REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 66 OF 2018

JOSEPH ONYANGO OKAKA.....APPELLANT

VERSUS..

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence delivered in Siaya Principal Magistrate's Court Criminal Case No 609 of 2018 by Hon. J.O.Ongondo, Principal Magistrate on 23/11/2018)

JUDGMENT VIA SKYPE WITH APPELLANT IN PRISON

1. The appellant herein Joseph Onyango Okaka is in person. He was charged with the offence of grievous harm contrary to Section 234 of the Penal Code. Particulars of the offence were that on 28/4/2018 in Ogwate 'A' village of Nyalgunga sub location, Siaya County the appellant did grievous harm to Mary Atieno Okaka.

2. After a full trial, the appellant was found guilty of the offence. He was convicted and sentenced to serve seven (7) years imprisonment. Being aggrieved by the said conviction and sentence, the appellant lodged this appeal setting out the following grounds of appeal:

1. ***That: I plead not guilty to the charge.***
2. ***That: There was no corroboration of evidence between PW1 and PW2.***
3. ***That: This was a fabricated story due to the land dispute with my half-brother who was born after the death of my father.***
4. ***That: my mother is the complainant in the case presented an old injury which caused [sic] by accident and the most recent was caused by failing into a pit in our home.***
5. ***That: I never assaulted my mother.***
6. ***That: I pray for lower court proceedings to allow me adduce more grounds.***

3. The appellant prayed that his appeal be allowed, the conviction be quashed and sentence set aside and that he be set at liberty.

4. This being a first appeal, this court is obliged to re assess and re-evaluate the evidence before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses as they testified. See **Okeno v Republic** [**1972] E.A. 32.**

5. Revisiting the evidence adduced in the trial court, the prosecution's case was that on 24/4/2018 at 7.00 am, PW2-Mary Onyango, a 72 years old lady from Ogwato A' village, Nyalgunga was at her farm planting potatoes. She was in the company of her grandchild, PW3-JO, a minor aged 8 years old a pre–one Unit pupil at [particulars witheld] Primary School. Suddenly, the appellant whom she described as her son by the name Onyango confronted her and without uttering a word dispossessed her of the jembe. He aimed the jembe at her head but the old lady blocked the threatened blow using her hands. The appellant hit her on both hands. When she fell down, the appellant continued the assault by hitting her on both knees. He left her lying on the ground and took off with the jembe.in cross examination she stated that the offence took place on 28/4/2018 which was a Saturday and she denied being injured by a cow.

6. PW3 gave evidence after voire dire examination and stated that was on the farm planting potatoes with PW2 his grandmother when the appellant appeared and disposed her of the jembe she had and used it to hit her on both hands and legs on the knees. On seeing this, PW3 ran to the home of Nyaugenya a neighbour and called her who came and took the complainant to hospital.

7. PW4 was in her house nearby when she heard the minor PW3 crying outside. When she ventured out to check, she found that it was PW3

whom she knew before. The minor told PW4 that Onyango-referring to the appellant had assaulted his grandmother, PW2. PW4 rushed to the scene wherein she found PW2 lying on the ground, under a tree. In a feeble voice, the complainant told PW4 that it was Onyango, the appellant who had assaulted her. With the help of another Good Samaritan, PW4 took from the victim's pocket Kshs 500 which she used to get a motorcycle and escorted the complainant to Siaya County Teaching and Referral Hospital where PW1, Sila Oluoch, a clinical officer at the hospital examined and treated the complainant. PW1 produced a P3 form and treatment notes from Siaya County Teaching and Referral Hospital showing the injuries sustained by the complainant. In the said medical examination report-P3 form dated 7/5/2018, PW1 indicated that he observed swellings and fractures on both hands and the left leg's patella region. He classified the injuries as grievous harm and indicated as such in the said P3 form produced as PEX1.

8. P.C Wasonga investigated the case, recorded witnesses' statements and charged the appellant with the offence of grievous harm.

9. Placed on his defence, the appellant Joseph Onyango Okaka denied the offence contending that the complainant had been attacked by her vicious cow. He stated that he had been working away from home and only returned on 18/5/2018 to see his mother who had been injured by a cow and that he was surprised on being arrested and charged for the offence before court. Before arrest, the appellant claimed that he was assaulted by the local chief and his youths.

SUBMISSIONS

10. In support of this appeal, the appellant filed written submissions which he wholly adopted at the oral hearing and made some highlights.

11. The appellant claimed as follows in his written submissions**:** ***biased and unfair trial amounting to unsound judgment based on misevaluated evidence by fabrication, inconsistent uncorroborated and contradictory witnesses.***

12. The appellant submitted that the evidence tendered by the prosecution against him was hardly enough to prove any case against him but was ridiculously misevaluated by the trial Magistrate resulting into complete bias, unfair trial and manifest unsound and fraudulent judgment. According to the appellant, the evidence of PW2 the complainant was far from logic and quite untruthful. That PW2 reported to have been assaulted on the 28th day of April, 2018 while according to the medical expert who testified before court as PW1, the incident occurred on 28th February 2018 (pg. 12 line 4 - 5 of the trial records). In the view of the appellant, this clearly illustrates from the onset that the whole evidence of PW1 and PW2 which was relied upon by the learned trial Magistrate was totally fabricated to manifest unsound judgment.

13. In addition, the appellant submitted that PW2 stated that she was attacked by the appellant while she was in the company of her grandson (PW3) at 7.00 am, which claim, according to the appellant, was contradicted by PW3's statements before court that the offence took place at about 8.00 am.The appellant therefore believes that PW3 must have been coached by the prosecution and that his testimony was based on leading questions contrary to the provisions of Section 150 of the Evidence Act.

14. The appellant further submitted that the learned trial magistrate failed to consider that the charge sheet used by the prosecution was defective since it bore a name different from the name of the complainant. That PW2 is known by the name Mary Onyango according to her testimony before court whereas in the charge sheet that was relied on by the prosecution, the complainant is called Mary Atieno Okaka. In the appellant's view, those are two different individuals therefore it is hard to tell who the complainant was.

15. Concerning the date of the alleged offence, the appellant lamented that there were major contradictions over the same. For instance, that PW2 claimed to have been assaulted on the 28th day of April 2018 as earlier stated in the submissions whereas PW3 who confirmed to the court that he was with PW2 at the time of the alleged offence but spoke of a different date of 24th April 2018, which date was also unsupported by PW4 (pg. 16 line 4) who testified before court having been taken the complainant to the hospital immediately after the alleged incident.

16. It was further submitted that PW4 further testified before court that after realizing that PW2 was injured, she called her colleague one by name **MARY ODHIAMBO** (pg. 16 line 10) who after telling her (PW4) that she was away, PW4 settled on another woman whose identity is not given (pg. 16 line 13 - 14) who eventually accompanied her in escorting the victim (PW2) to the hospital for treatment.

17. The appellant submitted that the prosecution is entitled to avail as many witnesses as possible in order to provide overwhelming evidence against an accused person and that although Section 143 of the Evidence Act does not prescribe the number under the above section, if it appears [sic] with any person that did not record his/her statements but can give direction or evidence required, the court is empowered to exercise its powers under Section 150 of the CPC to summon that person.

18. In this case it was submitted that there were two witnesses who were mentioned by PW4 but were not called to testify. He claimed that the Assistant Chief was informed of the matter and even instructed PW4 to take the victim to the hospital but he (the Assistant Chief) did not bother to appear before court to testify given that this matter fell under his area of jurisdiction. The appellant submitted that failure to call either of the witnesses creates doubts to the just decision.

19. The appellant also urged this court to weigh on the alleged conflicting evidence among the witnesses that rendered the trial unfair in the interest of justice.

20. The appellant further submitted that he was not accorded fair trial and that his rights under Articles 25, 50(2) and 5(4) of the Constitution were violated.

21. He further submitted that the medical report/evidence was distorted and thus could not prove any fact concerning the allegations, that PW2 the complainant herein was not trustworthy and credible; that PW3 was manipulated in order to give coached evidence; that PW4 was just given information and the information was not clarified to the required extent and finally PW5 only relied on history of allegations but did not carry out his duties as required on his criteria [sic] of investigation. The appellant prayed that his appeal be allowed.

22. The prosecution opposed the appeal and submitted orally contending that the prosecution evidence as adduced proceed their case against the appellant beyond reasonable doubt. Counsel urged the court to dismiss this appeal and uphold the conviction and sentence.

DETERMINATION

23. I have carefully considered the evidence adduced before the trial court, the grounds of appeal and the submissions for and against the appeal. In my humble view, the issues for determination are:

1. ***Whether the charge sheet was defective***
2. ***Whether there were contradictions in the evidence as adduced by the prosecution witnesses***
3. ***Whether the prosecution failed to call all witnesses who had relevant evidence in the case***
4. ***Whether PW3 was coached***
5. ***Whether PW2 gave credible evidence***
6. ***Whether the appellant's rights to a fair trial were violated***
7. ***Whether medical evidence was sufficient to prove the offence to the required standard.***
8. ***Whether the prosecution adduced evidence that proved the guilt of the appellant beyond reasonable doubt***

24. On whether the charge sheet was defective, the appellant claimed that the complainant's names in the charge sheet and those that she gave in court were different and that therefore it was not possible to tell who the complainant was.

25. The charge sheet signed on 21/5/2018 by the ODPP shows that the complainant is Mary Atieno Okaka. In her testimony, she on oath, she testified that she was Mary Onyango. She also testified that the appellant herein was her son and that he was called Onyango. The appellant in his defence testified that when he was arrested he had returned home from work away, to visit his mother the complainant who had earlier been attacked and injured by her vicious cow. The P3 form issued on 28/4/2018 produced as exhibit 1 shows that the complainant was Mary Atieno Okaka Onyango aged 70 years. The treatment notes from Siaya County Teaching and Referral Hospital shows that the patient who was being attended to on 28/4/2018 was Mary Atieno Okaka.

26. I find no evidence to show that the complainant in court was a different person from the person named in the documents produced as exhibits. If the complainant was the mother to the appellant then he knew his mother well and even acknowledged that she was injured by a vicious cow hence he cannot on appeal claim that there was a contradiction in the names of the complainant. That contradiction in itself did not in my humble view affect the fair trial of the appellant.

27. I dismiss the assertion by the appellant as being a mere rhetoric and without substance. The appellant never told the trial court that he was confused as to who the complainant was.

28. Section 137 of the Criminal Procedure Code on the preparation of charges provides that no objection will be entertained where the charge is drawn in conformity with the provisions of the section, which is in terms as follows:

> ***"137. The following provisions shall apply to all charges and information, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code - "***

29. Under section 137 (d) of the Criminal Procedure Code, mis-descriptions or on-description of a person in a charge is not fatal. The section stipulates:

> ***"(d) the description or designation in a charge or information of the accused person, or of another person to whom reference is made therein, shall be reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, a description or designation shall be given as is reasonably practicable in the circumstances, or the person may be described as "a person unknown"***

30. Therefore, it is sufficient that the statement of the offence described the complainant as Mary Atieno Okaka although there is no aliases in the names used by the complainant in her evidence. The charge sheet properly put the appellant on notice as to the nature of the charge that he faced and he cannot be heard to say that he was confused as to the offence that he faced and had to defend himself against because of the misstatement or misspelling or, indeed, no-statement of the complainant's name. see Muriithi J in **A. M. M. v Republic [2015] eKLR.**

31. In **Peter Ngure Mwangi v Republic[2014]e KLR,** the Court of Appeal faced with the same issue of alleged defect in the charge sheet on the question of the complainant's names, the learned Judges stated:

> ***"On the issue of a defective charge sheet, there are two limbs to it. The first one deals with the issue as to whether the charge***

sheet is indeed defective, whereas the second one deals with the issue as to whether even if a charge sheet is defective, that defect is curable or not. This Court considered the ingredients necessary in a charge sheet and stated as follows in the case of ISAAC OMAMBIA V REPUBLIC, [1995] eKLR:

> ***"In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."***
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> ***A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in YONGO V R, (1983) eKLR that:***
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> ***"In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:***
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> > ***(i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,***
> >
> > ***(ii) when for such reason it does not accord with the evidence given at the trial."***
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> ***Further guidance is found in the case of PETER SABEM LEITU V R, CR.A NO. 482 OF 2007 (UR) where this Court held thus:***
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> ***"The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial" We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."***
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> ***Turning to the second limb as to whether the defect in the charge sheet is curable under Section 382 of the Criminal Procedure Code or not, we have had occasion to revisit and construe this section on our own.***
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> ***Section 382 of the Criminal Procedure Code provides:***
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> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings." In the case of NJUGUNA V R, [2002] LLR NO. 3735 (CAK) this Court in considering whether a defect in a charge sheet is fatal stated:***
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> ***"We think, like the Learned Judges of the High Court did, that stating in a Charge Sheet a lesser amount than the amount which was actually stolen was no more than an irregularity in the Charge Sheet and it did not render the Charge Defective. It was an irregularity curable under the above quoted section of the Criminal Procedure Code and the Appellant did not point out to us any sort of prejudice which the irregularity could or did occasion to him." [Emphasis added]***
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> ***In the instant appeal, we find that the defect in the charge sheet of stating the complainant's name to read "Mongare" instead of "Mungai" did not prejudice the appellant in any way. Our reason for saying so is that the person who was robbed was "Mungai". He is the one who led police to the arrest of the appellant. He is the one who knew the appellant as a neighbour. By indicating his name to read "Mongare" instead of "Mungai" was merely a typographical error. The type of errors normally curable under Section 382 of the Civil Procedure Code. We are satisfied that the first two Courts were justified in finding it inconsequential to the success of the prosecution of the appellant in connection with the offence he had allegedly committed. Section 382 of the Civil Procedure Code as the appellant did not point out any prejudice which the irregularity could or did occasion him."***

32. Based on the above decisions and statutory provisions, it is clear that, section 382 of the Criminal Procedure Code would excuse such an error where, as here, the appellant was in no way prejudiced as, by whatever name, the complainant was present before the Court for cross-examination by the appellant and indeed, the appellant did cross-examine her without raising any question as to the correct names. Moreover, the objection as to the name of the complainant could have been raised at the trial court, if it were considered by the accused that he did not, on account of the different names used in the charge and evidence, know the person he was alleged to have caused grievous harm.

33. Accordingly I find and hold that there was no material defect to the charge sheet capable of vitiating the appellant's trial for the offence of grievous harm as charged.

34. ***On whether the prosecution evidence was marred with material contradictions***, the appellant claimed that the evidence on the dates of assault were contradictory and that there was also a contradiction in the evidence of PW3 and PW2 as to whether the offence took place at 7am or 8am.

35. The charge sheet states that the offence was committed on 28th day of April 2018. This is the date that the report was made to the police vide OB number 33 contained on the P3 form issued on 28/4/2018. On the said P3 it was stated that the offence took place at around 8am and the report was made at about 15.35 hours. The treatment notes exhibit2 shows that the complainant was treated at Siaya Count Teaching and Referral Hospital on 28/4/2018 vide Outpatient number 11151.

36. In her testimony in chief the complainant is said to have stated that the offence took place on 24/4/2018 at 7am but in cross examination the complainant stated that the offence took place on 28/4/2028 and she stated that it was a Saturday. PW3 the minor aged 8 years stated in his evidence that the offence took place on 24th April 2018 at about 8am. The P3 form and treatment notes and the Occurrence Book at the police station all refer to 28th April 2018 and not 24/4/2018. In my humble view, albeit there were discrepancies in the dates as recorded by the trial court, the discrepancies were created by the trial court and not the witnesses who were nonetheless, on the part of the complainant, a 72 year old who could forget the exact date but she was firm that the offence took place on a Saturday. This is because the Calendar for August 2018 shows that 28th August 2018 was indeed a Saturday while 24th April 2018 was a Tuesday. Further, the witness, PW3 was a child aged 8 years and he could have missed out on the date and time of the offence but firmly stated what he saw on the material day.

37. All other evidence of reporting to the police and seeking of medical attention show the date to be 28th April 2018. The trial court in his judgment created confusion when he stated throughout the judgment that the offence took place on 24th April 2018. This is an indication that the trial court misapprehended the date and wrote 24th April 2018 instead of 28th April 2018.

38. ***On the question of time of offence,*** 7am and 8am are early morning hours of a normal day and therefore by the complainant stating that it was at 7am whereas the minor witness stated that it was at 8am, the difference in the times in my humble view was not so much as to lead to a conclusion that the offence did not take place or as to render the evidence of the two prosecution witnesses incredible.

39. ***On the question of dates, as*** I have stated above, there were discrepancies on the dates as stated by PW2 and PW3 but the complainant corrected the date in her cross examination saying it was on 28th April 2018 which dates agree with the Occurrence Book report and the P3 form report all stating it was on 28th April 2018.

40. In my humble view, the discrepancies in the dates and time of the offence are minor and did not taint the strong prosecution evidence that it is the Appellant who assaulted the complainant who was well known to her as her son and which offence did not take place at night for anyone to assume mistaken identity of the assailant. The offence took place during early morning, not at night. There is no question of mistaken identity hence the discrepancies noted in my view did not prejudice the appellant's fair trial or go to the root of the charge.

41. ***On the appellant's claim that PW3 was couched,*** there is nothing on record to suggest that the minor was couched to give false evidence against the appellant and in favour of his grandmother, the accusation in my view is baseless and it fails.

42. On ***the ground that the prosecution failed to call all vital witnesses*** to testify, the appellant claimed that Mary Odhiambo the person who was called by PW4 and informed of the attack on the complainant and who told PW4 that she should proceed and take the complainant to hospital was not called to testify. Further, that the Assistant Chief who received information on the attack against the complainant was not called as a witness.

43. In criminal cases the prosecution is required to avail to the court all relevant evidence to enable court make an informed decision based on evidence available. This court is however alive to the fact there is no legal requirement in law on the number of witnesses to prove a fact. Section 143 of Evidence Act (Cap 80) 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."***

44. In **Bukenya & Others V Uganda [1972] EA 549** the court stated as follows on this question of failure to call vital witnesses:

> ***"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.***
>
> ***(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case. (iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.***

45. In **Keter V Republic [2007] 1 EA 135** the court held inter alia thus:

> ***"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."***

46. I have reviewed the evidence on record and find that the person who was called by PW4 and informed of what had happened to the

complainant would only come to testify and give hearsay evidence and so would the Assistant Chief since they were not eye witnesses or material witnesses to the case. Accordingly I find and hold that the Assistant Chief and Mary Odhiambo were not vital or material witnesses and therefore failure to call them as such witnesses by the prosecution did not in any way affect the quality of evidence adduced by the other prosecution witnesses or vitiate the trial of the appellant.

47. On ***whether medical evidence adduced was sufficient to prove grievous harm***, the prosecution witness No. 1 Sila Oluoch testified and produced a P3 form for the complainant and hospital treatment notes showing that on examination, the complainant was found to have sustained swollen, deformed , tender painful right and left hand; Xrays of both hands revealed fractures on both hands and the on the lower limbs, the complainant had tender, swollen, palpable left knee and Xrays showed fracture of the left knee patella all injuries were caused by blunt object.

48. Section 4 of the Penal Code 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, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense."***

49. The injuries as indicated by the clinical officer in the P3 form produced as PEx1 resonate with the definition of grievous harm at Section 4 of the Penal Code above.

50. Therefore, albeit the appellant claimed that the medical evidence was not to proof the prosecution's case beyond reasonable doubt, this court does not see the basis for that lamentation.

51. ***On whether the appellant's rights under Article 25(c) ,50(2) and 50(4) of the Constitution were violated?*** Apart from citing the above Articles in the Constitution and claiming that the rights were violated, there was no demonstration of how his rights under the said Articles of the Constitution were violated.

52. On 25/7/2018 the appellant confirmed to the trial court that he had received all witness statements and the exhibits that the prosecution intended to rely on before a hearing date was fixed. The trial record shows that the appellant was accommodated by the trial court without any issue. I find no evidence of violation of Constitutional rights of the appellant as alleged.

53. ***On whether the appellant was positively identified to be the complainant's assailant,*** PW2 testified that the appellant is her son and that on the material day if 28th April 2028 which was a Saturday, she was on her way to her farm accompanied by her grandson, PW3 who was aged 8 years when the appellant emerged, took the jembe which the complainant had and aimed it at her head but she dodged it by blocking it with her hands. So it hit her hands and he continued hitting her knees with it. She stated that the appellant was complaining that PW2 had killed his hen. He then escaped and PW3 went and called a good Samaritan Nyaugenya who came and assisted the complainant to go to hospital using a motorcycle.

54. PW4 Carolyne Achieng a neighbour to the complainant was called by PW3 who was crying at about 8.30 am saying that the appellant also called Baba Lameck had assaulted PW3's grandmother. When PW3 went to the scene, the victim told her that the appellant Onyango had "killed her over a woman". She sought for help and took the complainant to hospital.

55. There was evidence from the complainant and PW3 as well as PW4 that the offence took place during the early morning between 7.a.m and 8.30 a.m. The appellant is a son to the complainant. PW3-JO, the grandson of the complainant also knows the appellant as Baba Lameck or Kennedy Onyango and called him "uncle." The witness stated: -

> ***"On 24/4/2018, I was at the shamba with my grandmother, Mary Okaka planting potatoes at about 8.00 a.m suddenly my uncle (pointing to the accused) came and dispossessed my grandmother of the jembe she had and hit her on both hands and legs on the knees. I ran to tell Nyaugenya….."***

56. Both PW2 and PW3 clearly placed the appellant at the scene of crime. There was no mistake about his identity. Both PW2 and PW3 knew the appellant by name and appearance as he is their family member. I therefore agree with the trial court that the appellant is the one who attacked PW2 on the material date and time and assaulted her causing her grievous harm. The injuries sustained by the complainant were confirmed by the treatment cards and the P3 form produced as exhibits by the Clinical Officer Mr. Sila Omondi who examined the complainant on 7/5/2018.

57. ***On whether the injuries sustained by the complainant were old injuries inflicted by a vicious cow, I*** have examined the evidence on record, including the P3 form produced by PW1 and I find no evidence that the victim was injured by a cow. If there was an early injury by a cow then that was a different injury from the one inflicted by the appellant herein.

58. For all the above reasons I find and hold that the prosecution proved the charge of grievous harm against the appellant beyond reasonable doubt and therefore the conviction of the appellant was sound and safe. I uphold it and dismiss the appellant's appeal against conviction.

59. ***On sentence, t***he appellant was sentenced to serve seven (7) years in prison for causing grievous harm to his own mother. This was after he mitigated stating that he was sorry for the offence and that he prayed for noncustodial sentence, he also stated that he had children who were orphans. The appellant was also said to be a first offender.

60. Sentencing is in the discretion of the trial court. The complainant was the mother to the appellant and to date the motive for such vicious

attack has never been disclosed. As correctly stated by the trial court, there is absolutely no justification for breaking limbs of a 75-year-old mother.

61. The complainant did not deserve this kind of treatment from his very own son. If the appellant could cause such harm to his own mother, then he could have done even worse to a stranger or neighbour. Deterrent sentence was called for. The offence of grievous harm upon conviction carries up to life imprisonment but the appellant was given only seven years. The sentence imposed was so lenient. The appellant must be kept away from his aged mother as he is a threat to her life, for him to learn some lessons, as she heals from the effects of brutal attack that left her with broken limbs.

62. For the above reasons, I find no reason to interfere with the sentence imposed on the appellant by the trial court. I uphold the seven years imprisonment imposed on the appellant.

63. In the end, the appellant's appeal against conviction and sentence is hereby dismissed. The appellant to serve full sentence.

64. Orders accordingly.

Dated, Signed and Delivered at Siaya this 5th Day of May, 2020 via skype.

R.E. ABURILI

JUDGE