



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 7 OF 2019

BILDAD CHERUTICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the original conviction and sentence in Kabarnet Senior Principal Magistrate's Court Criminal Case NO. 598 of 2017 delivered on 10th January 2019 by Hon. N. M. Idagwa, SRM]

JUDGMENT

Introduction

1. The appellant who was convicted and sentenced to imprisonment for 6 years for the offence of grievous harm c/s 234 of Penal Code by the Kabarnet Senior Resident Magistrate appeals to the High Court on the principal ground of sufficiency of evidence as set out in his Amended Grounds of Appeal dated 5th February 2020, as follows:

1. That the trial court erred in law and fact in convicting me on contradictory and unreliable evidence of the Prosecution.
2. That the trial court erred in convicting me without realizing that the case resulted from a grudge which lasted since 1979.
3. That the trial magistrate failed in both fact and law in convicting and sentencing me in a case which had no cogent records, x-rays not brought to court.
4. That the trial court erred in law and fact by not taking into account my testimony in plausible defence.
5. That the trial erred in law and fact in failing to note that the prosecution did not prove its case beyond reasonable doubt.

Evidence

2. The evidence before the trial court was as follows:

“PW 1: I am Jackson Kipkures Chelelgo. I come from Ravine in Baringo county. I am a business person. I own a shop. Bildad Cherutich is my brother in law. My father and his father are brothers that's a brother in law. Bildad stays at Barwessa, he works for gain in Ravine. On 28/8/2015 in the morning at 8.00am I left home and went to Ministry of lands Barwesa where I had been summoned by demarcation officer he had called me to sign for my father's land. My father is deceased. The documents were to be sent to Nairobi when I was signing. Bildad's father Jonah Cherutich came to that office. I greeted him and asked him to help me trace my father's land. We were searching among the files I for the three out of which I signed two the third one had been changed into bildad's fathers name. I asked Jonah Cherutich why he had done it. He said he was not the one who had changed into his names. Jonah then went out and made several calls. I don't know when he was calling. I looked for other numbers and signed. I completed at 10.00am. demarcation officer told us to attend a meeting at Barwesa market. It went on until two pm all this while Jonah kept receiving and making calls. Robert the son to Jonah was present into in the meeting I went for lunch in a hotel Jonah came to the hotel. He kept making and receiving calls I finished my food and left. I visited different places at market and talked to people Jonah kept following me and making the calls. I left the market at around 4.00pm. I reached the River and decided to take a shower. After finishing I continued with my journey about 100 – 50 feet to my home, Robert Chepkwony, Bildad Cherutich and Elijah Chepkwony emerged from a bush ahead of me. Robert is my cousin, Elijah too. Robert, Elijah and Bildad are brothers. I greeted the three in mother tongue. They surrounded me. Bildad threw a stone at me. It hit me on the head, he threw another stone I charged towards Bildad I wanted to get hold of him he hit me with a rungu on the head. I got hold of him, Elijah Chepkwony came from my right side he stabbed me here in the right elbow. I used Bildad to shield myself, Elijah went round me and stabbed me, he aimed at my stomach, I shielded myself with my left hand, the knife stabbed me on my left hand here near to elbow due to the

impact on my moving left hand the knife got off Elijah's hand and fell inside a bush nearby, Elijah went searching for the knife inside those weeds., Robert then charged at me he hit me with a rungu on top of the head.

I shielded myself with my right hand, the rungu fractured my hand, it broke I was operated on and a metal inserted in it. Robert then hit me on the head. I fell down letting go of Bildad. After that I don't know what happened. I found myself in Kabarnet hospital. My entire body was swollen. I had cuts on the back. I was admitted for 9 days, I received blood transfusion, metal fixed on my right hand and given medication after being discharged, I reported to police was given P 3 form which was tied by the doctor. I have treatment sheets from hospital and P 3 form. This are the ones.

PROS: I pray that discharge summary from Baringo county referral hospital be PMFI 1 and 2.

I am still unwell. The metal had to be removed. I am still in great pain. I can't work anymore. I can't do a single thing on my own. Ever since this incident my life had been threatened they one day came with a gun to my home at night they shot the gun. I ran out through the window and escaped to the bushes. My witnesses are being threatened like Chepchumba my witness was attacked with stones by Bildad's mother. He run away from March to now he has not resurfaced. When Chepchumba heard that I was shot at I went underground. I have reported to the police. They visited my house and collected the cartridge. My witnesses are scared of coming to court to one in court today had to look for people to escort her today. I am so scared for my life. Bildad called me one evening and asked me to withdraw this case. I told him to look for elders we settle the issue amicably. He again called me that evening and told me "Wacha kuimane: (lets struggle) its then that that evening the gun shots happened. The guns were shot at 1.00am. It hit the front side of the bed.

Mr. Mwaita: What the witness is stating is not in his statement. These are new matters I object.

Prosecutor: The evidence being given will be cross-examined if they have evidence in rebuttal they have a right to do the same. The evidence being given is coming straight from the witness. He had a right to state the court everything he know about this case. We only have one chance to lay everything before court from this witness defence will have their day.

Mr Mwaita: The issues being raised by complainant are prejudicial to accused when witness talks about telephone calls whose details are not being given to court how are we going to cross-examine. We have not been told if the witness later on recorded further statement to capture what he is saying. We are saying we should have been given adequate notice so as to prepare our defence if the court is inclined to allow this piece of evidence. We pray that his statement be marked as our exhibit.

COURT: The evidence came directly from the witness. The defence will have a chance to cross examine and in the process Mr Mwaita being a senior counsel definitely knows how to go about the issue. Objection declined.

They were three shots. The bullets came from outside my house is wooden. I was not hit. The bullet came from the window my bed faced the window when it hit the bed I fell on the floor I heard some people talking. I heard a voice like Bildad saying (Tumempata) (We have found him). They said they want to confirm if I was dead. They knocked on my door. I ran through the sitting room window. I was shot I fell outside, the person who had the gun pushed me he jumped through window. I had used. I run towards the maize I disappeared into the maize. I did not see who was pushing me. I went to a neighbours place. It was at 10.00am. I was asleep alone in the house. The knife, stones and Rungus that they used to attack me were never recovered. Before I was beaten up the father to Bildad went and reported to the chief that his sons wanted to injure me. The assistant chief Joseph Kipinga told me. He reported the same day I was beaten.

CROSS-EXAMINATION BY MR MWAITA

Bildad's father and my father are blood brothers.

Pauline Chepsebat and Chepchumba and my mother saw me being attacked.

There were children who were going to the river, they saw me being beaten, they screamed attracting people.

Pauline Chepsebat recorded a statement.

Yes the statement you have read to me does not give names or mention a rungu.

That signature on the statement is not mine.

That statement you are reading to me does not mention where I was being hit and by who.

I never recorded additional statements in this file, but I have been reporting and I have OB numbers.

I heard what Jonah said on phone.

At lands' office Jonah told the receiver that he is at Kapramoi.

I heard what he was saying.

Jonah started by calling the name 'Kipsang' then asked "Where are you? ", then he said "I am at Kapramoi, come".

Bildad is called Kipsang at home.

The officer recording the statement did not ask me for specific words that I heard in phone conversation the way you have asked.

I told the police that Bildad's father had reported to her names are Charity Chepchumba.

My mother did not record statements.

Charity took me to hospital.

I recorded my statement on 5/9/15 at 2.45 pm.

I named Elijah Robert and Bildad to the police.

They were arrested.

I don't know if the police recorded it down.

That signature on the statement is not mine.

I told the police I am Jackson Kipkoros Chelelgo.

My phone number is 0720303319.

I told them I am a business person at Ravine.

I told them I had attended the lands office at Barwesa.

I was attacked at 5:00pm.

When I narrated to the police, I gave the names of the people who attacked me.

I did not just say three people the way it has been indicated in the statement.

I mentioned a rungu to the police.

I told the police what I have told court.

Chief (assistant)

The statement you have read to me has not captured the report by Bildad's father to assistant chief.

Assistant chief is not my witness, he is a public servant.

I don't know if investigating officer called the chief.

Before the attack Bildad had never complained about me to the police.

Robert had never reported me to the police before the attack.

The gunshots happened after the attack.

I never saw them but I heard them talk.

I was shocked by the gunshots.

Bildad conducts business at Ravine.

I don't know if he has a house at Ravine.

RE-EXAM

It is PC Kinuthia who was recording the statement while I was narrating.

I don't know if I was looking at what he was writing.

The officer from the statement I have been shown looks like he left other things I told him out.

I reported the threats thrice at Ravine police and twice at Kabarnet.

I signed the statement that PC Kinuthia recorded.

That signature on the statement I have been shown is not mine.

PC Kinuthia never gave me a copy of the statement I had recorded.

PW2: *I am Benjamin Kendagor from Kaptimbor sub-county hospital. I am a clinical officer. On 5/9/15 I filled a P3 form for Jackson Kures aged 40 years. He gave history of being assaulted on 25th August 2015 by person known to him. He sustained injuries on the face, back both upper arm and both lower limbs. He was admitted on 28/8/15 until 5th September 2015 and given IP number 24186/15 at Baringo county referral hospital. Upon examination, I saw bruise on forehead and surrounding region, swollen and tender bruise on the back and tender. There were two cut wounds on left and right hand with obvious deformity on the right forearm. There were bruises swelling and upon touching they were painful. The injuries had taken some hours. By then he had not received medication. X-ray was done on 28/8/15 which revealed a fracture of the radial bone. He was managed for the same. I formed opinion that degree of injury was grievous harm. I signed and filled P3 form on 5/9/15. I wish to produce the same as exhibit. I also used a discharge summary from Baringo referral hospital to assist fill P3.*

Diagnosis made on discharge of complainant was closed radius 1/3 distal fracture with soft tissue injuries. Surgical intervention for fracture was done. Dressing for soft tissue injury done. He was discharged on 5th of September 2015. Discharge summary was filled by Dr. Ole Naikuni. He is a medical officer. I have known him for two and a half years. He did his internship at Baringo county referral hospital when I was working at the same hospital. I wish to produce the documents as exhibits.

Prosecution – I pray that P3 form and discharge summary be produced as PEX1 and PEX2.

Mr. Mwaita – Discharge summary is a photocopy, I object. No objection for P3.

Prosecution – I pray that discharge summary be MF11 and P3 as PEX2.

Court – Allowed as prayed.

CROSS-EXAMINATION BY MR. MWAITA:

I filled P3 while I was working at Baringo county referral hospital.

I was closely working with Dr. Naikuni.

I was working at casualty section and could call doctor when there was an emergency.

The doctor could fill a form and sign.

X-ray is done to ascertain fracture.

Before admitting the patient x-ray was done.

I am not the one who did x-ray.

X-ray films are not in court now.

The fracture led to my conclusion of injury being grievous.

Discharge summary is final document.

The patient has a file at the hospital.

I gave court IP number.

I saw the patient on 5/9/15, he had a discharge summary.

I cannot remember if I was on duty on 28/8/15.

On 29/8/15 he was on the ward being attended to by the MOH.

By indicating hours on P3 I mean from the time he was being attended to by medical practitioner after the assault.

I am a clinical officer in general.

RE-EXAMINATION

I relied on discharge summary and my examination.

Dr. Ole Naikuni made an observation on admission of a closed fracture radius distal 1/3 and that is the same diagnosis upon discharge.

Complainant came with a complaint of being assaulted.

The patient came with an obvious deformity which was an indication of a fracture.

In 2015-2016 the hospital had installed new machines and the x-ray films were not being given to patients. A disk was being inserted in the computer and accessed through the computer.

PW3: *I am Pauline Kipsergon. I come from Kiturwa. I am a house wife. Jackson Kipkures is my brother, my follower. Bildad Cherotich is my cousin. His father and my father are brothers. Complainant stays at Solianyi.*

On 28/8/15 I was at home in Barwesa. I had gone to give my mother Kobilu a hand in the farm. I went in the morning. I found Jackson having arrived the previous day. I asked Jackson where mother was. He told me she had gone to Barwesa to adjudication process at lands. It was my father's land. My dad is deceased. We worked in the land up to evening. I was with mother and Charity Chepchumba. Charity Chepchumba had come to assist. We then heard noises, people were fighting. We ran to the scene. We saw them fight. They were Elijah Chepkwony, Bildad Cherutich and Robert Chepkwony and Jackson. Robert is Bildad's brother. Elijah is also Bildad's brother. When we arrived, I saw Elijah, Robert and Bildad surround Jackson. Elijah had a knife, club and stone, Bildad had a club and stone and Robert had a club and a stone. They were using them to assault Jackson. I saw Elijah stab Jackson on the right hand, Bildad hit Jackson on the head with the club. We screamed. People came. When a crowd came, Elijah, Robert and Bildad ran away. By that time Jackson was on the ground unconscious. He fell down after being hit on the head. He had a swelling on the head and was bleeding from the stab wound. We called a motorbike. We took Jackson to Barwesa. We were referred to Kabarnet district hospital. We brought him. I stayed with him in hospital for 9 days. His hand was injured, a metal was fixed inside. After we left hospital we recorded statements at Kabarnet police station. When I was young, there was a dispute between my father and Bildad's father but it was settled.

CROSS-EXAMINATION BY MR. MWAITA:

Jackson is my brother.

I recorded my statement with the police.

I can't remember the date.

I recorded the statement in 2017(year).

I recorded in 2015 not recently.

I don't know how to read and write.

I can't remember if I put a fingerprint.

(Witness shown a statement)

Yes this is my signature.

I don't know if what I have told the court nearly half of it is not in the statement.

I have not added facts not recorded in my statement.

In the statement I have not mentioned my mother.

In the statement I have not mentioned Elijah and Robert.

In the statement I said it's Charity who called me.

Mr. Mwaita – I pray that the statement of Pauline Chepsergon dated 8/9/15 be marked as DMFI-1

Prosecution – No objection.

Court – Allowed as prayed.

Witness continues;

From home to where they were fighting from is about 100 meters.

It is Charity who was first to arrive at the scene. Mother and I arrived after Charity.

When we arrived we found small children. They are the ones who made noise attracting us to the scene. The children around there were grazing cows.

At the scene there were no children.

When we arrived Jackson was still standing. Elija stabbed Jackson on left hand.

Bildad did not have a knife, he had a club and small stones the size of a fist.

Bildad hit him in middle front side of the head. It swelled.

It's just the left hand. Jackson's leg was swollen.

Robert hit him on the leg with a club. A crowd gathered.

We were not able to apprehend the suspects. They took off with the weapons.

Jackson fell down when the suspects ran away. I don't know if Jackson saw the person who hit him on the head.

At Barwesa the doctor did not attend to Jackson. I left Jackson behind with Charity and I went looking for a vehicle. I don't know if doctor gave Charity a note.

When we were young Bildad's father and mine fought. Bildad's father stabbed my father with a knife. I witnessed the fight.

It's not true that Charity was informed of the fight by children. Charity was at the scene.

My mother is Kobilo Cherop. She witnessed the fight.

Villagers came when we screamed.

RE-EXAMINATION:

I recorded my statement at the police station.

It's a police who recorded it while I narrated.

I did not read it after I finished narrating. I narrated in Kiswahili.

I saw children away from the scene.

They did not move close.

PW 4. *I am Joseph Toroitich Chebon. I am an assistant Chief of Kono sub location. I remember on 28/8/10 Mzee Jona Cherutich who is the father to accused met me on the road and told me his sons wanted to fight Jackson Chelalgo. I did not believe him. I told him to report at AP camp he left. I followed him, on arrival at Ap camp I did not see Jonah. I reported to the Ap what happened I was s given two Ap I was told complainat had been taken to Barwesa health centre. He was then transferred to Kabarnet district hospital. We were told to search for Elijah Chepkwony and Bildad Cherutich. We went to Elijah's home. We could not get in because of various dogs. Elijah run away he searched for him in vain. What I know Dickson Cherutich and Jonah Cherutich have been fighting over land for long. Dickson is deceased. That is all. Bildad Cherutich as accused before court others are at*

large.

CROSS EXAMINATION BY MR MWAITA

- ◆ *I was an assistant chief in 2015*
 - ◆ *I received my statement on 8/2/2018*
 - ◆ *I was very sick that is why I delayed.*
 - ◆ *I have a kidney problem and diabetes*
 - ◆ *I have been on treatment at Moi teaching and referral*
 - ◆ *In 2015 I was ok.*
 - ◆ *The whole of 2016 I was admitted in hospital on and off*
 - ◆ *I could be admitted for long.*
 - ◆ *Six months*
 - ◆ *I was discharged and stayed home for 3 months and I went back to hospital on admission*
 - ◆ *I have been unwell*
 - ◆ *I still fog for checkups*
 - ◆ *I stay near people*
 - ◆ *I told Ap for backup*
 - ◆ *I did not witness the assault*
 - ◆ *I was not a chief when the father to accused and complainant fought about 1979.*
 - ◆ *They have land issue*
 - ◆ *I recently wrote a letter to accused father telling him not to enter some land.*
 - ◆ *It is dated 25/4/2018*
 - ◆ *Mr Mwaita: I pray that it be marked DMFI 2*
- Prosecutor: No Objection*
- COURT: Allowed as prayed.*
- ◆ *The letter is for Jonah Kimwaiwe*
 - ◆ *The letter I acted on was from land adjudication office*
 - ◆ *Yes the letter is not signed*
 - ◆ *We have not had a meeting because the issue is being handled elsewhere.*
 - ◆ *I did not labors any malice against Jonahs family*

- ◆ *Unless I check the police file I would not tell if the AP recorded stated.*
- ◆ *I can go find out from them*
- ◆ *Complainant was taken to Barwesa health centre*
- ◆ *When I arrived at Barwesa health centre complainant had been referred to Kabarnet hospital*
- ◆ *Bildad and Robert stay at Eldama Ravive*
- ◆ *Jackson stays at ELdama Ravine*
- ◆ *Jackson and Bildad are brothers*

RE EXAMINATION

- ◆ *It is the nurse of Barwesa health centre who told me about the referral*
- ◆ *I wrote the letter dated 25/4/2018 to the accused father*
- ◆ *It refers to another shamba*
- ◆ *I have never handled a land case between accused family and complainants family*
- ◆ *I don't have a grudge against accused or his family*

PW 2 [Recalled to produce complainant's Discharge Summary]

I am Benjamin Kendagor clinical officer Kaptimbor dispensary. I have a discharge summary of Chelgo Jackson 38 years old who was admitted at Baringo county referral. On 28/8/2015 to 5/9/2015 ref No. 24186/15 he had a closed radius distal 1/3 (we divide the hands into 3 parts so it was the very last part towards wrist) closed means it did not have any wound. On being discharged there was a fracture which was closed of the radial borne with soft tissue injuries. The treatment done was that a blade was surgically inserted to support the fracture part. The injury was indicated to be as a result of an assault by a person known to him he had cut wounds of the right upper arm on the posterior aspect which was 2 cm in length and cut wound of the upper limb and a right lower limb was swollen x-ray was done confirming fracture of the upper and lower limb. Discharge summary was written by one Doctor Naikuni and he signed it. Its dated 5/9/2015. I know Doctor Naikuni who came to Baringo referral hospital in 2014 as intern and left in 2016 when he was an MOH. I am familiar with his handwriting and signature. I wish to produce the discharge summary as evidence.

PROSECUTOR: I pray to produce the discharge summary under section 77 of the evidence act. Doctor Naikuni left the hospital and can't be traced with ease. It had been marked MFI – 1. I pray it be produced as Pexh 1.

Mr Mwaita: No objection

COURT: Discharge summary Pexh 1.

CROSS EXAINATION BY MR MWAITA

- ◆ *The discharging officer should be one.*
- ◆ *The discharge summary does not have the official rubber stamp of the hospital*
- ◆ *It's the right upper limb that was fractured.*
- ◆ *There were some open wounds*
- ◆ *The fracture had no wound*
- ◆ *I am not a radiologist*

- ◆ *I have basic training on how to read X-ray.*
- ◆ *X-ray was done by somebody else*
- ◆ *I do not know if X-ray films have been presented in court.*
- ◆ *Doctor Naikuni is not an expert in radiology in radiology.*
- ◆ *As at that time he was a general practitioner.*

RE-EXAMINATION: Nil

PW 5. *I am No. 54272 PC Peter Kinuthia from Kabarnet police station. I am the investigating officer. On 30/8/15 complainant's wife came to the station and reported that the husband had been assaulted on 27/8/2015 by 3 people. A report was booked into the OB. I visited the complainant at Baringo referral he had been injured on the leg and hand. On 5/9/2015 after discharge complainant came on the station. We filled P 3 form and brought his witnesses on 7/9/2015 a phone was received from Pauline informing us that two suspects had been arrested. We went and collected Bildad and another. We preferred the charges. Bildad is the accused before court.*

CROSS-EXAMINATION BY MR MWAITA

- ◆ *I can't remember the complainants wife name. I did not visit the scene. Initial report was that complainant and accused's were residence of Ravine.*
- ◆ *We sent formal information that incase suspects are spotted in Ravine should be arrested.*
- ◆ *He was bandaged on right hand.*
- ◆ *The leg had bruises*
- ◆ *Complainant was talking*
- ◆ *The chief did not record his statement in 2015*
- ◆ *Complainant and accused are related*
- ◆ *Complainant was the eye witness*

Re-examination: Nil

DW 1. *I am Bildad Kipsang Cherutich alias Ben. I come from Eldama Ravine. Koibatek ward Sabatia location, Esageri division, I am a business man. I slaughter goats and cows. I slaughter them and supply to Nakuru. I know the charges I am facing. I say that they are false. On 28/5/2015 I was in Eldama Ravine carrying on my business. I was not in Barwesa. I am married with children. We live together at Kipkaber. I have been living in Kipkaber from 2008. I was arrested on 6/9/2015 at mid night by AP officers and taken to Eldama Ravine police station where I was remanded a vehicle for Kabarnet police station came and collected us. I was with my brother called Robert. I was collected from Eldama Ravine the same day. I spent a night at Kabarnet police station. I was then arained before court. I was with my wife at Eldama Ravine on 28/8/2015. I am related to Jackson Chelelgo he is my cousin. His father and my father are brothers. I have a grudge with Jackson which started in October, 2014. Jackson sold my brothers money. My brother is Robert. Sorry it was on 9/9/2014 and on 10/9/2014 my brother Robert reported at Eldama Ravine police station. It was Ksh. 28,000/- vide OB 24/10/2014. Jackson was arrested the same day and he repaid the money when at the police station. He then issued death threats to my brother in front of police officers. He was not arrested. Robert left and went back to the work place in Solian. Jackson lives at Solian. On 11/9/2014 I received a call from Jackson who promised to kill me whenever we will meet. I called Robert he told me he had received the death threat too. We met and went to report at Eldama Ravine police station via OB 27/11/2014 at 1200 hours. Robert feared for his life he changed residence to Kapimoi, he received a death threat after two weeks he then moved to Barwesa. I remained in Eldama Ravine Jackson continued threaten me. On 23/5/2015 at 5.00pm I had gone to buy goats at the boarder of Sabatia and Solian forest at Kamuriot. Jackson emerged he asked me what I was doing there. I told him I was conducting my business. He told me I had gone looking for him in the forest. I told him no he was armed with a panga he hit me with a panga near the ear. Robbed me of my phones and keys to a motor bike. I screamed people came to my rescue. I then went to hospital at Eldama Ravine that same day. This is the hospital document. I pray it be marked as my evidence.*

Mr Mwaita: *I pray that hospital sick sheet be DMFI 1.*

COURT: *I was given P 3 form at Eldama Ravine police station where I reported it was filled at Eldama Ravine Hospital. I pray it be marked.*

Mr Mwaita: I pray P 3 be MFI 2.

Witness identified the P 3 form to the police station they told me Jackson will be arrested. I continued with my chores. I went to the police station the police told me had not been spotted. I went away only for me to be arrested for this charge. After I left court I followed up on my case Jackson was arrested on 27/3/2016 he was charged in court at Eldama Ravine. Before the arrest of Jackson, it took the intervention of my advocate Mr Mwaita. The police were reluctant to arrest him. When my case at Kabarnet was going on the Kabarnet court was proceeding, Jackson kept lying to court that I had threatened him. In June, 2016 he brought officers to his place and claimed he had been shot at which was lies. The case then stalled. I don't know how it proceeded. I never received summons. In Feb 2017 at 9.00am when at work Jackson called me on phone and told me if I come to court he will kill me. I reported to Eldama Ravine Ob 10/5/2/2017 on 26/9/2017 I was arrested while at Ravine and then brought to Kabarnet when I was arraigned before court. I have been in custody since then. I was previously on bond Cash bail of 30,000/- which was forfeited when I absconded court. The charge is because of a grudge. What Jackson said in Cr 770/15 is not what he said before this court.

.....

I had earlier testified. The complainant had earlier testified in Cr 770/15. These are contradictions in that testimony and that in his case. In this case he said that my father was calling complainant to come but in Cr 770/15 he never mentioned this. In this case he state I had a stone and rungu in Cr 770/15 he said I had a knife and rungu. In Cr 770/15 he said my father had his debt Ksh.20000/- in this file he did not mention this. He said the debt was for exchange of cow to a calf in Cr 770/15 he said he reported to the police he did not specify what in this case he never mentioned it. Instead he said its his wife who reported to police.

This wife is not known because he said Charity Chepchumba is not his wife in this time complainant said he reported to the chief. In 770/15 he did not mention this. In this case, in the doctors evidence in cross examination over P 3 form Doctor said complainant had cut wounds so Jackson Chelelgo said he had cut wounds on the back in this file in 770/15 he did not mention this wounds in this file he said his entire body was swollen on Cr 770/15 he did not mention this. There are numerous contradictions in 770/15 and in this case I pray that court refers to proceedings of 770/15 when considering this case we come from the same location with complainant Sabatia location we share a chief. The chief is Benjamin Sitienei. He wrote me a letter sated 24/6/2016. This is after I reported to the chief about the threat of my life by Jackson Chelelgo. I was to bring the letter t court. He gave the character of the complainant as doubtful. I wish to produce the letter as exhibit.

Mr Mwaita: I pray that the letter be DMFI – 3.

Witness continued: I have faith in the court. I pray that justice prevails. I never committed the offence.

CROSS EXAMINATION BY PROSECUTOR

- ◆ Complaiannt stole my brothers Ksh. 20000/-
- ◆ I gave court the OB No. for the report we made to Eldama Ravine police station.
- ◆ My brother is not my witness
- ◆ My brothers money had nothing to do with me.
- ◆ When Jackson injured me on 23/5/2015 I reported to police
- ◆ I was treated at Eldama Ravine hospital.
- ◆ The OB number on the P 3 form
- ◆ The treatment notes, I was treated with do not show the date of treatment.
- ◆ Any assault case was at Eldama Ravine.
- ◆ I do not know the case number.
- ◆ I was the complainant. I never followed up on case due to threats from Jackson
- ◆ I do not encounter any challenges with authorities when pushing my assault case.
- ◆ I was injured on face, ear and
- ◆ I closed my butchery after my arrest on 26/9/2017

- ◆ *My initial arrest was on 6/9/2015.*
- ◆ *I absconded court for 3 months*
- ◆ *Yes I failed to attend that in Eldama Ravin*
- ◆ *Yes I absconded my case here.*
- ◆ *The chief's letter is dated 24/6/2016.*
- ◆ *On 24/6/2016 I had a pending case at Kabarnet law Courts.*
- ◆ *When complainant testified the letter was not brought to his attention*
- ◆ *It is not true the letter was an after thought*
- ◆ *Its not true that I am hiding under the chief's letter.*
- ◆ *I do not know where my brother whose money Jackson stole is*
- ◆ *He was my co-accused in 770/15*
- ◆ *On 11/9/2014 I received a phone call from Jackson threatening me.*
- ◆ *I reported to police OB 27/11/9/2014*
- ◆ *When I reported to police OB 27/11/9/2014*
- ◆ *When I reported to Chief in 2016, I did not report to my advocate*
- ◆ *It never reached court*
- ◆ *Jackson was never arrested for threatening my brother*
- ◆ *To show I had a case in Eldama Ravine I have a P 3 form and treatment sheet*

RE-EXAMINATION

- ◆ *In my brothers money issue I was his witness.*
- ◆ *Jackson knew I was a witness*
- ◆ *I can't remember my assault case OB No. Off load*
- ◆ *Its indicated on P 3 form (Wit shown a paper by counsel)*
- ◆ *Its OB No. 27/23/2015*
- ◆ *I was given P 3 form by a police officer at Eldama Ravine police station.*
- ◆ *The Eldama Ravin case did not proceed because Jackson threatened to kill me.*
- ◆ *I did not report the threat to the police.*
- ◆ *I reported to the chief instead*

- ◆ *The threats made me not attend both Ravine case and case in Kabarnet.*
- ◆ *I was to attend court on 29/6/2016. Jackson reported to court that he had been shot at.*
- ◆ *At page 17 of proceedings of CR 770/15 I talked about the threats.*
- ◆ *My not following up the two cases was not deliberate on my side.*
- ◆ *By 24/6/2016 I had already failed to attend court.*
- ◆ *I was given the sick sheet on 23/5/2015 then Eldama Ravin District hospital.*
- ◆ *Its not my mistake that date was omitted.*

DW 2: *I am Carolyn Chebet Rono. I come from Eldama Ravin Kikaber Sub location, Sabatia location. Bildad Cherotich is my husband. We got married in 2009. I know Jackson Chelalgo. He is my inlaw. On 28/8/2015 I was in Ravin with my husband. He was at his work place where he bought and sold goats to Esageri slaughter house. He was at his business he never left. We ate lunch together on 28/5/2018 and also I saw him in the evening he never left his business premises. On 23/5/2015 Bildad was doing his business on coming back he told me he had made Charles Chelelgo onto road who beat him up. He went to report to Eldama Ravin police station. We waited for the arrest of Charles Chelelgo. On 6/9/2015 Ap officers came to our house at Midnight they arrested Bildad and took him to ELdama Ravine police station. I went to check on him at the station that morning I was told he was transferred to Kabarnet police station. I can't tell how the relationship between my husband and Jackson has been*

CROSS-EXAMINATION BY PROSECUTOR

- ◆ *I live with my children at boma.*
- ◆ *I had children on 28/8/2015*
- ◆ *Bildad left for work 28/8/2015 in the morning at 9.00am and came back at midnight.*
- ◆ *He had people he interacted with in his daily chaos.*
- ◆ *There is nobody else who had come to tell court Bildad was at Rain on 28/5/2015.*

RE-EXAMINATION

?I remained at home on 28/5/2015 when Bildad left for work.

?I remained with my two year old child.

DW 3: *I am Benjamin Kipkemboi Sitienei. I am 57 years old. I come from Kipkaber location Sabatia location. I am Senior Assistant Chief of Kipkaber sublocation. I have worked in that capacity for 19 years. I know the accused. He is from Kapkaber sublocation Sabatia location. I know Jackson Chelelgo we call him Charles back home. He comes from Solian Sublocation Sabatia location. He is a cousin to the accused. I have known Bildad (accused) from 2008 when he bought land in my area. He is married and has children. He buys and sells goats and cows for sale. The complainant is also a business person he owns a shop at Solian. I have a letter that I wrote on 26/6/2006 when I was acting Chief of Sabatia location. In the letter I stated that Jackson had doubtful character among the community I wish to produce the letter as exhibit.*

Mr Mwaita: *The letter is DMFI – 3. I pray it be Pex 1.*

Prosecutor: *No objection.*

COURT: *Allowed*

WITNESS CONTINUED

On 23/5/2015 accused reported to me that he had been assaulted by Jackson. I referred him to the police I did not know how the case went. When I was acting chief I got information that gun shots had been heard at Jackson's home. I called police who took over the matter. I have never received a complaint against accused.

CROSS-EXAMINATION BY PROSECUTOR

- ◆ *The letter I have produced I was writing for Bildad.*
- ◆ *Its Bildad who came to the office and requested I write to the letter.*
- ◆ *He wanted me to write how he stays with people.*
- ◆ *I wrote the letter after Bildad had been assaulted.*

RE-EXAMINATION

What I wrote in the letter is out of my knowledge as a chief. He never influence me to write it the way it is.”

Judgment of the trial court

3. In convicting the appellant , the trial court resolved the issues that it framed as follows:

“ISSUES FOR DETERMINATION

1. *Was the complainant assaulted*
2. *Who assaulted the complainant*
3. *Has the accused alibi been displaced*

ANALYSIS

The accused was charged under section 234 of the penal code which states as follows:-

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

PW 2 stated that the degree of injury was assessed as grievous harm. Nature of injuries were bruises on the forehead & surrounding region swollen and tender bruises on the back and tender. Two cut wounds on the left and right hand with obvious deformity on the right fore arm fracture on the radial bone. Grievous harm was proved in his evidence the accused stated that he was not in Barwesa. He called PW 2 his wife who in her evidence stated that she was with the accused in Eldama Ravine.

In the case of Karanja V R [1983] KLR 501 the court held that

“In a proper case a court may in testing a defence of alibi and in weighing it with all the other evidence to see if the accused guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an after thought.

Its trite law that the burden of proving the falsity, if at all an accused’s defence of alibi lies on the prosecution, this was held in the case of Victor Mwendwa Mulinge VR [2014] eKLR. In the case of Elias Kiamathi Njeri v Director of Public Prosecution [2015] eKLR it was held that the failure of prosecution to adduce evidence to rebut the alibi of the appellant put the prosecution’s case in doubt considering that the evidence tendered was not overwhelming.

In his evidence the accused stated that he was in Eldama Ravine with his wife on 28/8/2015. His wife testified as DW 2. She stated that

“on 28/8/2015 I was in Ravine with my husband. He was at his work place where he bought and sold goats at Esageri slaughter house. He was at his business he never left. We ate lunch together on 28/5/2015 and also I saw him in the evening. He never left his business premises. On 23/5/2015 Bildad was doing has business on coming back he told me he had met Charles Chehelgo on the road who beat him up...”

On being cross examined PW 2 stated

In re-examination DW 2 stated that

“I remained at home on 28/5/2015 when Bildad left for work”

In prosecution’s evidence PW 1 stated that he was accosted by the accused in the company of his two brothers while on the road where they injured him. PW 3 stated that she was complainant’s sister. The accused and his brothers were well known to her. She run to the scene after hearing screams. She was in the farm when she heard the screams. On arrival at the scene she saw the

accused Elijah and Robert fighting Jackson. She was in the company of her mother and Charity and they screamed attacking people. The accused and the two others run away on seeing the people gather.

The accused raised the defence of alibi and called DW 2 to corroborate his alibi. DW 2 stated that she last saw the accused on the morning of 28/8/2015 at 9.00am. She again saw him at midnight on the same day. She could not ascertain when the accused spent his day. PW 2 and PW 1 saw the accused at the scene of crime on 28/8/2015 evening from his evidence the prosecution's evidence had displaced the accused defence of alibi in his defence the accused stated that there were contradictions in the complainant's evidence in CR 770/15 compared with his testimony in this case. I have perused Cr 770/15 the proceedings of 3/12/2015. The complainant was stepped down midway his examination in chief. He was not cross examined to test the evidence so far given. But just to mention. The complainant in CR 770/15 stated that he was accosted by accused and two others. The two threw stones at him Bildad had a knife and Rungu...

The accused and the complainant are well known to each other. The incident happened after four PM. The condition for positive identification was favourable. PW 1 and PW 2 were able to identify the accused and two others who assaulted the complainant. From this evidence the prosecution have been able to prove that the accused and two other assaulted the complainant. I therefore find that the charge has been proved beyond reasonable doubt. Accused is therefore guilty as charged. I convict him under section 215 CPC.

N. M. IDAGWA, RM

10/12/2018.”

Submissions

4. I prosecuting the appeal, the appellant filed corresponding written submissions and the DPP made oral submissions on the appeal to which the appellant responded as shown in the record of proceedings of 5th February 2020, as follows:

“Appellant

I have grounds of appeal and written submissions.

DPP

The appeal is opposed. Appellant convicted of grievous harm c/s 234 of the Penal code and sentenced to serve 6 years imprisonment from 10/1/2019. He has only served one year.

Criminal proceedings in no. 598 of 2017 were marred with counter accusations between the appellant and the complainant. However, the issue for determination were firstly whether the complainant was assaulted, secondly whether it was the appellant and thirdly whether the appellant's defense displaced the prosecution's evidence. PW1 testified that appellant is his cousin brother. On 28/8/2015 he went to Ministry of Lands, where he was to sign some documents with regard to land belonging to the deceased's father. As he was going back when just a few meters from the house, the appellant accompanied by his brothers (Robert and Elijah) emerged from the bush and started attacking him.

Appellant herein hit the complainant on the head using a stone and a rungu. His brother Elijah stabbed him on the right elbow and on the right hand. Robert hit him with a rungu on the head and on the right hand which got fractured. Robert then hit him on the hand and that is when he lost consciousness and found himself in Kabarnet Hospital. In his defense, the counsel for appellant in the trial court requested for a file No. 770/2015. This is a case where the appellant had been charged with brother Robert with the same offence but they had absconded and the matter was withdrawn under S. 87 (a) of the CPC. The Appellant was arrested and charged again in the case subject in this appeal. Before the two had absconded the appellant had testified and the appellants argument was that the evidence the complainant gave in case 770/2015 was different from the evidence in trial 598/2017. The issue raised was that there were some discrepancies on who among the three hit the complainant where among other discrepancies. Where each assailant hit the complainant in this case is irrelevant, as he was being assaulted by three people including the appellant and he was properly identified and it is not possible in the circumstances when one is attacked by several people to know who had hit him on which part. The prosecution proved that the appellant and his two brothers assaulted the complainant. The other two are at large.

PW2 is the clinical officer who testified that the complainant had bruises on the forehead, tender bruises on the back, cut wounds on the left and right hands with obvious deformity on the right forearm and a fracture on the radial bone on the right forearm. A metal blade was surgically inserted to support the fractured part of the hand. An x-ray was done and in the amended grounds, the appellant states the x-ray was not produced in court. At page 27 of the proceedings, PW2 the Clinical Officer line 13-4 testifies that x-ray was done on 28/8/2015 and which revealed a fracture of the radial bone. At page 30 line 1-3 he explained why the x-ray films could not be produced in court. He said that in 2015/16 the hospital had installed new machines and the x-ray files were not being given to the patients, but this was being inserted in the computer and accessed through the computer. No x-ray films were being issued at the time.

Whether the appellant was the one who assaulted the complainant;

PW1 testified that he was assaulted by three brothers who were his cousins. It was during the day and he was able to identify them all.

PW3 is the complainant's sister who testified that she was at home on the material day with her mother and a lady by the name Charity. She had been informed by her mother that the complainant had gone to Barwessa, to the Ministry of Lands office, that morning. She testified that in the evening they were at home, they heard voices of people fighting and they ran to the scene. They found the complainant and the three brothers including the appellant fighting as they were holding each other. The appellant and his two brothers were assaulting the complainant and the complainant was trying to defend himself.

PW3 and the other two ladies screamed and the appellant and his two brothers ran away. At that time the complainant was on the ground and was unconscious. She took her brother to hospital in Barwessa after which they were referred to Kabarnet Hospital. She stayed with her brother for 9 days that he was admitted at the hospital.

PW4 is the Assistant Chief of Kolowa sub-location who testified that on the material day, he had met with the father of the appellant and his father had informed him that his three sons including the appellant were planning to attack the complainant. They reported to AP camp and they were given two police officers but they were too late as they found the complainant had already been attacked and had been taken to hospital. This clearly showed that the appellant and his brothers had planned to attack the complainant and their father had information and that is why he reported to the assistant chief. The father of the appellant had nothing against the appellant and his brothers. During the proceedings, it was clear that there was an issue of land because when the complainant went to Barwessa Lands office, he met with the appellant's father and they were both in good terms.

He established that one of this fathers lands had been put in the name of the appellants father and on enquiring from the appellants father, who was with him, he said that he was not aware and that he had nothing to do with it. He started making calls who the complainant thought he was calling the appellant and his brothers. And that is how the appellant got to know the complainant was at the Lands office.

In his defense the appellant raised an alibi which was dismissed as it was not raised earlier in the trial for the prosecution to be able to respond. He stated that on the material day he was at Eldama Ravine with his wife- that that is where he used to stay and that he was not at Barwessa where the offence was committed. His alibi was contradicted by his wife who testified as DW2. His wife testified that on the material day the appellant went to work and she remained at home and the appellant came back at around midnight. So the evidence that the appellant spent the whole day at home with his wife is untrue. It is clear that he was at Barwessa with his brothers and they are the ones who attacked the complainant. The evidence against the appellant is over whelming. Section 234 of the Penal Code provides for maximum life sentence. The six years imprisonment is in the circumstances very lenient considering the permanent injuries sustained by the complainant. Appellant should be allowed to serve sentence so that he may learn to solve issues amicably and not to take the law into his own hands. The appeal should be dismissed.

Appellant in reply:

I did not commit the offence. It is not true. The x-ray to show that the appellant suffered injury is not provided. The Clinical Officer is a staff of Kampibor Dispensary at Kabarnet. Discharge summary has the stamp from the District hospital. The Clinical Officer testified that the complainant came to the hospital on 28/5/15 and he had been injured on 25/8/2015 at page 27 line 23. The Clinical Officer said that he did not know whether x-ray had been produced page 51 line 4. The discharge summary was a photocopy. When he was recalled, the clinical officer explained that there was no x-ray. This was inconsistent with what he said earlier, that the x-ray had been produced.

Issue for determination

5. The issue for determination in the appeal as in the trial court is whether the charge of grievous harm was proved and whether the appellant was shown to have been the perpetrator.

Determination

6. Before determining whether to uphold or reverse the conclusion of the trial court, in accordance with the duty of the first appellate court (see *Okeno v. R* (1972) EA32), this court must reconsider the evidence presented before the trial court and make its own conclusion giving allowance that this court did not have opportunity to see or hear the witnesses testify before the court.

Analysis of Evidence

Grievous harm injury

7. The complainant described in graphic detail the assault on him by the Cherutich brothers Robert Chepwoy, Bildad and Elijah sons of the complainant's deceased father's brother Jonah Cherutich. The circumstances of the assault is the land dispute between the complainant's family and the said Jonah Cherutich family, where some portions of land alleged to belong to the complainant's father were registered in the names of the said Jonah Cherutich. Medical evidence supported the assault by injuries on the complainant's body as follows:

“PW2: Upon examination, I saw bruise on forehead and surrounding region, swollen and tender bruise on the back and tender. There were two cut wounds on left and right hand with obvious deformity on the right forearm. There were bruises swelling and upon touching they were painful. The injuries had taken some hours. By then he had not received medication. X-ray was done on 28/8/15 which revealed a fracture of the radial bone. He was managed for the same. I formed opinion that degree of injury was grievous harm. I signed and filled P3 form on 5/9/15. I wish to produce the same as exhibit. I also used a discharge summary from Baringo referral hospital to assist fill P3.”

8. On cross examination and re-examination, the witness PW2 confirmed that he had relied on the Discharge Summary and that the patient had “*an obvious deformity which was an indication of a fracture.*” He explained that in 2015-16 the hospital had had installed new machines and that the X-ray files were not being given to patients, and a Disc would be inserted into a computer and accessed through the computer.

9. Although the X-Ray was not produced the medical P3 form from records and summarizes the findings of medical examination indicated the assault. The X-ray would only have been complimentary and its absence could only affect the cogency of the assault if reasonable doubt were raised on the evidence before the court. Such evidence as there is, support rather diminish the extent of the injury. The Discharge Summary supports the conclusion on the P3 showing investigations done as upper and lower limbs x-ray and the Discharge diagnosis as “*fracture (closed) radius distal 1/3 oblique and stab wounds,*” and the P3 noting as regards upper limbs “*- obvious deformity of Distal 1/3 right forearm.*” The doctor assessed the degree of injury as “*grievous harm*”. No prejudice in failure to attach the X-ray films and investigation report on which the p3 conclusions are based, there being no medical evidence to suggest contrary determination to that of the medical expert testifying s PW2, Clinical Officer Benjamin Kendagor. The Discharge summary produced by PW2 with no objection by counsel for the accused under section 77 of the Evidence Act.

10. PW3, Pauline Kipsergon, the complainant’s sister and cousin of the accused testified as follows:

“On 28/8/15 I was at home in Barwesa. I had gone to give my mother Kobilo a hand in the farm. I went in the morning. I found Jackson having arrived the previous day. I asked Jackson where mother was. He told me she had gone to Barwesa to adjudication process at lands. It was my father’s land. My dad is deceased. We worked in the land up to evening. I was with mother and Charity Chepchumba. Charity Chepchumba had come to assist. We then heard noises, people were fighting. We ran to the scene. We saw them fight. They were Elijah Chepkwony, Bildad Cherutich and Robert Chepkwony and Jackson. Robert is Bildad’s brother. Elijah is also Bildad’s brother. When we arrived, I saw Elijah, Robert and Bildad surround Jackson. Elijah had a knife, club and stone. Bildad had a club and stone and Robert had a club and a stone. They were using them to assault Jackson. I saw Elijah stab Jackson on the right hand, Bildad hit Jackson on the head with the club. We screamed. People came. When a crowd came, Elijah, Robert and Bildad ran away. By that time Jackson was on the ground unconscious. He fell down after being hit on the head. He had a swelling on the head and was bleeding from the stab wound.”

11. PW3 testified that she stayed with the complainant in hospital for 9 days and that the complainant’s injured “hand” had “a metal fixed inside”. She recalled that when she was young “*there was a dispute between my father and Bildad’s father but it was settled.*”

12. PW4, the area assistant chief testified that the accused’s father had informed him of planned assault by his sons on the complainant as follows:

“PW4. I am Joseph Toroitich Chebon. I am an assistant Chief of Konoo sub-location. I remember on 28/8/15 Mzee Jona Cherutich who is the father to accused met me on the road and told me his sons wanted to fight Jackson Chelalgo. I did not believe him. I told him to report at AP camp he left. I followed him, on arrival at AP camp I did not see Jonah. I reported to the AP what happened I was given two AP I was told complainant had been taken to Barwesa health centre.”

Significantly, the said Mzee Jona Cherutich did not testify. The witness, however, gave context to the fight when he said that the accused’s father and the complainant’s father Dickson Cherutich “*had been fighting over land for long.*” There is no reason why the area chief would lie that the appellant’s father who was not shown to bear a grudge against his own sons would have told on them to the chief that they had planned to beat up the complainant.

13. The court notes the delay in preparation of the witness’s statement for about three years from 28/8/2015 to 8/2/2018 which PW4 explained on the ground of ill-health for which he had been treated at Moi Teaching and referral Hospital Eldoret being admitted for a whole of 2916, on and off. The witness testified upon cross-examination and re-examination that he had written a letter on 25/4/2018 to the accused’s father requiring him not to enter some land apart from the one under dispute and that he had not dealt with “*a case before between accused family and complainant’s family.*”

14. PW5, PC Kinuthia the Investigation Officer testified confirming the police report on the assault as follows:

“On 30/8/15 complainant’s wife came to the station and reported that the husband had been assaulted on 27/8/2015 by 3 people. A report was booked into the OB. I visited the complainant at Baringo referral he had been injured on the leg and hand. On 5/9/2015 after discharge complainant came on the station. We filled P 3 form and brought his witnesses. On 7/9/2015 a phone[call] was received from Pauline informing us that two suspects had been arrested. We went and collected Bildad and another. We preferred the charges. Bildad is the accused before court.”

The Defence

15. When put on his defence, the appellant testified as DWI Bildad Kipsang Cherutich raising an alibi defence and raised an issue of existing grudge since October 2014 over loss of the appellant’s brother’s money as follows:

“On 28/5/2015 I was in Eldama Ravine carrying on my business. I was not in Barwesa. I am married with children. We live together at Kipkaber. I have been living in Kipkaber from 2008. I was arrested on 6/9/2015 at mid night by AP officers and taken to Eldama Ravine police station where I was remanded a vehicle for Kabarnet police station came and collected us. I was with my brother called Robert. I was collected from Eldama Ravine the same day. I spent a night at Kabarnet police station. I was then arraigned before court. I was with my wife at Eldama Ravine on 28/8/2015. I am related to Jackson Chelgo he is my cousin. His father and my father are brothers. I have a grudge with Jackson which started in October, 2014. Jackson sold my brothers money.

My brother is Robert. Sorry it was on 9/9/2014 and on 10/9/2014 my brother Robert reported at Eldama Ravine police station. It was Ksh. 28,000/- vide OB 24/10/2014. Jackson was arrested the same day and he repaid the money when at the police station. He then issued death threats to my brother in front of police officers. He was not arrested. Robert left and went back to the work place in Solian. Jackson lives at Solian. **On 11/9/2014** I received a call from Jackson who promised to kill me whenever we will meet. I called Robert he told me he had received the death threat too. We met and went to report at Eldama Ravine police station via OB 27/11/2014 at 1200 hours. Robert feared for his life he changed residence to Kapimoi, he received a death threat after two weeks he then moved to Barwesa. I remained in Eldama Ravine Jackson continued threaten me. **On 23/5/2015 at 5.00pm** I had gone to buy goats at the boarder of Sabatia and Solian forest at Kamuriot. Jackson emerged he asked me what I was doing there. I told him I was conducting my business. He told me I had gone looking for him in the forest. I told him no he was armed with a panga he hit me with a panga near the ear. Robbed me of my phones and keys to a motor bike. I screamed people came to my rescue. I then went to hospital at Eldama Ravine that same day. This is the hospital document. I pray it be marked as my evidence.”

16. DW1 then at length proceeded to allege assault by the complainant on 23/5/2015 before the incident for which he is charged herein and the prosecution of complainant in Eldama Ravine Court. There was, however, no evidence of any criminal proceedings against the complainant at the Eldama Ravine or any other court, and the existence of any criminal proceedings against the complainant in a case, or indeed civil proceedings (see section 193A of the Criminal Procedure Code), is no bar to prosecution against an accused on a different complaint by the complainant who is the accused in such other criminal proceedings.

Alibi defence and Identification of the appellant

17. The accused and his brothers were well-known to the eye-witnesses who were their cousins and the incident happened during the day and no question of circumstances of identification arose. The subsequent gun incident related by the complainant and which happened in the night does not affect the prior assault on 28/8/2015 which is the subject of this trial.

18. DW2, the appellant’s wife supported his alibi stating that she was with him at Ravine on the material date the 28/8/2015 and sought to confirm the alleged prior assault on the appellant by complainant as follows:

“On 28/8/2015 I was in Ravine with my husband. He was at his work place where he bought and sold goats to Esageri slaughter house. He was at his business he never left. We ate lunch together on 28/5/2018 and also I saw him in the evening he never left his business premises. On 23/5/2015 Bildad was doing his business on coming back he told me he had made Charles Chelelgo onto road who beat him up. He went to report to Eldama Ravin police station. We waited for the arrest of Charles Chelelgo. On 6/9/2015 AP officers came to our house at Midnight they arrested Bildad and took him to ELdama Ravine police station. I went to check on him at the station that morning I was told he was transferred to Kabarnet police station. I can’t tell how the relationship between my husband and Jackson has been.”

19. The evidence of DW2 does not really support the alibi of the appellant as she on cross-examination conceded that he had “left for work on 28/8/2015 in the morning at 9.00am and came back at midnight”, and on reexamination stated that she had on 28/8/2015 remained at home with her two year old child when her husband left for work. As agreed by DW2, no one from the appellant’s place of work whom he interacted with in his daily work was called to confirm that he was at Ravine on 28/8/2015. The court is, however, mindful that an accused does not have prove his alibi, and the duty of proof in a criminal case remains all the time with the Prosecution.

20. DW3, Benjamin Kipkemboi Sitienei senior Assistant Chief of Kipkabor sub location of Sabatia location, testified town a letter of 24/6/2016 where he stated that the complainant had a “doubtable character” and that on 23/5/2015, the appellant had reported to him that he had been assaulted by the complainant as follows:

“I know the accused. He is from Kapkaber sublocation Sabatia location. I know Jackson Chelelgo we call him Charles back home. He comes from Solian Sub location Sabatia location. He is a cousin to the accused. I have known Bildad (accused) from 2008 when he bought land in my area. He is married and has children. He buys and sells goats and cows for sale. The complainant is also a business person he owns a shop at Solian. I have a letter that I wrote on 26/6/2006 when I was acting Chief of Sabatia location. In the letter I sated that Jackson had doubtable character among the community I wish to produce the letter as exhibit.”

21. Any merit in the letter of 24/6/2016 is eroded, as to the character and credibility of the complainant, by his admission in cross-examination that the letter was written at the appellant’s behest and request, and that he had written it after the appellant had been assaulted by the complainant. It was clearly tailored to fit the allegation of assault of the appellant by the complainant.

Threats on life of complainant

22. Evidence of gunshots during the pendency of the trial while showing the poisonous relationship between the accused and the complainant is not evidence of the commission of the offence charged. The evidence was taken despite protest by the accused’s counsel. The question is not merely whether the evidence was one of hearsay or one directly from the witness. It is whether it is prejudicial to a fair trial of the offence charged when cross-examination cannot be meaningful. Defence should have been given opportunity to prepare for cross-examination by supply of further statements ahead of presentation of the evidence.

Evidence to discredit the complainant

23. The evidence allegedly given by the complainant in Eldama Ravine PM’s Court criminal case no. 770 of 2015, from which the appellant absconded leading to its withdrawal and subsequent charge upon arrest in the resent case, and to which evidence the accused testified was not properly before this court. The proceedings in criminal case no. 770 of 2015 were withdrawn under section 87(a) of the Criminal Procedure Code.

24. The Defence application for the trial court to peruse the record of criminal case no Eldama Ravine PMCCri. Case no. 770 of 2015 with the view that the court should “*see the glaring inconsistencies in the evidence and what [the complainant] testified in this case*”, could only be considered by way of evidence in prior criminal proceedings introduced into evidence in the present case. It ought to have been adduced on behalf the defence by production of certified copy of the record in that court by a court official pursuant to under section 163 of the Evidence Act which provide as follows:

“163. Evidence to impeach the credit of a witness

(1) The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him—

a) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

b) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

c) by proof of former statements, whether written or oral, inconsistent with any part of his evidence which is liable to be contradicted;

d) when a man is prosecuted for rape or an attempt to commit rape, it may be shown that the prosecutrix was of generally immoral character.

2. A person who, called as a witness pursuant to paragraph (a) of subsection (1) of this section, declares another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.”

The usefulness of the evidence in contradicting and discrediting the complainant was also reduced by the fact that the complainant had not finished his presentation of evidence in the previous suit before the appellant absconded.

Presence of a grudge

25. Evidence of grudge in the circumstance of this case does not indicate that charge was trumped up. The grudge resting on the land dispute may indeed be a motivation of the assault. The grudge does not rule out the assault.

Findings of the appellate court

Conviction

26. Having analysed the evidence before the court and weighed the prosecution and the defence as a whole, I find the prosecution to have proved by consistent evidence unshaken by the defence alibi evidence, which is rejected, and the evidence purportedly discrediting the character of the complainant. There was clear evidence that the appellant was involved in the beating up of the complainant on the 28/8/2015. It matters not that the complainant may not be able to pinpoint who of the three Cherutich brothers who mobbed him hit him on which part of the body and any inconsistencies in this regard must be rejected. It is clear that the Defence sought to litigate perceived grievances with the complainant through the Defence in this Criminal trial. The issues of alleged theft of money a prior assault by the complainant and dispute with the complainant before the Chief were not matters before the trial court.

27. For reason of the foregoing analysis of the evidence, the Prosecution has proved its case against the appellant beyond reasonable doubt. The appellant is guilty of the offence of grievous harm. There is no merit in the appeal from conviction.

Sentence

28. The trial court properly considered the gravity of the offence in the sentencing as follows:

“SENTENCE: I have perused the report by the probation officer. The report is positive. I have however looked at the sentiments of the complainant and those of the local administration which are negative. The accused was charged under section 234 of the penal code whose sentence is life. Having taken into consideration the nature of injuries and mitigation of accused and pre-sentence report I find that non custody sentence not suitable. I hereby sentence the accused to six years imprisonment. Accused having been in custody since 28/9/2017, the sentence to start running from 28/9/2017.

N. M. IDAGWA, RM

10/1/2019.”

29. A sentence of six years is, however, excessive for a first offender on a charge of grievous harm in the circumstances of this case and the principle of interference with sentencing discretion of a trial court in *Wanjema v. R* (1971) EA 493, this appellate court is entitled to interfere. The court considers a sentence of imprisonment for four (4) years to meet the justice of the case.

Orders

30. Accordingly, for the reason set out above, the appellant's appeal from conviction is without merit and the same is dismissed.

31. However, pursuant to section 354 (3) (b) of the Criminal Procedure Code, the court reduces the sentence of imprisonment for six (6) years to four (4) years.

32. The sentence of imprisonment for four (4) years shall commence, pursuant to section 333 (2) Proviso of the Criminal Procedure Code on **28/9/2017** the date when the appellant was remanded to await his trial, as was properly ordered by the trial court.

33. With remission the reduced sentence of four years becomes actual custody of **two (2) years and eight (8) months**. The appellant having been in custody since **28 September 2017** shall have served the full sentence on the **28th May 2020**.

34. Today being, the **6th May 2020**, the appellant has **only 21 days** to complete his four year imprisonment term, and there shall be an order for his release from custody forthwith unless he is otherwise lawfully held.

35. The court notes that the real dispute between the parties, the appellant's family and the complainant's family appears to be a land ownership contest between the families of the two brothers, and urges that the parties do seek civil adjudication thereon in the land court for permanent and peaceful solution thereof.

Order accordingly.

DATED AND DELIVERED THIS 6TH DAY OF MAY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.