REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 10 AND 11 OF 2014

REPUBLIC.....PROSECUTOR

V E R S U S

JOSEPH MURIUKI WAIGANJO .....1ST ACCUSED

JULIETA WAMBUI MWAI .....2ND ACCUSED

JUDGMENT

1. The 1st appellant Joseph Muriuki Waigajo and the 2nd appellant Juliet Wambui Mwai were charged with causing Grievous Harm to Simon Ndwiga Mugera contrary to **Section 234 of the Penal Code**. However, the trial court held that the prosecution failed to prove the charge since the only documented injury was cut wound on the head and therefore the complainant only suffered actual bodily harm.

2. The appellants were convicted of assault causing actual bodily harm contrary to **Section 251 of the Penal Code** and sentenced to 1 1/2 years imprisonment each.

3. They were dissatisfied with the conviction and sentence and filed petitions of appeal raising the following grounds:-

i) The learned Magistrate erred in law and fact in failing to find that the prosecution had not proved the charge of grievous harm contrary to section 234 of the Penal Code against the appellant beyond reasonable doubt as required by the law.

ii) The learned Magistrate erred in law and in fact in relying on uncorroborated, contradictory inconsistent and non-credible evidence of the prosecution in convincing the appellant.

iii) The learned Magistrate erred in law and in fact in shifting the burden of proof from the prosecution to the defence thereby occasioning miscarriage of justice.

iv) The learned Magistrate erred in law and in fact in convicting the appellant of the offence of grievous harm yet the legal ingredients for the said offence had not been proved.

v) The Magistrate erred in law and in fact in imposing a severe sentence with no option of a fine in the light of the charge against the Appellant.

vi) The learned Magistrate erred in law and in fact in not ensuring that the fundamental rights of the accused enshrined in Article 50(m) of the Constitution of Kenya were observed hence the appellant was not afforded a fair trial.

4. They pray that the appeal be allowed, the conviction be set aside and the sentence be quashed.

5. The appeal proceeded by way of oral submissions. For the appellants M/s Wangechi Munene Advocate submitted that the conviction was based on contradictory and uncorroborated evidence. She cited the evidence of PW-1- who stated that she was hit on the head, chest, eyes and on the right leg and that she lost vision, right leg fractured and chest injured. This she submits is not captured on the treatment notes which state that the only injury is being hit on the head by a blunt object. That the eye witness, PW-2-, saw complainant bleeding on the head and complained of injury on the head.

6. That PW-3- who visited the complainant said he only saw injury on the head PW-4- talked of bruise on the neck which the complainant had not complained of, that is bruise on the neck.

7. On the medical evidence she submits that the injuries on the P.3 form do not feature on the treatment notes. That the complainant's

allegation that she became unconscious is not on the treatment notes.

8. That there was contradiction on the weapon used as PW-1- said a stick was used while PW-3- said a firewood was used only to charge during cross-examinination and say that it was a stick.

9. It is further submitted that crucial witnesses were not called like one Oscar alleged to have been assaulted during the incident.

10. It is further alleged that their rights under Article 50(M) of the Constitution were infridged.

11. For the state, Mr. Obiri the prosecution counsel submits that it is not indicated how Article 50 of the Constitution was infringed but the record of the court speaks for itself as they followed the proceedings, cross-examined and the right was not violated. He further submits that the appellants were initially charged with assault and substituted with grievous harm. They were convicted with the lesser offence. He submits that PW2 & 3 were eye witnesses and the discrepancies do not affect finding. That evidence by PW-6- corroborates their evidence. He submits that the appeal is without merits.

12. I have analysed, considered and re-evaluated the evidence in line with the holding on Okeno –v- R (1972) E. A 32 being the 1st appellate court. I will proceed to consider the issues arising in the appeal.

13. The 1st issue is on contradictory and uncorroborated evidence.

14. The counsel for the applicant has submitted on the contradictions touching on the injuries sustained, the weapon used and medical evidence. Having considered the evidence of PW1 & 2 who are eye witnesses, there are no contradictions on material particulars. The testimony of PW 3 is that he saw an injury on head of the complainant. Similarly PW-4- had an injury on the head which was bleeding and a bruise on the neck. He further testified that when he touched the complainant on the leg he responded with a painful scream. This witnesses were in agreement that the complainant was normal before the incident but has since been walking with help of crutches.

15. PW 6 who was the doctor stated that PW 1 sustained cut on the left side of the head. By the time of filling the P3 form he noted a scar on anterior aspect of the neck, healed cut wounds around right eye, cut wound on left hand above the elbow and he was still in crutches.

16. However the treatment notes only captures the injuries on the head.

a) Weapon used

17. PW 1 stated that he was hit by PW1 using a stick and by PW 2 using firewood but during cross examination he indicates it was a stick. PW 2 said it was a piece of timber.

18. There is no contradiction herein since stick, timber and firewood are all one and the same thing.

19. The alleged contradiction on the injury sustained was not material since it was confirmed that the PW 1 was indeed injured though he had exaggerated and the appellants were identified as the attackers.

In **Daniel Njoroge Mbugua v Republic [2014] eKLR**

The Court of Appeal stated;

> **From the record, we find that the evidence of PW1 and PW2 was consistent and their testimonies corroborative. Any discrepancies or inconsistencies in the evidence adduced by the prosecution were minor and did not weaken the probative value of the evidence on record.**

20. The inconsistencies pointed out did not weaken the prosecution case.

4. **Imposing severe sentence with no option of fine.**

21. It is trite that sentencing is the discretion of the trial Judge and an appellate court will not interfere with the exercise of the discretion unless it is proved that the Judge acted on some wrong principles, took into account matters which were not relevant or failed to consider some relevant matters or is excessive based on the circumstances of the case. This has been the holding in binding authorities by the Court of Appeal and persuasive decisions by the High Court.

In **Bernard Kimani Gacheru V Republic [2002] eKLR**

The court in holding that sentence given was well deserved and found absolutely no reason to interfere with it stated;

> **It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even**

if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

The appellants were charged with assault.

22. The penalty for assault under **Section 251** above is five years. The sentence imposed upon the appellants of 1 1/2 years was lawful. There is no reason whatsoever for this court to interfere with the sentence meted out to the appellant by the trial court as the same was neither harsh nor overly excessive. The sentence was lawful in the circumstances of this case.

1. Whether the prosecution prove the charge beyond reasonable doubt

It is trite that the burden of proof always lies with the prosecution to prove their case.

23. The prosecution relied on the evidence of PW 1 and PW 2 who were eye witnesses while PW 3 overhead the 2nd appellant talking about the incident at the hotel. They also relied on the evidence of PW 6 who confirmed the injuries sustained.

The upshot is that the conviction was proper in the circumstances.

24. The appellants were charged with grievous harm. The trial Magistrate convicted them for assault causing actual bodily harm. In her Judgment she stated as follows:-

"Finally, I found no satisfactory medical explanation as to why after the incidence the complainant was unable to walk without the use of clutches. No fractures were noted upon X-ray examination, and no evidence was tendered on the condition of the complainant's back bone/spinal code. Furthermore, the complainant did not testify to being hit on the back or by any of the accused persons or suffering any injury on the back or at all.

Thus the only documented injury which is consisted with the oral testimonies given by the complainant and the other witnesses (prosecution witness 2 and prosecution witness 3) is the injury on the head which was described as cut wound.

At the time of filling the P3 form Dr. Njiru observed that the cut wound had healed leaving a scar on the wound.

Did the cut wound on the head amount to grievous harm?

First and foremost, the size of the wound and or the resultant scar by clinical measurements is not given, nor did the complainant show the court the same when he testified. Still when the doctor testified, did not address himself to the effects of the injury and the resultant scar on the health of the complainant.

The law in the penal code section 4 defines grievous harm as *"any harm which amounts to a maim or dangerous harm, or seriously or permanent injuries 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 membrane or sense".*

In the present effort, the doctor who testified did not try to link the injury suffered by the complainant on the head within the foregoing legal qualifications.

His classification of the injuries suffered as grievous harm seems to have been based on the complainant's loss of consciousness and inability to walk without the use of clutches.

First and foremost, the complainant's allegation of loss of consciousness is not corroborated at all either by the other witnesses or medical documents submitted in evidence. The discharge summary does not state the complainant was received at the hospital while unconscious. Similarly when prosecution witness 2 went to the scene, did not find the complainant unconscious.

Infact it was the evidence of prosecution witness 2 that they walked home by foot though slowly and they spoke to each other. The following day in the morning, the complainant spoke to his father prosecution witness 3.

I have already stated that the inability of the complainant to walk without use of clutches has not been explained to the required standard by the medical evidence on record and such cannot be linked to the incident in question. Likewise that cannot form basis for a finding that the complainant suffered grievous harm.

My finding is that contrary to the charge herein and the particulars thereof, the complainant suffered actual bodily harm and not a grievous harm as a result of the assault by the 2 accused persons."

25. The trial Magistrate having considered the facts presented before her convicted the appellant on the lesser offence

26. This is what is called coguate offences. ***Section 179 of the Criminal Procedure Code*** provides:-

> ***"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it. (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."***

27. A person can be convicted of lesser offence where the facts and the particulars of the charge disclose a lesser offence. The offence of grievous harm under Section 234 of the Penal Code is a more serious offence than a charge under Section 215 of the Penal code. The lesser offence is a cognate offence. The Black Law Dictionary defines cognate offence as follows:-

> ***" A lesser offence that is related to the greater offense because it shares several of the elements of the greater offense and is of the same class or category."***

28. The conviction for assault where the charge was grievous harm was proper.

29. The prosecution proved assault causing actual bodily harm for which the appellants were convicted beyond any reasonable doubts. The upshot is that the appeal is without merits and is dismissed.

Dated at Kerugoya this 7th day of February 2019.

L. W. GITARI

JUDGE