



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 38 OF 2018

LIMO NGURAKERIS.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Senior Principal Magistrate's Court at Kabarnet Criminal Case no. 590 of 2017 delivered on the 22nd day of February, 2018 by Hon. S.O. Temu, PM]

JUDGMENT

[1] The appellant was convicted and sentenced to five years for the offence of grievous harm c/s 234 of the Penal Code, the particulars of which were as follows:

“CHARGE SHEET

CHARGE: GRIEVIOS HARM CONTRARY TO SECTION 234 OF THE PENAL CODE

PARTICULARS OF OFFENCE: LIMO NGUKAKERIS: On the 17th day of September 2017 at around 2000 Hrs at Chemelil village in East Pokot Sub-County within Baringo County unlawfully did grievous harm to Ngorakeris Amodongole.”

[2] In his grounds of appeal the appellant principally sought a reduction of sentence and offered the following grounds of mitigation:

“GROUNDS OF MITIGATION

1. That I am the only sole bread winner, my mother died four years ago, the complaint (father) is alcoholic the younger siblings are not schooling and basically poorly kept I request the court for second chance to parent them.

2. That the genesis of the case erupted when I requested medical aid, that could only be possible by sell of the complainants cow instead it turned hostile.

3. That the complaints hostility evolved in him chasing me with a spear and due process he fell down and injured his ailing arm then he implicated it on me.

4. That there is supportive evidence in the proceeding proving that I was sick during the alleged offence the court order for treatment refers.

5. That I am remorseful for the fateful incident that occurred and its repercussions.

6. That I am first offender and promise henceforth to be a law abiding citizen.

7. That I wish to be present during the hearing of this mitigation appeal.

REASONS WHEREFORE:

I pray that my appeal be allowed conviction quashed, sentence set aside and set free at my liberty.”

[3] The appellant filed written submissions in which he raised for the first time an apparent defence of intoxication affecting the *mens rea*

for the offence as follows:

“WRITTEN SUBMISSIONS

The evidence tendered by the prosecution indicates that at the time of the alleged offence vide page 11 lines 8 and 1 quote.

“You were drunk when you assaulted the complainant as depicted by PW2 on cross-examination.”

The same has also recurred throughout the trial proceedings. **May it also be noted that on such conditions, the prevailing conditions does not favour the development of criminal guilt. When under the influence of the alleged substance, the appellant herein regrets of the acts having been committed on the fateful night. The mental stability had been tampered with and thus could not form proper and positive judgment.**

In the case of *DUNCAN MWANGI GICHUI =VS= REP (2015) eKLR* it was held that:

It is necessary to examine whether the appellant had the necessary mens rea so as to be said he intended to commit the offence in question. Mens rea or criminal intent is the essential mental element considered in Court proceedings to determine whether the criminal guilt is present.....the essence of criminal law has been said to lie in the maxim actus, non falit reum nisi mens sit rea. There can be no crime large or small without an evil mind. It is therefore a principle of our legal system as probably it is every other that the essence of an offence is the wrongful intent without which the offence must not exist.

It is therefore, that my lordships, there genesis of the entire issue did not originate for the fully preformed intent of crime commission.”

[4] During the hearing the DPP made oral submissions recorded in the proceedings as follows:

“Appellant

I have written submissions. I do not wish to add.

DPP

Appeal is oppose.

Court: appellant convicted of grievous harm contrary to section 234 of Penal Code. He was sentenced to 5 years on 22/2/18.

Appellant is son to complainant and both of PW2, PW1 and PW2 testified that it was the appellant who assaulted the appellant in the material night. Pw2 testified that he found the appellant assaulting PW1 and attempted to rescue him two times but the appellant chased him away and threatened to assault him also.

PW3 testified that he administered First Aid to the complainant and went with him to his house as they feared the appellant would attack them again.

He assisted the complainant and took him to hospital the following day. Pw4 is the officer who examined the complainant. It was found his left arm was swollen and painful. The complainant legs were also injured. He referred the complainant to Baringo County Hospital where he was further to Eldoret Referral Hospital.

An X-ray on the head of the complainant showed there was an iron bar on the head which was broken as a result of the assault. Injuries classified as grievous harm.

Pw1 testified that iron bar on his hand was placed after the occurrence injury some time back and injury was caused by the appellant. The complainant had complained the appellant in the first instance but the appellant attacked the complainant that same time, hitting him at the exact place where he had hit him the first time breaking the iron bar used to reinforce the broken arm.

PW1, PW2, PW3 and PW4 confirmed that the complainant’s hand was fractured during the attack and that it was the same hand that the appellant had attacked the complainant earlier.

At p. 40 line 7 – 8 and noted that appellant did not look remorseful even as he was cross-examining his father. It was an opinion that the appellant should have sought forgiveness from his father instead of cross-examining him on the injuries.

Appellant requires rehabilitation and deterrence considering that it was not the first time to attack his father. Section 234 of Penal Code provides for a life sentence. The sentence of 5 years was lenient. I urge the Court to dismiss the appeal.

Appellant

I have understood what the DPP said. I have nothing to add. I pray that pre-trial detention period be considered. It was 5 months

between 25/9/17 to 22/2/18.”

Determination

[5] The issue before the court is whether the appellant is guilty of the offence of grievous harm.

[6] The evidence before the trial court is set out in full as follows:

PW1

My name is Ngurakeris Amundongole.

I am resident of Chemrei.

I am first at home the accused before court is my son.

On 17/9/17 I was at home at 8 evening resting.

I was with my three wives when the accused came there where I was at the fire side.

The accused was with other boys.

The accused had asked his brother Ruto whether he was the one who had flashed a torch at him but Ruto said that he did not have a torch and he ran away.

I had asked the accused why he was disturbing the boy that was taking care of animals that day.

I was there and the accused had aimed stones at his brother but he ran off.

The accused had come to where I was and he stated that we wanted to beat him.

The accused was drunk and I had raised my stick to beat him.

The accused took the stick from me and he had hit my left hand and leg.

The hand had broken and I went to hospital where I was treated.

The accused had used several walking sticks and after they were finished he had picked a stone and he had hit me on the head and he stated that he was to kill me.

He left me down on the ground and he left me and he went after the other boy.

I was taken to the neighbour home as the accused was to kill me if he came back.

I had slept and members of the public had come and they had applied local medicine on my hand and I slept.

The following day the accused had come ready to fight me.

I asked the neighbor to take me to hospital.

At 3 am I went to the road to Chemolingot hospital.

I had boarded a lorry and went to hospital where I was treated and referred to the police station Nginyang and I reported and I later went back to the hospital and I was treated and I had the hospital document filled and I took them to the police station.

I was taken to Kabarnet hospital where x-ray was taken.

P3 form is marked as MFI P1.

Film for x-ray is marked as MFI P2.

I was informed that the hand had broken at another point not where there was a metal bar over another injury.

I was taken to Eldoret hospital where the plate was inserted to my hand.

The 1st injury was caused on me by the accused and he had ran away and he was not arrested for one year.

I had forgiven the accused when he assaulted me on the first instance.

The treatment notes are identified and marked as MFI P3.

Accused is identified in court.

CROSS EXAMINED BY ACCUSED

I have never stabbed you with a spear.

PW2

My name is Ruto Murakeris.

I am resident of Mpaka I am herdsman.

The accused is my brother.

On 17/9/17 at about 8pm I was at home together with my family parents and siblings.

The accused came from a market and he asked me how the day was.

I informed him everything and he had flashed a torch at me and I had asked him to put off the torch.

He stated to quarrel and he pointed a stick to my eye and he intended to hit me on the eye.

My farmer came and he asked the accused why he was disturbing me.

I had gone to the side.

The accused had taken my father's walking stick and he had used it to beat him.

The complainant is my father had fallen down as the accused assaulted him.

I went to rescue my father but the accused had changed me while arrested with a knife.

I had ran off to some distance and the accused did not reach me.

I went back home and found that my father was still on the ground and the accused was assaulting him using a stone.

The accused had chased me for the 2nd time and one boy had taken the complaint to some home.

When I met the complaint later he had injured me the head hand and legs.

The complainant was injured on the hand that had a metal bar which had been placed in his hand when the accused had hit him again earlier on.

I was not there when the complaint was taken to hospital.

I have no dispute with the accused.

CROSS EXAMINATION BY ACCUSED

You were drunk when you assaulted the complainant.

You used to be sick earlier on but you had recovered.

PW3

My name is Ptukung Lokwiapok.

I am resident of paka.

I know the accused as he is my neighbor.

The complaint is the accused's father.

On 17/9/17 at about 10pm, I was at home when Ruto the complainant's son came to my home together with his mother and he informed me that the complainant had been assaulted and was in one home and he had sent for me to administer first aid in his hand which had been injured.

I went to where the complainant was and he stated that his hand had been injured.

The hand which had been injured earlier on.

The complaint has injuries to the head and hand and leg.

I stayed with him to the following day and he requested for an ambulance to take him to hospital.

I talked for boda boda which took the complainant to the road and I found an ambulance which took him to Kabarnet.

The accused had earlier on assaulted the complaint on the same hand.

Accused is identified in court.

CROSS EXAMINED BY ACCUSED

Sometime you vomit blood.

I did not see you that night

I have never heard that your father had chased you while armed with a spear.

PW4

My name is James Kithinji.

I am a clinical officer attached to Chemolongot Health centre.

On 18/9/17 I was at the hospital when the complaint herein Ngurakeris was brought to the hospital.

He was 60 years old.

He stated that he had been injured by known person.

I had examined him and I found that his left arm was swollen and painful.

The right leg was painful and swollen.

The legs had injuries too.

I inquired as to what was wrong and the complainant stated that his left hand was injured earlier on and an iron bar placed in it.

We gave the complainant medication to stop bleeding.

We realised that the injuries the complainant had could not be managed at Chemolingot and we had referred him to Kabarnet County hospital and he was also referred to Eldoret referral hospital.

I had then filled P3 and I have treatment notes.

The complainant was taken X-ray at MTRH and it is before court.

The X-ray shows iron bar in the hand.

I had categorized the injured as grievous harm.

The P3, medical chits and X-ray film are produced as exhibit P1, 2 & 3.

CROSS EXAMINED BY ACCUSED.

The complaint stated that the first injuries were inflicted on him by the person that had assaulted him again for the 2nd time.

PW5 MALE ADULT IS SWORN

I am number 101216 P.C Hassan Bore.

I am attached to Nginyang police station I am the investigating officer in this case.

On 21/9/17 I was at the station at 1045 am when one old man the complaint herein was assaulted to the station by his brother.

He was in pain and he stated that he had been assaulted.

I directed him to anti stock theft unit.

I had issued him with P3 form and I referred him to Chemolingot hospital.

I had then asked him to return it thereafter.

On 22/11/17 the complainant is relatives came to the station at 9am together with is sons and they availed the accused in the station.

I had re arrested the accused and I had changed him with the offence of grievous harm.

The complaint had injuries to his arm the injuries were inflicted on him by the accused who is before court who is also the accused's son.

CROSS EXAMINED BY ACCUSED

You were brought to the station by your brothers and other relatives.

The complainant had reported first and you were arrested later.

The complainant stated that you had assaulted him earlier on again before the said time.

You had denied the charges.

Your father refused to forgive you.”

[7] When put on his defence, the appellant said, as material, as follows:

“Court – Accused gave unsworn statement in English and Pokot.

My name is Limo Ngurakeris.

I am resident of Paka or Tuoti.

I am a herdsman.

The charges are not true.

On the date of the incident I was sick.

I informed the complainant that I wanted to go to hospital. I asked him to take me to hospital.

The complainant stated that he was sick and he asked me to look for a camel and I looked for it from Friday and found it on Sunday.

I had gone home and I asked one by one to give me medicine on Sunday. I had gone home and I asked whether the camel had reached and the complainant had asked where I was.

*He had gone into the house and he picked his spear and he stated that I should ie as I was not helpful. **The complainant had come over with a spear and he came over to me and he had fallen down and he screamed for help and he had summoned Ruto.***

I slept in the forest and the following day the children informe d me that the complainant had gone to hospital and he stayed there

until Friday. When he came back home some people came and they had arrested me....”

Judgment of the trial court

[8] In convicting the appellant the trial court resolved the issues before it as follows:

“JUDGMENT”

Upon hearing the entire case the issues for determination herein:

(1) whether it was the accused that inflicted injuries on the complainant.

(2) Whether there was any justification for the assault.

(3) Whether the injuries were grievous.

As per the evidence on record the complaint was father to the accused and indeed they were together on the date of incident before the attack.

It was also clear that there was no dispute on identification since the accused agreed that he was with the complainant and PW2 had also stated that he was with PW1 and the accused before the attack.

It was thus beyond doubt that the accused was properly identified.

PW1 stated that he had gone to where the accused was as he chased PW2 and he had attempted to hit the accused but the accused had taken the stick from him with which he had beaten him.

PW2 confirmed that indeed the complaint had gone to his rescue when the accused wanted to beat him and the accused had taken the stick from the complainant and he had hit him severally as he was on the ground and that when PW2 had attempted to rescue the complaint, the complaint had chased him two times and he had ran away and recovered and found that his father the complaint had been rescued and taken to a neighbours house and he had been informed.

PW1 PW2 PW3 confirmed that the complainant's hand was fractured in the process of the attack and PW3 was summoned to administer first aid and he had slept with the complainant that night and he had assigned him to go to hospital.

The clinical officer confirmed that when the complaint was taken to Chemolingot hospital he had a broken hand and he had referred him to Kabarnet and from where he was referred to MTRH Eldoret where and X-ray was taken and the fracture fixed.

The clinical officer produced that P3 form as exhibit PW1 the medical clinic exhibit P2 and x- ray as exhibit p3.

The said documents proved that indeed the complainant had suffered a fracture to his left hand which had another previous fracture.

PW1 and PW2 stated that the previous fracture had been inflicted on the complainant by the accused earlier on and the complainant had forgiven him.

The P3 indicated that the complainant had suffered other injuries to the scalp and lower parts of the body.

The accused's defence that the complainant had suffered a fracture when he fell down could not hold as the complainant had suffered other several injuries out on the beatings.

I also find that the prosecution had proved their case beyond any reasonable doubt that indeed it was the accused that had attacked the complainant as he went to rescue PW2 and that he had inflicted serious injuries on the complainant which required a fracture to the left hand.

I thus find the accused guilty and I connect him for the offence of causing grievous harm contrary to section 234 of the Penal Code as charged.

22/2/18.

S.O.TEMU, PM”

Consideration of Evidence by the first appellate court

[9] Having considered the evidence before the trial court and the appellants unsworn statement, I find the prosecution evidence demonstrated that the appellant had assaulted his father and the appellant's defence that the complainant had fallen down during an argument could not be true in view of the nature of the severe nature of injuries on head and arms which are consistent with the evidence of the prosecution

witnesses PW1, PW2 and PW3 and for which complainant was hospitalised for some 7 days from Sunday to Friday from 18/9/2017 to 25/9/2017, which is conceded by the appellant himself in his unsworn statement.

[10] The defence of intoxication is only available in circumstances set out in section 13 of the Penal Code as follows:

“13. Intoxication

(1) Save as provided in this section, **intoxication shall not constitute a defence to any criminal charge.**

(2) **Intoxication shall be a defence to any criminal charge** if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—

a. **the state of intoxication was caused without his consent by the malicious or negligent act of another person;** or

b. **the person charged was by reason of intoxication insane, temporarily or otherwise,** at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code ([Cap. 75](#)) relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.”

[11] I find that the appellant was shown to have been the perpetrator of an assault on his father which assault was categorised by medical expert (PW4) as grievous harm, and consequently, the appellant is guilty as the defence of intoxication that he proffers - which was not shown to have been inflicted by another person and or to have caused him insanity temporarily or otherwise - is not available to him in the circumstances of the case. The sentence of imprisonment for 5 years imposed on the appellant for the offence of grievous harm with a maximum sentence of life imprisonment and for such offence against his father which was the second time he had perpetrated such assault on his father and the appellant being a repeat offender, is in no way excessive, and this court does not find any error in principle that would justify interference with the sentencing discretion of the trial court.

Consideration of pre-trial detention period

[12] The trial court is shown properly to have to take into account, as prescribed by section 333 (2) Proviso of the Criminal Procedure Code, the period [which it erroneously states to be one year rather than five (5) months] between the date of sentencing on 22/2/2018 and the arraignment on 25/9/2017 when the appellant was held pending trial. The trial court considered the period of pre-trial detention as it was obliged to do under the said section, as shown in the record of the sentencing proceedings as follows:

“MITIGATION

Accused – I am young and I did not commit the offence.

Court – I have considered the nature of the offence and fact that the accused had assaulted the complainant earlier on and he had inflicted on him which we treated by fixing using steel bars and that he had repeated again and he had injured the same hand which had suffered a second fracture.

During the trial the accused did not look remorseful even when he cross examined PW1 his father.

It will thus be useless to send the accused home to serve none custodial sentence when he is not remorseful at all.

He deserved custodial sentence and the offence herein being grievous in nature the accused deserves years which will enable him reform and learn some trade while in prison.

The offence calls for life imprisonment but since he is first offender I will give him some reprieve and having served one year the same will be considered.

The accused will thus serve 5 years imprisonment.”

Orders

[13] Accordingly, for the reasons set out above, the appellant’s appeal herein is dismissed.

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.