REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 13 OF 2020

CALEB NDUBI OSORO.....APPELLANT

-VRS-

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Judgement of Hon. A. C. Towett – SRM dated and delivered on the 7th day of May 2020 in the original Nyamira Chief Magistrate's Court Criminal Case No. 1253 of 2015}

JUDGMENT

The appellant faced three counts of the offence of Grievous harm contrary to section 224 of the Penal Code. After the trial he was convicted on all three counts and sentenced to a concurrent term of imprisonment for two years. Being aggrieved by the sentence and conviction he preferred this appeal. The grounds of appeal are that: -

> **"1. The learned trial magistrate erred in law and fact when he convicted the appellant on the charge of grievous harm whilst the ingredients of the offence had not proved by the evidence tendered by the prosecution.**
>
> **2. The learned trial magistrate erred in law and fact when he in analysing the evidence before him took into consideration irrelevant matters, ignoring relevant ones to the prejudice of the appellant.**
>
> **3. The learned trial magistrate erred in law and fact when he failed to sufficiently consider or take into account the appellant's evidence that he tendered in his defence.**
>
> **4. The learned trial magistrate erred in law and fact when he convicted the appellant while the prosecution evidence was full of contradictions, contradictions sufficient enough to raise a reasonable doubt.**
>
> **5. The learned trial magistrate erred in law and fact when he handed down a sentence which was excessive in the circumstances of the matter."**

Given the ministry of Health regulations to combat the Covid-19 pandemic, this court directed that the appeal be canvassed by way of written submissions. Thereafter the court held a virtual session for the parties to highlight their submissions. At the hearing the appellant elected to rely on his written submissions entirely. Mr. Majale, Learned Counsel for the Prosecution responded orally.

The appellant submitted that the charges against him were not proved beyond reasonable doubt; that the injuries described by the complainants and the doctor who produced the P3 forms did not disclose grievous harm but common assault; that there was no proof that Robinson Saisi one of the complainants was treated at Nyamira Level Five Hospital as he alleged and he should have been treated as an untruthful witness. He urged this court to find that he should have been charged with an offence lesser than that of grievous harm. He also urged this court to find that the sentence meted by the trial court was excessive and that he ought to have been placed on probation.

On his part Mr. Majale submitted that he was conceding to the appeal albeit not for the reasons advanced by the appellant. He submitted that his reason was that from the record it was evident that whereas the appellant had indicated he wished to call a witness he was never allowed to do so and further that the record did not disclose that the appellant had closed his case. He urged this court to allow the appeal but order a re-trial.

The respondent's concession to the appeal is not binding and this court is still enjoined to consider the same. This is more so given that the issue raised by learned prosecution counsel is one of an irregularity which is curable by **Section 382 of the Criminal Procedure Code which** states: -

"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."

The appellant did not raise the issue adverted to by Mr. Majale either in his petition of appeal or in the submissions and in my view that is an indication that the omission by the trial Magistrate to inquire if he was intent on calling the witness, did not occasion a failure of justice. Moreover, the issue was one that the appellant should have raised at the trial by reminding the court that he wished to call a witness. This court can safely presume that that since he did not remind the trial Magistrate that he had a witness then he was not intent on calling one and the court was entitled to close the defence case.

On the merits, I have re-considered and evaluated the evidence before the trial court while keeping in mind that I did not see or hear the witnesses and my finding is that the evidence adduced proved the charges against the accused beyond reasonable doubt. The complainants sustained serious injuries which were classified as grievous harm by the doctor who treated them. The doctor's evidence though it is merely an opinion was corroborated by the witnesses and by the nature of the weapon used to inflict those injuries. It is instructive that the appellant disputes the degree of injury but not the fact that he attacked the complainants and wounded them. Regarding Robinson Saisi there was evidence that he too was assaulted and treated for his injuries. His P3 form was produced as exhibit 2. His evidence was corroborated by eye witnesses and I am not persuaded that he was an untruthful witness. The upshot is that the appeal against conviction has no merit.

As for the sentence, **Section 224 of the Penal Code** prescribes a sentence of life imprisonment. Sentencing is in the discretion of the trial court based on the law and the sentencing policy guidelines. The trial Magistrate recorded that in sentencing the appellant she considered his mitigation that he was asking for forgiveness. It is my finding that in the circumstances of the case and in view of the fact that no antecedents were presented to the court the sentences imposed were fair and just. In the premises there is also no merit in the appeal against the sentence and the appeal is dismissed in its entirety. It is so ordered.

Signed, dated and delivered in Nyamira this 16th day of July 2020.

E. N. MAINA

JUDGE

Judgement delivered virtually via Microsoft Teams