



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 22 OF 2017

JAMES OURU MOKUA.....APPELLANT

=VRS=

REPUBLIC.....RESPONDENT

{Being an appeal against the conviction and the sentence of Hon. J. N. Mwaniki – SPM

dated and delivered on the 18th day of April 2017 in the Original Keroka

Principal Magistrate's Court Criminal Case No. 1162 of 2013}

JUDGEMENT

The appellant was sentenced to three (3) years imprisonment for grievous harm contrary to Section 234 of the Penal Code. The particulars of the charge were that on 17th July 2011 at Lower Manga in Borabu District within Nyamira County jointly with another before court he unlawfully did grievous harm to Francis Misati Nyachiro. He pleaded not guilty to the charge but after evaluating the evidence the trial magistrate found him guilty and convicted him. The appellant was aggrieved by the conviction and the sentence and so he preferred this appeal. The appeal is premised on grounds that can be summarized thus: -

- “1. That the learned magistrate erred in law and fact in convicting and sentencing the accused person notwithstanding that he was a first offender.**
- 2. The trial magistrate erred in law and facts in convicting the appellant and sentencing him to three years' imprisonment without considering a non-custodial sentence.**
- 3. That the trial magistrate failed in law and fact in failing to note that the appellant was innocent.**
- 4. That the learned trial magistrate erred in law in shifting the burden of proof to the appellant.**
- 5. That the trial magistrate erred in law and fact for not finding that there were contradictions in the evidence of the prosecution witnesses.**
- 6. That the trial magistrate ought to have given the benefit of doubt to the accused.**
- 7. That the trial magistrate erred in both law and fact in the manner he evaluated the evidence thereby arriving at a wrong verdict.**
- 8. That the trial magistrate erred in law and fact and grossly misdirected himself in his entire approach on the law relating to writing of judgement and sentence.”**

By this appeal the appellant prays that the conviction be quashed, the sentence be set aside and he be set free or that the sentence be suspended or substituted with a community service order. The appellant has been on bond pending appeal.

The appeal was canvassed through written submissions which I have considered alongside the evidence before the trial court. I find it a fact from the evidence that the appellant assaulted the complainant. The appellant was in the company of one Jeremiah and they were angered by

the complainant telling them to stop smoking in the part of the bar where he was seated and asking the management to throw them out. The fact that the complainant sustained injuries was corroborated by his wife, the police officer he found at Manga Police Station and the clinical officer who examined him and later filled his P3 Form. They all confirmed that he had a fresh wound on his forehead with the clinical officer adding that he had a fracture of the elbow. The complainant and the appellant were neighbours so he knew him well and as there were lights in the bar where the offence occurred the complainant positively recognized him. The complainant's evidence was also corroborated by James Morara, a witness called by the appellant. This witness stated that he saw the appellant's accomplice hit the complainant on the head. Jeremiah Marura (Dw3) also confirmed that the complainant was in the bar. He however sought to exonerate the appellant by stating that it was him that assaulted the complainant. He too was charged for assaulting the complainant and he was found guilty and convicted. All this evidence goes to demonstrate that the complainant was a truthful and reliable witness. I do however find that the injuries sustained by the complainant do not conform to the definition of grievous harm either in Section 4 of the Penal Code or in the P3 Form. There is however evidence to prove a charge of assault causing actual bodily harm beyond reasonable doubt. Accordingly, the conviction for grievous harm is quashed and substituted with one for assault causing actual bodily harm contrary to Section 251 of the Penal Code. The sentence of three (3) years imprisonment is also set aside and substituted with one of a fine of Kshs. 15,000/= or three (3) months imprisonment. Right of appeal to the Court of Appeal explained.

Signed, dated and delivered in Nyamira this 6th day of March 2019.

E. N. MAINA

JUDGE