affirm the conviction but allow the appeal to the extent that the sentence of 20 years' imprisonment with hard labour is quashed and substituted with a sentence of **five (5) years' imprisonment**.

DATED and DELIVERED at NAIROBI this 14th day of May 2020.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Nandwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.