**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF AT MERU**

**CRIMINAL APPEAL NO. 107 OF 2019**

**CORAM: D.S. MAJANJA J.**

**BETWEEN**

**JAMES KIMATHI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence of Hon. O. Wanyaga, SRM dated 26th June 2019 at the Magistrate's Court at Maua in Criminal Case No. 715 of 2018)***

**JUDGMENT**

1. The appellant, **JAMES KIMATHI,** was charged, convicted and sentenced to 30 years' imprisonment for causing grievous harm contrary to **section 234** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The charge was that on 12th November 2013 at Giika Location in Igembe South Sub-county within Meru County, he jointly with another person not before the court, unlawfully did grievous harm to JACKSON THURANIRA.

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 not 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. Jackson Thuranira (PW 1) testified as follows:

> *I come from Giika. I don't do anything. I have no hands (court notes that the accused has no palms). I recall on 12/11/2913 at around 1pm. I had come from Giika …. Kimathi and Ntongai came . Ntongai started throwing stones. I was in Mutwiri's house which he had let my wife. I saw him throwing stones. They even removed the window. Ntongai and the accused removed me from the house by force.. They took me to the road. They tied my hands and they both cut my hand. Accused is the one who cut both my hands. I pleaded with them not to cut my hands. I had sold miraa and they wanted to steal my money. I lost consciousness, I found myself in hospital. I saw them cut my hands. I was admitted to hospital for two days. I went to police ……*

4. David Nyaga, PW 2, the clinical officer, produced the P3 medical form. He confirmed that PW 1 attended the hospital on 22nd March 2018 for examination. PW 2 testified that PW 1 was admitted to Meru Teaching and Referral Hospital on 12th November 2013 and discharged on 14th November 2013. He confirmed that PW 1 sustained amputation of both hands at the wrist inflicted by a sharp object. I classified the injury as grievous harm.

5. The final prosecution witness was Sergeant Katelo Ali, PW 3, the investigating officer who confirmed that the incident of assault was reported by PW 1 on 21st March 2018 whereupon he issued the P3 medical form. He took PW 1's statement. He stated that the appellant was not immediately arrested as he had gone into hiding until he was arrested later for a period of 5 years. He confirmed that the incident had been reported in the Occurrence Book entry 17/12/11/13.

6. When put on his defence, the appellant denied the offence in his sworn testimony. He told the court that he did not know PW 1 and was seeing him in court for the first time. He told the court that on 12th November 2013, he was at home building a cow shed.

7. The issue in this appeal is whether the appellant committed the offence of grievous harm. In his supplementary grounds of appeal, the appellant complained that he was convicted on the basis of the evidence of a single witness. He 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. The 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.*

8. In this case, the testimony of PW 1 was clear and consistent and was not shaken in cross-examination. When cross-examined, he stated that he knew the appellant as they came from the same area. The incident took place at daytime when he was assaulted and taken from the house of his ex-wife before his hands were cut. The totality of these circumstances displace any notion of mistaken identity. I also note that the incident was reported to the police but the appellant was not arrested immediately as he disappeared from the locality.

9. The appellant also complained that the other villagers who were present when the incident took place 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.*"

10. Apart from the fact that PW 1's testimony was credible, PW 3 told the court that even after he conducted investigations he was unable to get witnesses as they feared the appellant and his brother who were still at large hence could not call them as witnesses.

11. The appellant's defence was a bare denial and could not overcome the positive recognition and the totality of the evidence. Like the trial magistrate I do not see any reason that PW 1 would come to accuse a stranger of having amputated him in the circumstances outlined in the evidence.

12. Finally, the injuries sustained by PW 1 were self-evident and corroborated by the medical evidence. Amputation amounts to grievous harm. Having evaluated the evidence, I am constrained to agree with the respondent that the prosecution discharged its burden of proof and that the appellant was properly convicted.

13. The maximum sentence for grievous harm is life imprisonment. At the sentencing, the prosecution stated that the appellant was serving a 3-year sentence in Criminal Case No. 691 of 2019 for the offence of grievous harm. The appellant pleaded leniency and maintained his innocence. The trial magistrate concluded that, "*The harm to the complainant is immense and permanent. It calls for a deterrent sentence.''*

14. The 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**).

15. While the offence and resulting injuries were serious and the court was entitled to impose a custodial sentence, I find the sentence of 30 years' imprisonment on the higher side considering the sentence imposed is for murder and robbery with violence which invariably involve an element of grievous harm. The duty of the court is also to maintain consistency in sentences imposed for similar offences.

16. Having regard to previous conviction and the facts stated by the trial magistrate, I am constrained to quash the sentence of 30 years' imprisonment and substitute it with a sentence of 10 years' imprisonment.

17. I affirm the conviction but allow the appeal to the extent that the sentence of 30 years' imprisonment is quashed and substituted with a sentence of **ten (10) 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.