REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 9 OF 2018

BENSON KARANI KIMATA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Kyuso Principal Magistrate's Court Criminal Case No. 293 of 2016 by Hon. B. M. Kimtai S R M on 07/07/17)

J U D G M E N T

1. **Benson Karani Kimata**, the Appellant, was charged alongside other Accused persons with three (3) counts.

> **Count 1: Grievous Harm** contrary to **Section 234** of the **Penal Code. Benson Karani Kimata, Samuel Wamba Seye, Albanus Makau Mulonzi** and **David Musyoka Mwangangi.** Particulars of the offence were that on the **25th** day of **September, 2016** within **Kitui County,** unlawfully jointly did grievous harm to **MMM.**
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> **Count 2: Assault Causing Actual Bodily Harm** contrary to **Section 251** of the **Penal Code. Benson Karani Kimata, Samuel Wamba Seye, Albanus Makau Mulonzi** and **David Musyoka Mwangangi.** Particulars of the offence were that on the **25th** day of **September, 2016** within **Kitui County,** jointly assaulted **JWM** thereby occasioning him actual bodily harm.
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> **Count 3: Assault Causing Actual Bodily Harm** contrary to **Section 251** of the **Penal Code. Samuel Wamba Seye.** Particulars of the offence were that on the **25th** day of **September, 2016** within **Kitui County,** assaulted **MM** thereby occasioning him actual bodily harm.

2. They were tried, convicted and sentenced thus:

> **Count 1:** Fined **Kshs. 100,000/=** or in default to serve **one (1) year imprisonment.**
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> **Count 2:** Fined **Kshs. 50,000/=** or in default to serve **six (6) months imprisonment.**
>
> **Count 3:** Fined **Kshs. 50,000/=** or in default to serve **six (6) months imprisonment.**

3. Being aggrieved by the conviction and sentence the Appellant appeals on grounds that can be condensed thus: The Appellant was convicted on presumption and circumstantial evidence not sufficient to justify any reasonable inference of guilt; Evidence adduced was contradictory and uncorroborated; The conviction was based on a non-existent charge; The case was not proved beyond reasonable doubt and the Appellant's alibi defence was disregarded without any weight being attached thereto.

4. Facts of the case were that the 1st and 2nd Complainants, minors of tender years were arrested following allegations of having stolen money and taken to the Administration Police Camp where they were beaten so as to make a confession. The 3rd Complainant, PW3 **MM** was also arrested, interrogated about the money and assaulted. PW4 **SM** their mother on hearing of the incident went to the Administration Camp and had them released. They reported the matter to police and sought medical treatment. Investigations were carried out that culminated into the arrest of the Appellant and his Co-Accused who were subsequently charged.

5. When put on their defence, the Appellant in particular stated that on the material date at about **8.00 a.m.** he encountered **David Mwangangi** (Co-Accused) who reported to him that his house had been broken into. He telephoned **APC Samuel Wambua** (Co-Accused) and informed him about the Complaint. In the meantime he advised the Complainant to lodge the Complaint at **Mivukoni Police Post.** At noon he rang **APC Samuel** who informed him that they had arrested the suspects therefore he decided to go to the camp where he found the two (2) suspects on motorcycles. He boarded a motorcycle and went to their home. They searched their home but did not recover anything. Thereafter did not go back to the camp. The following day he went to **Kyuso** and stayed until **4.00 p.m.** In the evening he went back to the

camp and found the mother of the suspects who promised to refund the money therefore he drafted for them the agreement. On cross-examination he stated that he was not denying the fact that the children were assaulted.

6. The Appeal was canvassed by way of written submissions that I have duly taken into consideration.

7. This being a first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

8. It is urged that it was erroneous on the part of the learned trial Magistrate to convict the Appellant on a non-existent charge and in particular Count 3. It is true in Count 3, per the amended charge sheet and even the initial one, only **Samuel Wamba Seye** was charged with the offence of assaulting **MM.** In his Judgment the trial Magistrate stated that PW3 (Complainant in the 3rd Count) only exonerated Accused 4 of injuries he sustained and proceeded to convict Accused 1 (Appellant), Accused 2 and Accused 3. Indeed there was no complaint or formal charge drawn against the Appellant. It was therefore a misdirection on the part of the trial Magistrate to convict the Appellant and **Albanus Makau** of a non-existent charge that they were not called upon to answer.

9. It is contended that the Prosecution failed to discharge the legal burden of proof as there were glaring inconsistencies and discrepancies that the Court failed to correctly apply itself to. That in convicting the Appellant and his Co-Accused the Court did so on the basis that the evidence of PW1, PW2 and PW3 was very corroborative of each other. It was argued that had the Court critically examined evidence adduced by the witnesses it could not have convicted. That it was erroneous for the Court to conclude that the witnesses were credible and truthful. In this regard the case of **Omuroni vs. Republic (2002) 2 EA 508** was cited where the Court stated as follows:

> ***"Trial courts can decide cases one way or the other on the basis of demeanour of a witness or witnesses particularly where the issue of credibility of such witness is decisive. In such a case the trial judge must point out instances of demeanour which he noted and upon which he relies. The trial court must point out what constituted the demeanour which influenced the trial judge to make favourable or unfavourable impression about the credibility of a particular witness."***

And the case of **Jon Cardon Wagner vs. Republic & 2 Others (2011) eKLR** where the Court reinstated the principle in **Omuroni Case** (supra) by stating thus:

> ***"… The above decision clearly defines or sets the parameters that have to be followed or established before a particular witness can be said to be a witness of truth or otherwise. It is required, which is of paramount of importance, that a trial court must indicate or point out instances of demeanour which he noted and which he relies upon as a basis of accepting the evidence of a particular witness. The trial court can only be influenced to make a favourable impression about the credibility of a particular witness after establishing the instances as to why and how he thinks that particular witness is a witness of truth. In this case the trial court did not pay any regard to this elementary principle of law in arriving at the decision as to whether the three complainants were witnesses of truth. In the absence of any basis for establishing whether the three witnesses were witnesses of truth, the trial court was wrong in its decision..."***

10. This is a case where PW1 and PW2 stated that they were aged 8 years and 10 years respectively. **Section 19** of the **Oaths and Statutory Declarations Act** provides thus:

> ***"(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.***
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> ***(2) If any child whose evidence is received under subsection (1) wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment."***

11. In the case of **Kibageny Arap Korir vs. Republic (1959) EA 92** it was established that a child of "tender years" means a child under the age of 14 years under the **Oaths and Statutory Declarations Act.**

12. The trial Magistrate was obligated to form an opinion whether or not the evidence of the children could be received on oath or not. He was duty bound to establish whether the children were competent to testify, whether they were capable of comprehending questions that would be put to them and answer them appropriately. And where the children would not understand the nature of oath, the Court would establish if the minors were seized of sufficient intelligence and were capable of telling the truth. This could only be done by the Court conducting a *voire dire* examination which was not the case in the instant case. When PW1 a child of eight (8) years appeared in Court on the **28th February, 2017** as a witness of the State the Court proceeded to have him affirmed without making any remarks and this was the case with PW2 a child of 10 years.

13. In the case of **Oloo s/o Gai vs. Republic (1960) EA 80** it was stated that:

> ***"…. In this case, as we have stated, the Complainant was a child of 12 years who as we have demonstrated above, was to be treated as a child of tender years. It was necessary that the trial court satisfy itself that he understood the nature of an oath before being sworn to give evidence on oath as is spelt out under Section 19 of the Oaths and Statutory Declaration Act … or***

even ascertain that he was sufficiently intelligent to give evidence even if not on oath … the effect of the failure to strictly comply with those requirements on the trial will depend on the circumstances of each case. In the circumstances of this case we find that the trial was vitiated, the conviction cannot stand and the sentence of 21 years imprisonment cannot also stand both are set aside."

14. Regarding the issue whether the charges were proved beyond any reasonable doubt, the learned trial Magistrate in his Judgment opening statement stated thus:

"The Accused persons herein …. are charged with Grievous harm contrary to Section 234 of the Penal Code …"

He convicted on the count and imposed a fine of **Kshs. 100,000/=** or in default to serve **one (1) year imprisonment.**

15. At the first appearance in Court, the Appellant and his Co-Accused were charged with a holding charge of **Assault Causing Actual Bodily Harm** contrary to **Section 251** of the **Penal Code** in the first Count. The Complainant PW2 was later examined and found to have sustained grievous harm which necessitated substitution of the charge.

16. Initially the Appellant and his Co-Accused pleaded to the charges on the **14th October, 2016,** at their first appearance. When the case came up for hearing on the **17th November, 2017** the Court Prosecutor addressed the Court thus:

"I have an amended charge sheet. I pray for an adjournment since I have realized that there are lapses in the statements.

Accused 1: It's okay.

Accused 2: It's okay.

Accused 3: It's okay.

Accused 4: It's okay."

The adjournment sought was granted and the next hearing date set.

17. Thereafter, on the **28th February, 2017** the case proceeded to hearing. The amended charge sheet where the Accused were charged with **Grievous Harm** contrary to **Section 234** of the **Penal Code** found its way on the Court record. It bears a stamp impression as having been received by **ODPP** on **17th November, 2017** but there is nothing on record to suggest that it was read to the Appellant and his Co-Accused.

18. **Section 214(1)(i)(ii)** of the **Criminal Procedure Code** provides thus:

"(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary."

The charge having been altered it was mandatory for the Prosecution to be granted leave to have the initial charge substituted and the Appellant and his Co-Accused ought to have been called upon to plead to the altered charge. The procedure laid down in law was not followed. The question to be posed is how the trial Magistrate convicted the Appellant and his Co-Accused on a charge that they were not informed and they did not answer. In the circumstances the trial, and conviction were vitiated by a mistake of the trial Court. The question to be posed is therefore whether a retrial should be ordered.

19. In the case of **Muiruri vs. Republic (2003) KLR 552** the Court of Appeal stated as follows:

"3. Generally whether a retrial should be ordered or not must depend on the circumstances of the case.

4. It will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not."

This is a case where minors were assaulted and their brother an adult was similarly assaulted. Medical evidence confirmed that fact. The Appellant and his Co-Accused were fined and given the opportunity of not being incarcerated. The fines imposed were paid immediately. That being the case they will not be prejudiced.

20. I do note that only the Appellant appealed, his Co-Accused did not appeal. It is a case where a revision file should be opened to enable this Court to deal with the matter regarding the Appellant's Co-Accused.

21. However, in this Appeal I quash the conviction on all Counts and set aside the sentences imposed. The money paid as fine shall be released to the Appellant who should appear before the **Kyuso Principal Magistrate's Court** for a retrial on the **4th February, 2019** in default a warrant of arrest shall issue.

22. It is so ordered.

Dated, Signed and Delivered at Kitui this 9th day of January, 2019.

L.N. MUTENDE

JUDGE