IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 146 OF 2019

CORAM: D.S. MAJANJA J.

BETWEEN

GILBERT GITUMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. G. Sogomo, PM

dated 15th August 2019 at the Magistrate's Court at Tigania in Criminal Case No. 33 of 2019)

JUDGMENT

1. The appellant, **GILBERT GITUMA,** was charged and convicted on one count for causing grievous harm contrary to **section 234** of the ***Penal Code (Chapter 63 of the Laws of Kenya)*** where he was sentenced to 10 years' imprisonment and on the second charge, for assault causing actual bodily harm contrary to **section 251** of the ***Penal Code*** where he was sentenced to 3 years' imprisonment. Both sentences were to run concurrently.

2. The particulars of Count I were that on 23rd December 2018 at 8.00pm at Antuamakia Village, Anjuki Location in Tagania Central Sub County, within Meru County he unlawfully caused grievous harm to PURITY NKATHA by chopping off her left index finger and a deep cut in the left thumb, cutting her severally with a panga on the head and hands. On Count II at the same place and time he was accused of willfully and unlawfully assaulting FRIDAH KAWIRA by cutting her on the right shoulder and on the left forearm thereby occasioning her actual bodily harm.

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

4. Purity Nkatha (PW 1) testified that on 23rd December 2018, she was at the home of her sister, Stellah Mugere (PW 2) where the appellant was drinking alcohol. She recalled that the appellant started fondling her sister NK, who was in standard 6. When she protested, the appellant fished out a machete and slashed her on the hand severing her left indent finger and cutting her left thumb.

5. Fridah Kawira, PW 3, who was also present recalled that she saw PW 1 arguing with the appellant and when she inquired, PW 1 told her that the appellant was fondling NK. She left for a while to escort a friend and when she returned, she saw PW 2 pushing the appellant. PW 1 told her that the appellant had persisted in fondling NN. As she went back to the house, she saw the appellant slashing her with a panga on the left hand, right shoulder and back. She stated that she saw the appellant slashing PW 1.

6. PW 2 confirmed that on the material night, the appellant came to her home where she sold chang'aa. She recalled that as she was cooking she heard the appellant arguing with PW 1 about him fondling their sister, NN. She later heard a commotion and when she went, she found both PW 1 and PW 3had been cut and he had fled the scene.

7. Martha Njeri Murunga, PW 4, a clinical officer at Mikinduri Sub County Hospital confirmed that PW 1 and PW 2 came to the hospital on 23rd December 2018. PW 1 was bleeding seriously and her left index finger had been chopped off. PW2 had cut wounds on the right shoulder and left forearm. She opined that the injuries were inflicted by a sharp object. PW 4 produced the respective P3 forms in evidence.

8. The investigating officer, PC James Saitoti testified that PW 1 and PW 2 made a report at Mikinduri Police Station that they had been assaulted by the appellant. He stated that the appellant was arrested on 8th January 2019 after being apprehended by members of the public.

9. In his sworn defence, the appellant denied the charge. He stated that he did not hail from the complainants' village as he resided about

11km away. He complained that the complainants were out to frame him.

10. The issue in this appeal is whether the appellant committed the offence of grievous harm. In his petition of appeal, further grounds of appeal and written submissions, the appellant complained that he was convicted on the basis of inconsistent and contradictory evidence and that an essential witness was not called.

11. I have considered the evidence and the prosecution case is straightforward and based on direct testimony of PW 1 and PW 2 who gave clear testimony on how they were assaulted. Their testimony was corroborated by PW 3 who confirmed that the appellant was at the scene and he saw the appellant and PW 1 quarrelling over the appellant fondling NN. The appellant was well known to PW 1, PW 2 and PW 3 and even though it was at night, the evidence is clear that the appellant and witnesses had interacted for a sufficient period of time to exclude the possibility of mistaken identity. Moreover, when PW 1 and PW 2 reported the incident to the police on the material night, they named his as the perpetrator. The totality of the evidence proves that it is only the appellant who could have committed the act as his defence was a bare denial. No reason was put to PW 1 and PW 2 on why they would frame him for committing a felonious act.

12. Although the appellant referred to contradictions in evidence regarding the testimony of PW 1, PW 2 and PW 3 as what happened on the material day. What is clear is that each witness narrated what they perceived and the totality of the evidence is that the appellant and PW 1 had an argument and the appellant cut PW 1 and PW 2. I do not see any material discrepancies in the evidence as to undermine the prosecution's case as the fact of the assault.

13. The appellant suggested that essential witnesses including the person who lived in the same place and the complainant's sister, NK, were not called as witnesses. **Section 143** of ***Evidence Act (Chapter 80 of the Laws of Kenya)*** provides:

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

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

14. It is not clear whether the complainant's sister witnessed the incident but there was sufficient direct and corroborative evidence to point to the fact that the appellant is the person who assaulted PW 1 and PW 2. Likewise, the injuries which were suffered by PW 1 and PW 2 were confirmed by the testimony of PW 4.

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

16. The nature of the offence, the fact the appellant slashed two people who were trying to defend their sister, a child, from the lascivious intentions of the appellant, I cannot say the sentence imposed on the appellant warrants interference.

17. I affirm the conviction and sentence. The appeal is dismissed.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT MERU THIS 8TH DAY OF JUNE 2020.

A. MABEYA

JUDGE

Appellant in person.

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