



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 16 OF 2020

JUSTINE KEBUT CHEPTOO.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Resident Magistrate's Court at Kabarnet Criminal Case no. 731 of 2019 delivered on the 19th May 2020 Hon. V. O. Amboko, RM]

JUDGMENT

1. The appellant was upon being convicted for the offence of grievous harm contrary to section 234 of the Penal Code sentenced to imprisonment for four (4) years on 26th May 2020. The Particulars of the offence were that he “on the 16th day of November 2018 at about 10,00pm at Namba village in Baringo North sub County within Baringo County, unlawfully did grievous harm to Samuel Kamuren.”
2. The appellant appealed to this court on grounds set out in his Petition of Appeal dated 20th June 2020 as follows:

“PETITION

1. THAT the learned trial magistrate erred in law and fact in convicting and sentencing the Appellant to serve four (4) years imprisonment without an option of a fine when there was no sufficient evidence presented to sustain the charge.
2. THAT the learned trial magistrate erred in both law and fact in finding that there was sufficient evidence to prove that the complainant identified the appellant as his assailant at the time of the assault, when there were clear and cogent evidence in the discharge summary form that the complainant was assaulted by people unknown to him.
3. THAT further the learned trial magistrate erred in both law and fact in failing to find that the conditions existing at the time of the assault were not conducive for a positive identification and/or voice identification cannot be taken as sufficient identification.
4. That the learned trial magistrate erred in both law and fact in finding that the glaring contradictions apparent in the respondent's case were minor and did not go to the substance of the case, when there were evidence to the contrary that the contradictions were material and ought to have been considered in favour of the appellant.
5. THAT the learned trial magistrate erred in both law and fact in finding that there was no grudge between the complainant and the appellant hence the complainant had no reason to give false evidence against the appellant when there was sufficient evidence that the complainant had eloped with the wife of the appellant hence the complainant had every reason to give false evidence to put away the appellant.
6. THAT the learned trial magistrate erred in both law and fact in disregarding the appellant's defence as unbelievable and a mere denial and/or in shifting the burden of proof to the appellant.
7. THAT the learned trial magistrate erred in both law and fact in failing to find that the complainant did not make a report at the police station about any assault by the Appellant and the purported report allegedly made on 17th November 2018 if any was made by the wife of the appellant who had eloped with the complainant and was therefore out to fix him.
8. THAT the learned trial magistrate erred in both law and fact by disregarding the appellant's mitigations, thereby unjustly sentencing him for four (4) years imprisonment without an option of a fine, when they were mitigating circumstance in the form of the probation report which showed that the complainant had a grudge against the appellant hence a non custodial sentence would suffice.”

3. At the hearing of the appeal on the 24th August 2020, counsel for the appellant made oral submissions in highlighting written submissions dated 20th August 2020 previously filed, and the Prosecution Counsel for the DPP made oral submissions in reply as set out in the record of proceedings for the day as follows:

“Mr Chebii for the appellant

Appeal no. 16/20 from SPM CR 731 of 2019.

We have written submissions.

Grounds 1,2, 3 together

Sufficient evidence to warrant conviction. *Identification. No identification. Discharge summary E. no 2 from MTRH states assault by people unknown to him. It was 3 weeks after attack.*

Pw1 purported to identify appellant on the date of attack is not correct.

Information in PEx. No.2 was transferred to P3 form. The doctor is the same who did the discharge summary.

P3 form and discharge summary indicated evidence by Pw1 and Pw2 was not correct.

Glaring inconsistency

Appellant arrest on 10/9/2020 from assaulting his brother in Cr Case 730 was withdrawn and he was charged with Cr 731 of 2017.

Appellant was charged in 731 of 2017 before the P3 form was prepared. They charged him and later prepared the P3 form.

The complainant has not given a reason for waiting for 10 months until when appellant was charged with another matter.

No positive identification. *Appellant was not able to see the person who hit him as he said he “heard”. He could not have seen the weapon he used. The story of the complainant is not plausible.*

Contradictions

Time of attack as 9.30 pm charge sheet shows 10.00pm. Pw2 said it was 7.00pm. The court erred in holding that they were minor contradictions. The time impacts on identification.

Appellant’s Defense

The trial court disregarded as unbelievable and mere denial. The defence was factual and verifiable. It is not mere denial.

Burden of proof shifted to the appellant.

Mistrial

*Language of evidence **Pokot** interpretation while accused **a Tugen**. Proceedings were conducted in Kiswahili. The appellant was not able to mount any defence. He did not ask questions and the court should have been provided a **Tugen** interpretation.*

Trial court disregarded mitigation of the appellant even after Probation officer indicated had the appellant ran with a complainant’s wife. The court should have rendered a lesser sentence. The court did the opposite and imposed a stiffer penalty.

The complainant did not ever report of being assaulted by appellant. The report allegedly by the wife was not produced and the wife did not testify in court.

If court finds trial was defective, the time he has stayed in the custody does not call for retrial and the lack of identification shall call for acquittal.

Mr Abwajo for the DPP in reply

Appeal is opposed by DPP

Sentence meted against the appellant considered mitigation. Greivous harm contrary to section 234 of Penal Code. Life sentence. The sentence of 4 years is lenient.

Sufficiency of evidence an identification. *Voice identification was one of the means of identification.*

Appellant and the complainant had a grudge so they were known to each other and the complainant could identify his assailant by voice. Voice identification was sufficient.

Time inconsistency

Between 9.30 pm and 10.00pm. It is likely that one may miss the exact time. The court resolved that the inconsistency between 9.30 and 10.00 did not go to the core of the offence.

Appellant's illiteracy

Trials are not a reserve of the literate. The court shall not consider the level of education that those who are illiterate should have be put to trial.

Accused did not have ability to follow the trial as he did not understand the trial language.

The record of proceedings at p.1, plea was entered and unequivocal in the language which was Kiswahili that “**ni uwongo**”.

Trial did not show the issue of language as having been raised by defence. It was an afterthought.

Relationship between criminal cases 730 and 731 of 2019. The two have no bearing and the court should not regard the same.

Relationship of appellant and wife of the complainant. It was not before the court below. It is no reason for framing a ground of appeal by the defence.

Appellant was known to complainant at the assault or time of making medical report. Medical officer filing the report is entitled to examine and talk to patients. He is not bound by discharge summary of the patient.

The appellant was able recall the attacker at the time he gave information to the examiner.

Proceedings of the trial. Statement in judgment of “unbelievable and mere denials” did not shift the burden on the accused.

Section 210 of CPC. At that stage the court has already cautioned itself that should the defendant decide to remain silent, the evidence should be sufficient to convict and, therefore, when the defendant engages in mere denial, the court is left with no choice but to convict.

Ignorance of the defence does not make him or her not to avail an alibi defence for the mere fact that he is illiterate. He could have given alibi defence.

We seek that the appeal be dismissed.

Mr Chebii for the appellant in reply

Identification. The complainant did not identify his assailant. There is no presumption that he knew the **voice** of the appellant.

Time of attack

Differences of 3 hours' time difference is major.

Burden of proof

Paragraph 19 of the Judgment. The court said that appellant did not state where he was at the time of the assault and that he statement that he was arrested at the time of offence was most factual. The time 7.30 was a major being on the defence.

The clinical officer is entitled to examine the patient afresh but the court depart fundamentally on whether the complainant identified the assailant.

Sentence was stiffer. The court adopted remarks that the appellant should be hit hard. The relationship with complainant's wife and prospects of grudge is a mitigating factor. Identification is crucial. Proceedings was in Pokot/Kiswahili.”

Issues for determination

4. The principal issue for determination in the appeal is whether the appellant was properly identified as the attacker who did grievous harm on the complainant. There was also an issue of defective trial of the appellant using a language which he allegedly did not understand. The sentence of 4 years was also challenged as severe in the circumstances of the case.

5. In accordance with the duty of the first appellate court, this court shall re-examine the evidence presented by the prosecution and the

defence before the trial court to make its own conclusion on the basis of which it will then consider whether the conclusion of the trial court shall be affirmed or otherwise, giving allowance, as guided in **Okeno v. R** (1972) EA 32, that it did not itself see or hear the witnesses adduce evidence.

Determination

Record of Proceedings

6. Because of the grounds of inability to understand the language used by the witnesses during his trial, the record of the entire proceedings of the trial court is set out as follows:

“REPUBLIC OF KENYA
IN THE SENIOR PRINCIPAL MAGISTRATE’S COURT
AT KABARNET
CRIMINAL CASES NO.731 OF 2019
REPUBLIC PROSECUTOR
VERSUS
JUSTINE KEBUT CHEPTOOACCUSED

12/9/2020

Before Hon. V.O.Amboko (RM)

State Counsel – Ms Macharia

Court Clerk –Shillah

Accused – Present

Interpretation – Kiswahili

The substance of the charge(s) and every element thereof has been stated by the court to the accused person in the language that he understand, who being asked whether he admits or denies the truth of the charge(s) replies:-

Accused: Ni uongo

Court: Plea of not guilty is entered.

Prosecutor: I have supplied statements

Court: The accused is granted a bond of Ksh.50,000/= with one surety hearing on 7/10/2019 at Loruk before court 3. Mention on 26/9/19.

V.O.AMBOKO, RM

12/9/19

26/9/19

Coram Before Hon. N.M.Idagwa, SRM

Court Clerk- Ms. Kitilit

Court Clerk- Frenky

Accused – Present

Court – hearing on 7/10/19

N.M.IDAGWA, SRM

26/9/19

7/10/19

Coram Before Hon. V.O.Amboko, RM

Prosecutor – Joseck Abwajo

Court Clerk- Lesaaya/ Cecilia

Accused – Present

Interpreter: Benjamin Kibet (Pokot)

Prosecutor: I have 2 witnesses. I am ready to proceed.

Accused – I am ready to proceed.

PW1 MALE ADULT CHRISITAN SWORN AND STATES IN POKOT / KISWAHILI

I am Samuel Kamuren, I live in Ngaratuko. I am the Assistant Chief in Loruk. On 16/11/2018. Before the 16/11/2018 there were thieves who attacked a farmer in Ngaratuko and took his cattle. The farmer was Kapielel Arabal I and the villagers went to console the family of the deceased on 16/11/2018. I went at around 7:00pm I used my official motorbike and parked at Namba centre. I walked to the homestead of the deceased. We made funeral arrangements until 9:30 pm on the same day. When I arrived at the home there were a few people as villagers were afraid of being attacked.

After that arrangements I went back to Namba Centre. I had parked my motorbike on the verandah of one of the shop's. As I was pushing my motorbike I saw the accused person approaching me and his hands were folded on his back behind him. He came to where I was and asked me if the shop owners were present. I looked around to check if there was anyone in the shop.

At the time I was alone, I heard the accused person jump all of a sudden. I looked to check what had happened, the accused was 3 metres away. I heard a loud bang near my ear I fell down, I felt a sharp pain on the left side of my jaw to the ear. (witness shows visible scar from his cheek to his ear.

I felt blood trickling and the area was warm. The accused person had cut me with a panga. He ran away. I started screaming George Chebor came to where I was, he lives close to the centre.

When George arrived I told him not to ran away but to help me as I was injured. George looked for a cloth and tied the area I was bleeding. He called other neighbours Enock Chelimo had a car, I met him on the way as I was being ferried by a motorbike. Enock Chelimo took me to Marigat district hospital where first aid was conducted. I was taken to valley hospital Nakuru where I was admitted for 5 days. I was later taken to Moi Teaching and Referral hospital where my brother was working.

The doctor told me I had a crack on the lower jaw and a piece of metal was to be inserted in my jaws. I stayed at Moi Teaching and referral Hospital for 2 weeks I was later discharged after 2 weeks. I was told to attend clinic after 1 month.

On the 17/11/2018 my wife had reported the incident at Loruk police station at that time I was admitted in valley hospital. I knew the accused person before the incident he lives in the same area. I had received a report from the villagers that he was suspected of setting fire to a house belonging to one of the villagers.

At the time of the incident I saw him through moonlight. He talked to me asking for the shop keeper. I recognized his voice. After treatment, I went to Nakuru where my family lives. I went to the police station and was given a P3 form which I took to Marigat sub-county hospital. The P3 Form was filled, I also have documents form Valley hospital, discharge summary from Moi teaching and referral hospital.

I also have NHIF pre-authorization form. NHIF Made a medical report it is in court.

- P3 Form MFI1.

- Discharge Summary 19.12.18 MFI 2 (Moi teaching referral hospital)

- Medical Report (NHIF) MFI 3.

- Dental Pre-authorization report (NHIF) MFI 4

- Summarized interim invoice (Moi Teaching and Referral) MFI 5

The accused person is in court. The accused person went into hiding after the incident. In September 2019. I received a phone call asking me to go to Loruk Police station. I went and found the accused person had been arrested. The phone call was from OCS Loruk police station.

V.O.AMBOKO, RM

7/10/19

CROSS EXAMINATION.

I have never quarreled with you. You cut me on the 16/11/18. You did not call me through mobile phone on that day. Sibilo is in Loruk, my work as an Assistant Chief covers Sibilo area.

I know you.

V.O.AMBOKO, RM

7/10/19

RE-EXAMINATION

I know the accused person. He lives in the same area where I am an Assistant Chief. I work with people who live in Loruk area.

V.O.AMBOKO, RM.

7/10/19

PW2

MALE ADULT CHRISTIAN SWORN AND STATES IN KISWAHILI.

I am George Talam Chebor, I live in Ngaratuko I am a business man. On 16/11/2018 at 7:00pm I was in house in Ngaratuko, Namba area near Namba centre. I heard someone screaming from the centre. As I was near the centre, I ran to the centre which was 100 metres away. The person was screaming and asking for people to help him.

In that week, there was someone who had been shot in the area and goats had been stolen. When I arrived at the centre I found the person screaming was the Assistant Chief. He was laying on the ground and had blood dripping from his face. I asked him what had happened and he told me Justine Kebut had cut him.

I knew Justine Kebut as he comes from the same area. I did not know the reason why he injured the Assistant Chief. I tore the Assistant Chief's shirt I tried the area he was bleeding on the cheek and jaw. I called for a motorbike. The motorbike was mine I took the Assistant Chief, as I was on the way I called Enock who met us on the way. Enock had a car, we took the Assistant Chief to Marigat sub-county first aid was conducted and they referred him to valley hospital Nakuru.

The chief was put in an ambulance. I also boarded the ambulance to valley hospital, we went with a doctor who was treating him. I left the Assistant Chief at hospital once his brother arrived. The following day a report was made at Loruk station.

I do not remember the date I recorded my statement. The Assistant Chief had told me Justine Kebut had cut him. I did not see Justine on the date of the incident. Justine lives 4 km from Namba Centre. I can be able to identify Justine he is in court.

I have never had any differences with him. I do not know if Justine had differences with the Assistant Chief.

V.O.AMBOKO, RM.

7/10/19

CROSS EXAMINATION

I was at my house when the incident occurred. I ran to Namba Centre after hearing a scream. I found the Assistant Chief he told me you cut him.

V.O.AMBOKO, RM.

7/10/19

Re- Examination

Prosecutor- None

V.O.AMBOKO, RM.

7/10/19

Prosecutor- *I pray for another date to avail the remaining witnesses. 2 witnesses.*

Accused – *I have no objection.*

Court – *further hearing 4/11/2019*

Mention on 22/10/2019.

V.O.AMBOKO, RM.

7/10/19

22/10/19

Coram Before Hon. V.O.Amboko, RM

Prosecutor- *Mr. Abwajo*

Court Clerk- *Frenky*

Accused – *Present*

Court – *Hearing on 4/11/2019.*

V.O.AMBOKO, RM.

7/10/19

4/11/2019

Coram Before Hon. V.O.Amboko, RM

Prosecutor- *Ms. Miriu*

Court Clerk- *Frenky*

Accused – *Present*

Prosecutor – *I am not ready to proceed. I do not have the police file nor witnesses.*

Accused – *I have no objection.*

Court – *Hearing is adjourned to 20/11/19.*

V.O.AMBOKO, RM

4/11/19

20/11/2019

Coram Before Hon. V.O.Amboko, RM

Prosecutor- *Mr. Abwajo*

Court Clerk- *Lesanya*

Accused – Present

Prosecutor- I pray for the file to be placed.

Court – File is placed aside.

Later at 10:45 am.

Prosecutor – It is a Loruk File. They were expecting us to go for mobile court in Nginyang. I pray for another date.

Court – Hearing is adjourned to 4/12/19.

V.O.AMBOKO, RM

20/11/19

4/12/19

Coram Before Hon. V.O.Amboko, RM

Prosecutor- Mr. Abwajo

Court Clerk- Lesaaya

Accused – Present

Prosecutor- The doctor is away on leave and requests for a date in January. The investigating officer and doctor are the only remaining witnesses.

Accused- I have no objection.

Court – hearing is adjourned 5/2/20

Mention on 18/12/19.

V.O.AMBOKO, RM

4/12/19

18/12/2019

Coram Before Hon. V.O.Amboko, RM

Prosecutor- Mr. Abwajo

Court Clerk- Tamar

Accused – Present

Hearing on 5/2/20

Mention 2/1/20

V.O.AMBOKO, RM

18/12/19

2/1/2020

Coram Before Hon. P.C. Biwott, SPM

Prosecutor- Ms Macharia

Court Clerk- Tamar

Accused – Present

Court – Hearing on 5/2/20. Mention on 16/1/2020

P.C. BIWOTT, SPM

16/1/20

Coram Before Hon. N.M.Idagwa, SRM

Prosecutor- Ms Muriu

Court Clerk- Lokwete

Interpretation – English/Kiswahili

Accused – Present

Court – Hearing on 5/02/20

16/1/20

Coram Before Hon. N.M.Idagwa, SRM

Prosecutor- Ms Muriu

Court Clerk- Lokwete

Interpretation – English/Kiswahili

Accused – Present in person

Hearing on 5/2/2020. Mention on 29/1/2020.

N.M.IDAGWA, SRM

16/1/2020

29/1/2020

Coram Before Hon. V.O.Amboko, RM

Prosecutor- Mr. Abwajo

Court Clerk- Frenky

Accused – Present

Hearing 5/2/2020

V.O.AMBOKO, RM

29/1/20

5/2/2020

Coram Before Hon. V.O.Amboko, RM

Prosecutor- Mr. Abwajo

Court Clerk- Frenky

Accused – Present

Prosecutor- I pray for the file to be placed aside. I have not received the police file.

Court – File is placed aside.

Later at 10:10 am.

Prosecutor – I have the doctor and investigating officer. I am ready to proceed.

Accused – I am ready to proceed.

PW3

MALE ADULT CHRISTIAN SWORN AND STATES IN KISWAHILI.

I am Samuel Cheserem Clinical officer Marigat sub-county hospital. I have a P3 form of Samuel Kamuren which I filed on 12/9/2019.

The patient came to hospital and complained of being assaulted by a person known to him, 10 months prior. He complained of a panga cut on the left jaw, deep cut on the jaw. As a result he sustained a fracture of the left jaw. 6 teeth had been broken. He had an x-ray which showed a fracture of the left mandible.

On examination, he was in fair condition. On further examination he had a scar wound on the left side of the jaw. I discovered that some of the lower teeth was broken. He had no other visible injuries. He had been admitted in hospital, he had x-rays and internal fixation of the jaw had been carried out, he had been discharged and put on drugs.

Approximate age of injuries was 10 months.

Probable type of weapon was sharp.

The degree of injury was grievous harm.

The patient had been seen at valley hospital in Kabarnet. There is a discharge summary. He was also seen by a dentist at the valley hospital. I relied on the discharge note and x rays from valley hospital. I wish to produce the same in evidence.

The patient was discharged from Moi Teaching and Referral hospital he was referred to the hospital from valley hospital.

There is also a treatment voucher from Moi teaching referral Ksh.246,835/= there is also another voucher Ksh.151,680/= from Moi Teaching and Referral Hospital.

There was a report/ document from NHIF to authorize treatment for the patient.

P3 Form EX1.

Discharge summary (MTRH) Exhibit 2

Invoice (MTRH) Exhibit 3

Dental Services pre authorization Exhibit 4

Medical report NHIF Exhibit 5

Discharge summary Valley hospital Exhibit 6.

V.O.AMBOKO, RM

5/2/2020

Cross Examination:

Accused – I have no questions.

V.O.AMBOKO, RM

5/2/20

Re- Examination

Prosecutor- None

V.O.AMBOKO, RM

5/2/2020

PW4 MALE ADULT CHRISTIAN SWORN AND STATES IN KISWAHILI.

I am no 63314 CPI John Kajara. Stationed at Loruk Police Station. I am the investigating officer. On 17/11/2018 at 10:10am. I was at the station when one lady Moureen Kibet came and reported that on 16/11/2018 at 9:30pm her husband Samuel Kamuren, who was the Assistant chief Loruk Sub-location had been attacked by the accused person and he had been cut on the left jaw and he was taken to hospital and was on critical condition. I went to Marigat sub-county hospital, the Doctors informed me that the complainant had been referred to Nakuru referral hospital for treatment. I discovered on 16/11/2018 there was one Kapalel Arabi who was a guard Namba area who had been killed by attacker from the Pokot community.

The assistant chief had gone to console the bereaved family. The Assistant Chief had left his motorcycle at Namba trading centre and had walked to the bereaved's home. The owners of the shop had ran away for fear of attacks at the trading centre. When the assistant chief went to board his motorcycle he was attacked by the accused person who cut him with a panga and the accused escaped.

I later recorded the statement of the complainant, I issued him with a P3 Form which was filled by the Doctor, and the injuries were classified as grievous harm. Together with the help of residents I was able to arrest the accused person and arraign him before court.

After the complainant was injured the accused person ran away from his home and went to Keiyo Marakwet for a period of 5 months.

I arrested the accused at Sibilo trading Centre on the 10/9/2019. The accused person is in court.

V .O.AMBOKO, RM

5/2/2020.

CROSS EXAMINATION

Accused – I have no questions.

V.O.AMBOKO, RM

5/2/2020

RE-EXAMINATION

Prosecutor- None.

V.O.AMBOKO, RM

5/2/2020

Prosecutor- That marks the close of the prosecution's case.

Court- Ruling on case to answer on 12/2/2020.

V.O.AMBOKO, RM

5/2/2020

RULING

I have evaluated the evidence adduced by the 4 prosecution witnesses and exhibits produced in support of the prosecution's case. I find that a case has been made out against the accused person to warrant him to be placed on his defence under section 211 of the CPC.

V.O.AMBOKO, RM

12/2/2020

Read out, signed, and delivered in open court in the presence of:

Accused – Present

Prosecutor – MS Kitilit

Court Clerk- Frenzy.

Section 211 of the CPC explained to the accused person to which he replies.

Accused – I will give sworn evidence and I will not call any witnesses. I am ready to proceed.

Prosecutor – I am not ready to proceed. I am holding brief for my colleague I have not familiarized myself with the file. I pray for a date next week.

Court – Defence hearing is adjourned to 18/2/2020.

V.O.AMBOKO, RM

12/2/2020

18/2/2020

Coram Before Hon. V.O.amboko (RM)

Prosecutor – Mr. Abwajo

Court Clerk – Frenky

Accused – Present

Accused – I am ready to proceed.

Prosecutor- I am ready to proceed.

Later at 10:55 am.

DW1

MALE ADULT SWORN CHRISTIAN AND STATES IN KISWAHILI

I am Justine Kebut Cheptoo. I live in Sibilo location. I am a businessman on 10/9/2019 my brother Isiah Cheptoo reported me on a case of threatening his life. He reported me at Loruk police station. I was arrested and informed of this charges and brought to court. I do not know anything about this charge. That is all.

V.O.AMBOKO, RM

18/2/2020

CROSS EXAMINATION

Prosecutor – None

V.O.AMBOKO, RM

18/2/2020

Accused – I have no witness. I close my case.

Court – Judgment on 19/3/2020

Mention 3/3/2020

V.O.AMBOKO, RM

18/2/2020

19/5/2020

Coram Before Hon. V.O.Amboko, RM

Prosecutor- Ms Macharia

Court Ass. – Kosgei/Alex

Accused – Present

Mr. Kiprono – The probation report is ready.

Court – I have considered the fact that the accused person is a first offender. The probation report recommends a custodial sentence to discourage the use of violence to resolve conflict. I am in agreement with the report, a deterrent sentence should be meted out to discourage such acts. I sentence the accused person to serve 4 years imprisonment. The sentence to run from 12/9/2019 when the accused person was placed on remand pending trial.

Right of appeal 14 days.

V.O. AMBOKO, RM

26/5/2020”

Language of the Court and witnesses

7. The Kenya Judiciary Criminal Procedure Benchbook, 2018 makes the following observations as regards the accused’s right to interpretation -

“An accused person has the right to an interpreter at the expense of the court, if the person does not understand the language of the court language (art. 50(2)(m), CoK).

This right includes interpretation in English where another language not understood by the advocate is used (s. 198(2), CPC; [Swahibu Simiyu & Another v R Court of Appeal at Kisumu Criminal Appeal 243 of 2005](#)).

The language in which court proceedings are held must be recorded; failure to record renders it impossible to determine whether this right was observed ([Charles Mithika Muindi & another v Republic High Court at Meru Criminal Appeal Case No. 177 Of 2007, \[2010\]](#); [Michael Nganga Kinyanjui v Republic Court of Appeal at Nairobi Criminal Appeal No. 230 Of 2011, \[2014\] eKLR](#)).

However, where the record shows that the accused participated actively in the trial, an accused person cannot be said to have been prejudiced by the failure to record the language used in the proceedings ([George Mbugua Thiongo V Republic, Court of Appeal Criminal Appeal Case No. 302 of 2007](#)).

Violation of the right to interpretation may render the trial a nullity as interpretation is not a procedural technicality ([Hawo Ibrahim v Republic Court of Appeal at Nyeri \(sitting in Meru\) Criminal Appeal No. 46 of 2014](#); [Michael Nganga Kinyanjui v Republic Court of Appeal at Nairobi Criminal Appeal No. 230 of 2011 4](#)). However, the finding that this right has been violated should not automatically lead to a retrial. The decision in each case depends on the particular facts and circumstances of that case, and an order for retrial should only be made where interests of justice require it ([Julius Kaunga v Republic Court of Appeal at Nairobi Criminal Appeal No. 189 of 2000](#)).”

8. The record of the trial court does not indicate that the accused said he understood Kiswahili, Pokot or another language. However, the record indicates the appellant’s plea was taken with interpretation into **Kiswahili** language when the appellant as accused then responded in Kiswahili “ni uongo” that is **it is false**, and witnesses PW1 testified in **Pokot/Kiswahili**, while PW2, PW3 and PW4 testified in **Kiswahili** language. The appellant himself when put on his defence is shown to have testified in **Kiswahili** language setting out his defence clearly and coherently. The appellant is also shown in cross-examination at considerable length of the complainant and his witness PW2 and must be taken to have actively participated in the trial and cannot be said to have been prejudiced by failure to indicate in the record the language understood by the accused appellant in the proceedings. From the record of proceedings that “**PW1 MALE ADULT CHRISTIAN SWORN AND STATES IN POKOT / KISWAHILI**” it is the complainant PW1 who was testifying in **Pokot** language with interpretation into **Kiswahili** and not that the witness testified in **Kiswahili** with interpretation into **Pokot**, and the record shows that there was a Pokot interpreter named as “**Interpreter: Benjamin Kibet (Pokot)**”. In any event, there is evidence that the appellant did understand **Kiswahili**, as it is the language in which he is shown to have entered his plea and given his testimony upon being placed on his defence.

9. As regards language used in trial proceedings, the Court of Appeal in **George Mbugua Thiongo v Republic** [2013] eKLR (Nambuye, Mwera & Gatembu, JJA.) held as follows:

“21. The language in which the witnesses testified is not indicated either throughout the trial, however, there was a court clerk. In the case of Said Hassan Nuno V. Republic Criminal Appeal No. 322 of 2006 this Court stated:-

“Apart from the above, at each stage of the proceeding, a court clerk was in attendance and we take judicial notice that one of the core duties of a court clerk is to offer interpretation services to accused, his counsel, the court or to the witness.....It is our view that there was a language in which the proceedings were conducted and with the appellant's admission that he understood the charge, we are in no doubt he followed the proceedings adequately.”

22. For the court to nullify proceedings on account of lack of language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial.

That is not the case here. The appellant cross-examined all three witnesses with no difficulty. He had no difficulty in conducting his defence. It is clear that the appellant clearly understood the proceedings. We do not therefore consider that the omission by the learned trial magistrate to record the language occasioned a miscarriage of justice.”

10. There is no evidence on the record that the appellant did not understand the proceedings of his trial and that he was prejudiced in any way have fully participated by cross-examination of the prosecution witnesses and testifying in his own behalf in defence. I reject the ground of appeal based on the language of the trial court proceedings.

Identification of the appellant

11. The complainant relied on both **visual** identification and voice recognition of the appellant. PW1 said in examination in chief–

“I and the villagers went to console the family of the deceased on 16/11/2018. I went at around 7:00pm I used my official motorbike and parked at Namba centre. I walked to the homestead of the deceased. We made funeral arrangements until 9:30 pm on the same day. When I arrived at the home there were a few people as villagers were afraid of being attacked.

*After that arrangements I went back to Namba Centre. I had parked my motorbike on the verandah of one of the shop's. **As I was pushing my motorbike I saw the accused person approaching me and his hands were folded on his back behind him. He came to where I was and asked me if the shop owners were present. I looked around to check if there was anyone in the shop.***

***At the time I was alone, I heard the accused person jump all of a sudden. I looked to check what had happened, the accused was 3 metres away.** I heard a loud bang near my ear I fell down, I felt a sharp pain on the left side of my jaw to the ear. (witness shows visible scar from his cheek to his ear.*

I felt blood trickling and the area was warm. The accused person had cut me with a panga. He ran away. I started screaming George Chebor came to where I was, he lives close to the centre.”

12. The complainant (PW1) explained that he knew the accused before and that he had seen him using moonlight and recognized his voice when he spoke to him as follows:

*“I knew the accused person before the incident he lives in the same area. I had received a report from the villagers that he was suspected of setting fire to a house belonging to one of the villagers. **At the time of the incident I saw him through moonlight. He talked to me asking for the shop keeper. I recognized his voice.**”*

The appellant was known to the complainant as a person who lived in the area where the complainant was the Assistant Chief and, more, the appellant had been reported to him by villagers previously as having been suspected of setting fire to a house belonging to a villager. The appellant was previously known to the complainant and there is a clear basis for a finding of recognition identification.

13. PW2 said that upon answering to a call for help he found the complainant had been attacked and the complainant told him that he had been attacked by the appellant, as follows:

*“**On 16/11/2018 at 7:00pm** I was in house in Ngaratuko, Namba area near Namba centre. I heard someone screaming from the centre. As I was near the centre, I ran to the centre which was 100 metres away. The person was screaming and asking for people to help him.*

*In that week, there was someone who had been shot in the area and goats had been stolen. **When I arrived at the centre I found the person screaming was the Assistant Chief. He was laying on the ground and had blood dripping from his face. I asked him what had happened and he told me Justine Kebut had cut him.**”*

14. PW2 also knew the appellant as a person who lived in the area, the same area where the complainant was an administrator as Assistant Chief, and he said of him as follows:

“I knew Justine Kebut as he comes from the same area. I did not know the reason why he injured the Assistant Chief. The Assistant Chief had told me Justine Kebut had cut him. I did not see Justine on the date of the incident. Justine lives 4 km from Namba Centre.”

15. Counsel for the Appellant relied on the case of *Aloice Okelo Okelo v. R* (2012) eKLR where the court (Ali-Aroni, J.) considered the Court decision on voice identification in *R. Ndalania & 2 Others* (2003) KLR 638 (Osiero, J.) where (citing *R v. Turnbull* 1956 3 All ER 549) it was held that –

“Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

And found voice recognition evidence in that case to have been uncorroborated and consequently quashed the conviction of the appellant.

16. Counsel also relied on the decision of Aburilli, J. in *Joseph Otieno Oketch v. R* (2019) eKLR where the judge found evidence of corroboration the evidence of recognition of the appellant in that case. The learned judge, however, properly accepted that the position of the law was not that there could be no safe conviction based on evidence of recognition even at night, as follows:

“46. In R –vs- Turnbull & Others (1976) 3 ALL ER 549, which decision has been generally accepted and greatly used in the Kenya’s system, the English Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

47. The above decision does not say that there cannot be safe recognition even at night. The Court of Appeal in Douglas Muthanwa Ntoribi vs Republic (2014) eKLR in upholding the evidence of recognition at night held as follows:-

“On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-

“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.”

The Learned Judge further noted that the complainant testified that he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...”

48. In Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported) the Court of Appeal had this to say on the evidence of recognition at night:-

“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.”

17. In this case, the evidence of PW2 as to the identity of the attacker is corroborative of the complainant’s evidence of identification by visual and voice recognition.

Inconsistency of statements in Discharge Summary and P3 on whether assailant was known to the victim.

18. On the Discharge Summary (PEX.2) dated 3/12/2018 from Moi Teaching and Referral Hospital, Eldoret where the complainant had been hospitalized upon attack, the history of the case is set out indicating attack by unknown person as follows:

“Patient referred from Valley Hospital NKR after being assaulted by pple [people] unknown to him and he sustained injury left lower jaw...”

19. The medical examination report P3 dated 12/9/2019, completed over 10 months later, the section on *brief details of the alleged offence* indicates that the complainant had been attacked by someone known to him as follows:

“He alleges to have been assaulted by a person well known to him.”

20. The Discharge Summary is a document of the second medical facility to which the appellant according to the evidence was referred and

the source of the information as to the circumstances of assault is unclear when it is noted from the evidence that the complainant was taken to hospital by PW2 who responded to his screams and one Chelimo who offered his vehicle for transport as testified by the complainant and PW2. To be sure, it is reasonable to understand that the discharge summary is not the document of a complainant and its contents which are written by other persons who receive the patient from interview with the patient or his escort. The P3 issued 10 months after the incident may reasonably be expected to contain information by the complainant himself.

21. However, the two documents not having been made by the complainant himself cannot properly be used against him.

Essence of time of the attack

22. The date and time of the alleged offence is given on the charge sheet as 16/11/2018 at **10.00pm**. However, while testifying the Investigation Officer PW4 put the date and time of attack **16/11/2018 at 9:30pm**, as follows:

*“On 17/11/2018 at 10:10am. I was at the station when one lady Moureen Kibet came and reported that on **16/11/2018 at 9:30pm** her husband Samuel Kamuren, who was the Assistant chief Loruk Sub-location had been attacked by the accused person and he had been cut on the left jaw and he was taken to hospital and was on critical condition.”*

23. The complainant said the attack happened at about **9.30pm** after he returned to the Namba Centre from a home where he had gone to commiserate with a bereaved family from 7.00pm. PW2 said he responded to screams from the Centre at about 7.00pm when he found the complainant who told him that he had been attacked by the appellant.

24. The time of attack is essential in determining the circumstances of visual identification or in assessing the consistency of evidence on alleged events. As regards the timing of the attack it was testified by all accounts that it was at **night** and the complainant said he identified the appellant using moonlight. In this situation, whether it was at 9.30pm or 7.00pm in the night, the difference is not material as to the circumstances of identification.

25. As regards the consistency of the evidence, the court must give allowance that where the determination of time is incapable of accurate report, difference in estimates by witnesses as to time would naturally exist. Although the time difference between 7.00pm and 9.30pm is a 2 ½ hours, it cannot be held to be so large as to be evidence of impossibility or improbability of truth of the related events.

26. What is key on the aspect of identification of the appellant is the alleged circumstances of identification, nature of identification and the presence or otherwise of corroboration, as required by law. I find the evidence of the complainant (PW1) as single witness of identification to have been corroborated in the material particulars as to the identity of the attacker by the evidence of PW2 who went to the rescue and was given by the complainant the identity of the attacker.

Evidence of the attack

27. For completeness the attack and injury of the complainant is testified to by Medical Examination Report P3 (PEX1), Hospital Discharge Summary from Moi Teaching and referral Hospital (PEX.2) and the evidence of the examining Doctor PW3 who testified on his findings on examination on 12/9/2019 as follows:

*“The patient came to hospital and complained of being assaulted by a person known to him, 10 months prior. He complained of a panga cut on the left jaw, deep cut on the jaw. **As a result he sustained a fracture of the left jaw. 6 teeth had been broken. He had an x-ray which showed a fracture of the left mandible.**”*

28. There is no question that the injury amounted to grievous harm as categorized under section 4 of the Penal Code to mean “any harm which amounts to maim, or endangers life, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ.” The *actus reus* of the offence of grievous harm is proved.

Verdict of this court

29. From the foregoing examination of the evidence before the trial court, this court finds the appellant to have been properly identified by both visual identification in difficult circumstances under moonlight but which is corroborated by other material evidence by witness PW2 that he had upon responding to the screams for help found the complainant (PW1) who told him that he had been assaulted by the appellant, and by voice recognition during a conversation with the appellant prior to the attack. The Complainant PW1 and the Investigation Officer PW4 explained that the appellant went into hiding after the attack, which would explain delayed prosecution, PW1 testifying –

“The accused person went into hiding after the incident. In September 2019. I received a phone call asking me to go to Loruk Police station. I went and found the accused person had been arrested. The phone call was from OCS Loruk police station.”

PW4 said:

“After the complainant was injured the accused person ran away from his home and went to Keiyo Marakwet for a period of 5 months. I arrested the accused at Sibilo trading Centre on the 10/9/2019.”

30. On the evidence before the court, I would find the offence of grievous harm contrary to section 234 of the Penal Code proved against the

appellant.

Judgment of the trial court

31. In her judgment the trial court resolved the issues before her as follows:

“REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE’S COURT OF KENYA AT KABARNET

CRIMINAL CASE NO 731 OF 2019

REPUBLIC..... DPP

VERSUS

JUSTINE KEBUT CHEPTOO..... ACCUSED

JUDGMENT

1. The accused person Justine Kebut Cheptoo has been charged with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars of the offence are that on the 16th day of November 2018 at about 10:00pm Namba village Baringo North sub-county within Baringo County unlawfully did grievous harm to Samuel Kamuren.

2. The prosecution tendered the evidence of 4 witnesses and at the close of the prosecution’s case the accused person was put to his defence where he elected to give sworn testimony and did not call any witnesses.

PROSECUTION’S CASE

3. **PW1 Samuel Kamuren** testified that he was the assistant chief Loruk area, he stated that on the 16th of November 2018 he had gone to console a bereaved family in Namba area at around 7:00pm. He parked his motorcycle and proceeded to the homestead of the family where he stayed until 9:30pm. It was his evidence that he went back to Namba center where he had parked his motorcycle. As he pushed his motorbike he saw that accused person approaching him with his hands folded behind his back. The accused person went to where he was and asked him if the shop owners were present. PW1 looked around to see if there was anyone in the shops. He heard the accused person jump all off a sudden, the accused person was 3 metres away from him. he heard a loud bang near his ear and he fell down. He felt a sharp pain on the side of his left jaw to his ear. The accused person had cut him with a panga and ran away. PW1 started screaming, George Chebor came to his rescue and tied a cloth where he was bleeding. He took him on his motorbike and while on their way to hospital they met Enock Chelimo who took them to Marigat sub county, hospital using his vehicle. He was later admitted to valley hospital Nakuru, and Moi Teaching and referral hospital. He stated that he had a crack on his lower jaw. The incident was reported at Loruk Police station by his wife on the following day. It was his testimony that during the incident he saw the accused person through moonlight, he recognised the accused person’s voice as he had talked to him during the incident voice as he had talked to him during the incident. He also knew the accused person as he lived in the same area.

4. On cross examination he stated that he had never quarrelled with the accused person before the incident. He knew the accused person before the incident.

5. **PW2 George Talam Chebor** stated that on the 16th of November 2018, he was at his house at 7:00pm when he heard someone screaming from Namba centre which was 100 metres from his house. He ran to the centre and saw PW1 was bleeding on his face while lying on the ground. Upon inquiry PW1 informed him that the accused person had cut him. PW2 tore PW1’s shirt and tied his cheek and jaw that were bleeding. He put PW1 on his motorbike and were on their way to hospital when he met one Enock who used his car and drove them to Marigat sub county hospital where first aid was conducted. He then escorted PW1 to valley Hospital Nakuru for further treatment. It was his testimony that he did not see the accused person on the date of the incident. he also stated that the accused person lived 4km from Namba centre.

6. During cross examination he stated he ran to Namba centre after he heard a scream. PW1 informed him that the accused person had cut him.

7. **PW3 Samuel Cheserem** a clinical officer from Marigat sub county hospital stated that on the 12th of September 2019 PW1 went to the hospital with a history of having been assaulted 10 months prior. On examination he had a scar wound on the left side of the jaw, some lower teeth had been broken, there were no visible injuries. PW1 had been admitted after the incident, he had x-rays and internal fixation of the Jaw had been carried out. The approximate age of the injuries was 10 months, probable type of weapon was sharp, degree of injury is grievous harm.

8. **PW4 Cpl John Kajara** the investigating officers stated that on the 17th of November 2018 Maureen Kibet went to Loruk police station and reported that her husband had been assaulted by the accused person on the 16th of November 2018 and was in critical condition. PW4 went to the Marigat sub county hospital and found that PW1 had been referred to Nakuru referral for treatment. In his investigations he established that PW1 had been attacked by the accused person using a panga . PW4 later recorded the

statement of PW1 and issued him with a P3 form. The accused person was arrested at Sibilo trading centre on the 10th of September 2019.

DEFENCE CASE

9. The accused person in his sworn defence stated that he was arrested on the 10th of September 2019 after his brother made a report at Loruk Police station that he had threatened to kill him. It was his evidence that he did not know anything about this offence.

ISSUES FOR DETERMINATION

10. Whether the accused person assaulted the complainant

THE LAW

11. Section 234 of the Penal code that provides that

“Any person who unlawfully commits grievous harm to another is guilty of a felony and is liable to imprisonment for life.

The ingredients of the offence of grievous harm are:

(a) Assaulting the complainant or victim;

(b) Occasioning grievous bodily harm.

ANALYSIS AND DETERMINATION

12. PW1 in his testimony stated that the incident happened at around 9:30pm as he was pushing his motorcycle which he had parked at Namba center. It was his evidence that the accused person approached him while his hands were folded behind his back and asked him if the shop owners were around. As PW1 checked to see if any shop owners were present, he heard the accused person jump all of a sudden, he had a loud bang near his ear and he fell down, he felt a sharp pain on his left side of the jaw to his ear. According to him the accused person had cut him with a panga and ran away after the incident. PW1 started screaming and PW2 came to his rescue and assisted in taking him to Marigat sub county hospital where he was referred for further treatment in Nakuru.

13. PW2 told the court how he heard a scream from his house which is near Namba Centre. He rushed to the Centre and found PW1 was injured. It was his evidence that PW1 told him that the accused person had assaulted him.

14. There is a contradiction as to the time the incident occurred, PW1 stated that he went to pick his motorbike from the center at 9:30pm and shortly after the incident occurred. PW2 on the other hand stated that he heard PW1 screaming at 7:00pm on the date of the incident. The contradiction as to the time the incident occurred is minor and does not go to the substance of the case. I cannot therefore reject PW2's evidence.

15. The P3 Form that was filled and signed on the 12th of September 2019 by PW3 indicates that PW1 had a fracture on the lower jaw (left mandible), 6 teeth had been broken. The approximate age of the injuries was 10 months. He noted that PW1 had been admitted and he produced treatment and discharge notes from Moi teaching and referral hospital.

16. From the testimonies of PW1, PW2, PW3 sufficient evidence was adduced to prove that the complainant was injured and sustained grievous injuries on the 16th of November 2018.

17. The evidence of identification is that of a single witness, PW1 stated that he was able to identify the accused person as there was moonlight, additionally the accused person had talked to him before the assault and he was able to recognize him as he came from the area.

18. PW2 stated that when he arrived at the scene PW1 informed him that the accused person had assaulted him, though he did not see the accused person upon his arrival.

19. The accused person in his defence did not state his whereabouts when the incident occurred. It was his testimony that he was arrested on the 10th of September 2019 as a result of a report of threatening to kill made by his brother. I find the accused person's defence unbelievable and a mere denial.

20. I warn myself on the danger of relying on a single witness as the circumstances of the attack on the complainant occurred at night when visibility was poor. From the complainant's testimony he knew the accused person before the incident as he lived in the area where the incident occurred. Further the accused person asked the complainant if there were any shopkeepers around and shortly thereafter assaulted him using a panga.

21. I find that sufficient evidence was adduced to show that the complainant identified the accused person as he was able to recognize his voice before the assault. The fact that the complainant was able to tell PW2 the identity of the accused person

immediately after he was attacked is proof that he knew his attacker and was not mistaken as to his identity.

22. There was no evidence of any grudge between the accused person and the complainant. Therefore, the complainant had no reason to give false allegations against the accused person.

23. From the foregoing I find that the prosecution proved beyond reasonable doubt that the accused person assaulted the complainant and caused him grievous harm. **I find the accused person guilty and convict him of the offence of grievous harm contrary to section 234 of the Penal code.**

DATED, SIGNED and DELIVERED at KABARNET this 19th of May 2020

HON: V.O AMBOKO

RESIDENT ...MAGISTRATE

32. I do not accept that in observing that the appellant did not respond to the charge, the trial court was shifting the burden of proof to the accused. The court only observed, properly in my view, that the defence of the appellant did not raise an issue on the charge levelled against him, and, therefore, could not be taken to raise a doubt to the prosecution case as understood by that court. The accused is, of course, entitled even "to remain silent and not to testify during the proceedings" under Article 50 (2) (i) of the Constitution. However, in view of the findings of this court as to identification of the appellant, nothing turns on this distinction.

Conclusion

33. The appellant was placed at the scene of assault by visual and voice identification by the complainant PW1 who knew him previously and with who they had a conversation shortly before the attack. The evidence of identification was corroborated by the evidence of PW2 who heard the complainant's screams and went to help when he was told by the complainant that he had been assaulted by the appellant. From the evidence, the appellant ran away to another region and was arrested at another centre ten months after the assault.

34. For my part, I do feel it was safe to convict the appellant for the offence of grievous harm as charged, and the judgment of the trial court on conviction is affirmed.

Sentence

Use of Presentence Probation Officer's Report

35. The Court of Appeal in ***Kyalo v. R*** (2009) KLR 325, 329, (Omolo, Waki and Onyango Otieno, JJA), counselled against acceptance of statements in Probation Officer's Report which had not been tested on cross-examination as the sole basis for sentencing, as follows:

"It must be considered that the Probation Report, though important as it leads the court into making its mind as to whether to put a person convicted on probation, is nonetheless composed of allegations some of which had not been tested through cross-examination in court and are matters that the person convicted has not had an opportunity to comment on and as such should not form the only basis of sentencing. Once the court finds that it is not favourable and that a convict cannot be put on probation on the basis of it, the court must proceed on the original mitigating factors and consider an appropriate custodial sentence of course taking into account the contents of the Probation report."

Probation Officer's report wrongly used by trial court

36. The Probation Officer's pre-sentence report dated 26th May 2020 in this case called for by the court before sentencing was in part, as follows:

"CIRCUMSTANCE OF THE OFFENCE

The offender and the complainant were in a relationship with a lady, the offender broke up with the lady giving the complainant opportunity to cohabit with her. This made him bitter and made arrangements to ambush the complainant at the lady's rental house. On the material night, he waited for him at the door where he cut the complainant with a panga sustaining injury on the jaw.

HIS ATTITUDE TOWARDS THE OFFENCE

He denies the offence, however prays for forgiveness. He indicates that he did not seek to reconcile with the complainant since he was wrongly implicated.

COMMUNITY ATTITUDE

His immediate community describes him as a humble young man, however of high temperament when provoked and sometimes acts irrational with the influence of his peers. They raise no reservation over the offender serving his sentence within the community.

COMPLAINANT ATTITUDE

The complainant who is the Assistant Chief Loruk Sub Location expressed his bitterness about how he nearly lost life following the attack. He prays the court to give a deterrent sentence to safeguard brutality towards public officers. He further indicates that the offender has not sought to reconcile with him.

CONCLUSION AND RECOMMENDATION

Your honor, the offender has no previous conviction. He doesn't own the offence however pleads for forgiveness.

Social enquiry revealed that had indifference emanating from alleged relationship with a lady who deserted the offender to cohabit with the complainant, this seems to have infuriated the offender. He is described as a humble but a person of high temperament by his immediate community. The offender and his family did not seek to reconcile with him. The complainant expresses bitterness about how he almost lost his life and prays for deterrent sentence.

Despite the positive sentiments about the offender's character, the offence was unwarranted, he distances himself from the offence and no reconciliation was pursued. The rampant use of violence to resolve conflict often lead to loss of life or harm and needs to be discouraged. Therefore, deterrent sentence may discourage such acts.

He is recommended to be dealt with otherwise.

Ngochoi M.J

PROBATION OFFICER

KABARNET STATION

26/05/2020.”

37. In sentencing the appellant, the trial court said as follows:

“Court – I have considered the fact that the accused person is a first offender. The probation report recommends a custodial sentence to discourage the use of violence to resolve conflict. I am in agreement with the report, a deterrent sentence should be meted out to discourage such acts. I sentence the accused person to serve 4 years imprisonment. The sentence to run from 12/9/2019 when the accused person was placed on remand pending trial.”

38. Although the trial court considered that the appellant was a first offender, it is apparent from the sentence that the court is overly swayed by the recommendation of the Probation Officer to mete out a deterrent sentence in the circumstances of the case. Heeding, the Court of Appeal's caution the trial court should have given allowance for the fact that the statements in the Probation Officer's report had not been tried by cross-examination and the appellant had not had opportunity to comment on them, and give due weight that he was a first offender with no antecedents as there were no previous records and the remorseful mitigation by the appellant where he sought forgiveness although categorical according to the Probation Officer's report that he did not admit the offence.

39. I would agree that a **custodial** sentence, to cater for the deterrent effect, is warranted. However, giving due credit for his first offender status in accordance with principle of sentencing (see **Wanjema v. R** (1971) KLR 493) and being mindful not to accept as the sole basis for sentencing the untested adverse statements in the Probation Officer's report, an imprisonment for **three (3) years** should in the circumstances have met the justice of the case.

Orders

40. The appellant's appeal from conviction for the offence of grievous harm contrary to section 234 of the Penal Code is declined.

41. The sentence of imprisonment for **four (4) years** is reduced to one of imprisonment for **three (3) years** from the date of remand for trial on **12/9/2019**, as directed by the trial court.

Order accordingly.

DATED AND DELIVERED THIS 9TH DAY OF OCTOBER 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Chebii, Advocate, for the Appellant.

Mr Abwajo, Prosecution Counsel for the Respondent.