REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 19 OF 2018

JOHN MOMANYI MOSE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

{Being an appeal against the conviction and the sentence of Hon. B. M. Kimutai – SRM dated and delivered on the 7th day of June 2018 in the Original Keroka Principal Magistrate's Court Criminal Case No. 876 of 2016}

JUDGEMENT

The appellant was charged with grievous harm contrary to Section 234 of the Penal Code. The particulars were that on 24th July 2016 at Nyamesocho Sub-location in Masaba South Sub-county within Kisii County he unlawfully did grievous harm to Stephen Isoe.

The appellant pleaded not guilty to the charge and the prosecution then called four witnesses to prove its case. Thereafter the appellant made an unsworn statement in which he maintained he was innocent. However, after evaluating the evidence by both sides and upon hearing the appellant's mitigation and the prosecution's evidence that he was not a first offender, the trial magistrate sentenced him to serve five years' imprisonment.

The appellant was aggrieved by the conviction and the sentence and so he preferred this appeal. The same is premised on grounds that: -

> **"1. That he pleaded not guilty to the charge and firmly maintains that plea.**
>
> **2. That the trial magistrate did not establish that the circumstances of his arrest irresistibly pointed to a case of mistaken identity.**
>
> **3. That the prosecution did not avail independent or circumstantial evidence.**
>
> **4. That the prosecution's case was full of contradiction and inconsistencies making the integrity of the witnesses doubtful.**
>
> **5. That the trial magistrate acted without jurisdiction and based his judgements on beliefs not in the evidence.**
>
> **6. That the trial magistrate did not inform him that he had a right to recall witnesses and therefore violated his right under Article "50 9209k0"(sic) of the constitution which guarantees every accused person a fair trial that includes the right to adduce and challenge evidence and as such the trial is a nullity."**

He therefore prayed that this appeal be allowed, the conviction be quashed and the sentence be set aside.

The appellant filed written submissions and also submitted orally at the hearing. The appeal was opposed and this court also heard the submissions of Counsel for the respondent.

In addition to considering the submissions, I have also evaluated and reconsidered the evidence in the court below so as to arrive at my own conclusion. In doing so, I have made provision of the fact that I did not observe the demeanour of the witnesses.

The complainant testified that he had gone to the appellant's house to drink chang'aa. He stated that this was at about 5pm and that he knew the appellant for well over ten years. When he asked the appellant for his change, the appellant turned on him with a panga and cut him on the right hand. This was confirmed by medical evidence (a P3 Form and treatment notes) which were produced in evidence by the clinical officer (Pw3) who examined him at Gesusu Hospital. According to the clinical officer, the complainant also had a bite wound on the chin and

soft tissue injury and pain on the right hip joint. He opined that the weapons used were a human bite and a panga. He classified the degree of injury as harm. Moses Mwaha (Pw4) a police constable attached to Ramasha Police Station testified that the investigations in this case fell on him. he stated that he received instructions to investigate the case on 25th July 2016 at 1100hours. He confirmed that he issued the complainant with the P3 Form which was subsequently filled at Gesusu Hospital. He later made arrangements to arrest the appellant who he then charged with this offence.

On his part, the appellant told the court that he was a boda boda rider and that he knew the complainant. He contended that on the day it is alleged he committed the offence, he was in Narok. After two days he travelled home but on going to Ramasha Police Station he was arrested and later charged with this offence. He contended that he did not commit this offence.

In his submissions, he faulted the trial magistrate for not fully considering the evidence. He stated that the complainant's testimony was to the effect that he was assaulted by somebody else. He also took issue with the fact that one James who the complainant alleged to have been with was not called as a witness. He submitted that the evidence of the witnesses who gave evidence was contradictory. He stated that although the complainant testified that he went to hospital the same day, the clinical officer said he saw him after two days. He wondered how the accused would have been assaulted yet his evidence was that he ran away.

Counsel for the prosecution submitted that the appeal lacked merit. He submitted that the complainant's evidence was corroborated by the clinical officer. He agreed with the trial court that the defence was an afterthought and contended that the alibi set up by the appellant was not tested and the appellant had no witnesses to support it. As for the sentence, Counsel submitted that it is within the law. He prayed that this appeal be dismissed.

The medial evidence adduced by the clinical officer (Pw3) confirms that the complainant suffered injuries on 24th July 2016. The injuries are documented in the P3 Form. The clinical officer is an independent witness who did not know the complainant or the appellant before and who therefore had no reason to lie against the appellant or to favour the complainant. I am therefore satisfied that he told the truth. As to who inflicted the injuries upon the complainant, my finding is that no doubt it was the appellant. The complainant knew the appellant well, a fact admitted by the appellant himself and the offence having occurred in broad daylight I am satisfied that the complainant positively recognized him. I am not convinced that this was a case of mistaken identity. If there was any doubt, and I am not saying there is, that was erased by the evidence of Samuel Omae (Pw2) who was present when it all happened.

The accused made an unsworn statement which cannot compare to the sworn and corroborated evidence of the complainant. He raised his alibi late in the proceedings thereby denying the prosecution a chance to test it. It is my finding that it was an afterthought. I am not satisfied there were contradictions in the evidence of the prosecution's case. To the contrary I am satisfied that it was proved beyond reasonable doubt that he assaulted the complainant. Be that as it may, I am of the view that the injuries sustained by the complainant did not fit the degree of injury classified as maim. According to the clinical officer the complainant sustained a bite wound on the chin 4cm deep, small cut wounds on the right hand and soft tissue injuries on the right hip. He also had right hip joint pains. Maim is defined as **"destruction or permanent disabling of any external or internal organ, member or sense."** The clinical officer did not allude to any such destruction or permanent disabling and in my view the injuries fit more in the definition of harm which means **"any bodily hurt, disease or disorder whether permanent or temporary."** I would in the circumstances find and hold that the offence committed by the appellant ought to have been reduced to assault causing actual bodily harm.

From the record, the appellant's right to recall witnesses as provided in **Section 200 (3) of the Criminal Procedure Code** was duly complied with. As for legal representation he does not seem to have suffered any prejudice as he robustly participated in the trial. Those grounds of appeal are not therefore merited. However, for the reasons enumerated above, I hereby quash the conviction for grievous harm and substitute it with one for assault causing actual bodily harm contrary to section 251 of the Penal Code.

As for the sentence, the court was not told the nature of the offence for which the appellant was serving a sentence of six months. It was important to disclose that to the court. The offence of assault causing actual bodily harm which the appellant should have been charged with attracts a sentence of five (5) years in jail. I am satisfied that a sentence of imprisonment for eighteen (18) months suits the crime committed by the appellant. Accordingly, the sentence of five (5) years imprisonment is set aside and in its place the appellant will serve 18 (eighteen months) imprisonment with effect from 7th June 2018. The Deputy Registrar to communicate the reduction of the sentence to the Prison authorities. His right to appeal to the Court of Appeal is explained.

Signed, dated and delivered at Nyamira this 7th day of February 2019.

E. N. MAINA

JUDGE