



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 59 OF 2015**

**PATRICK MUTUA MUTUNGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal against the conviction and sentence by Hon. T. B. Nyangena on 10<sup>th</sup> April, 2015 in Machakos Chief Magistrates Court Criminal Case No. 942 of 2014)**

**JUDGEMENT**

1. The Appellant appeals against the conviction for the offence of grievous harm contrary to Section 234 of the Penal Code and sentence of life imprisonment meted upon him on 10<sup>th</sup> April, 2015 in **Machakos Chief Magistrates Court Criminal Case No. 942 of 2014**. The particulars of the offence was that the appellant on 16<sup>th</sup> May, 2014 at Kimutwa location within Machakos County unlawfully did grievous harm to Stephen Kisinga Kithendu.

2. He pleaded not guilty to the offence and was put to trial. The prosecution's case was as follows; Stephen Kisinga Kithendu (PW1) was on 16<sup>th</sup> May, 2014 at about 5.30 pm on his way to the shops when he met the appellant. The appellant asked him his name and where he comes from. He then told PW1 that he looked like an Al Shabaab and assaulted him using his fists. The appellant hit PW1 on the cheeks and mouth occasioning loss of three teeth. He lost one instantly. The other two were left loose and one was removed by a doctor and one by himself. PW1 ran and the appellant chased him up to the gate. He entered the home of a neighbour by the name Henry Mueni where he found a worker by the name Willy Mutua. He made a report to Kimutwa Police Station and was issued with a P3. form. He was treated at Machakos Level 5 Hospital. On cross examination, PW1 stated that the appellant was beaten up by someone else on 7<sup>th</sup> May, 2014. On cross - examination by court, PW1 stated that the appellant had been beaten up by 'boda boda' operators near his employer's gate before the incident of 16<sup>th</sup> May, 2014. That the 'boda boda' operator was arguing with his employer's brother's worker that his iron-sheets had been stolen. He went out when he heard the argument and saw the appellant carrying iron-sheets. Mary Mwikali Mueni (PW2) who is PW1's employer stated that she received a call from PW1 on 18<sup>th</sup> May, 2014 informing her that he had been assaulted by Mutunga's son. He informed him to go to town and took him for treatment. That the doctor removed the second tooth and later she recorded a statement with the police. She stated that she had never had any quarrel with the appellant. Police Constable Pius Ngila (PW3) attached to Machakos Police Crime Office was on 8<sup>th</sup> May, 2014 instructed to investigate the case. He gave PW1 a note to go with to hospital and three days later recorded his statement. PW1 also returned a duly filled P3 form which stated that the degree of injury he sustained was grievous harm. The appellant was apprehended and charged. Dr. Lilian Nyagwenya (PW4) testified on behalf of Dr. Muoki with whom she had worked for six months and with whose signature and handwriting she said she was conversant with. She produced a P3 form in respect of PW1's examination as P. Exhibit 2 and stated that his clothes were blood stained at the collar. That he had a bruise near his left eye and his pre-molar had been knocked and a molar extracted by the doctor.

3. The Appellant was found to have a case to answer and was put on his defence. He gave unsworn statement that the evidence against him was not true.

4. Aggrieved by the conviction and sentence, the appellant has appealed on the following grounds that can be summarized thus:

***a) That the prosecution did not prove its case beyond reasonable doubt.***

***b) That he was convicted on conflicting evidence.***

***c) That the sentence meted upon him was harsh in the circumstance.***

***d) That his mitigation was not taken into consideration.***

5. The Appellant submitted that the evidence by the prosecution witnesses did not prove beyond reasonable doubt that he committed the

crime. That there was no evidence that he committed the crime. That he gave defence in rebuttal of all the allegations which the trial magistrate did not consider and handed him a harsh sentence and that the trial magistrate failed to consider his mitigation that he was a first offender who deserved mercy and leniency from the court.

6. The respondent on the other hand cited section 4 of the Penal Code and submitted that according to the evidence on record, the incident took place during the day around 5.30 pm when the circumstance favoured proper identification of the appellant. That PW1 knew the appellant since he had seen him being assaulted by *boda boda* operators prior to the occurrence of the offence in question. That his evidence of identification was further corroborated by PW2 who testified that he told her that he had been assaulted by Mutunga's son. On contradictions, the respondent submitted that in considering those discrepancies a court must be guided by section 382 of the Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence. That it must be remembered that when it comes to human recollection, no witness recall exactly the same thing to the minutest detail. That the appellant has not pointed out any specific contradiction, if any, that would affect the substance of the charge. On whether the appellant's defence was considered, it was submitted that the appellant was placed on his defence and gave unsworn statement which was mere denial that had no probative value to his case. On the sentence, it was submitted that the offence under which the appellant was charged attracts a maximum sentence of life imprisonment. That PW1 had bruises on top of his left eye and had lost three of his teeth as a result of the assault. That it is on account of the nature of the injuries that the court meted a life sentence.

7. This being a first appeal, this court is under duty to evaluate the evidence adduced at the trial afresh and come up with its own findings and conclusions bearing in mind that the court did not have the advantage of examining the witnesses. See **Okeno v. Republic (1973) EA.32.**

8. I have given due consideration to the evidence and the rival submissions. The issue I would want to dispense with preliminarily is the ground that he was convicted on conflicting evidence. It is worth noting that the appellant failed to point out any such conflicting evidence. This court took the liberty to analyze the evidence and did not identify any conflicting evidence. That ground therefore fails. Grievous harm is defined in the Penal Code as any harm which amounts to maim or dangerous harm, 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 extent or internal organ, membrane or sense. PW1's evidence was corroborated by PW4 who confirmed that he lost three teeth as a result of the assault and sustained a bruise on the upper part of his left eye. The appellant's evidence on the other hand was a mere denial which, as correctly submitted by the respondent, carries no probative value and or does not cast doubt to the prosecution case. In the circumstances, I find that the prosecution proved its case beyond reasonable doubt.

9. On the gravity of the sentence, the trial court pronounced itself that it was clear from the evidence that the appellant hit the complainant using his fists indiscriminately on the mouth, cheek and knocked off his teeth. That the injuries occasioned PW1 a permanent disfigurement that was dangerous to his health and well-being. That all that can be deduced from the appellant's action is that he is a dangerous man who should be removed from the society since he attacked PW1 with no provocation.

10. The circumstances where an appellate court would interfere with the exercise of discretion were discussed in **Felix Nthiwa Munyao v. Republic CA. No. 187 of 2000** and **Macharia v. Republic [2003] 2 E.A. 559.** The principle is that an appellate court should not interfere with the discretion of a trial Court as to sentence except in such cases where it appears that in assessing the sentence, the court acted on some wrong principle or has imposed a sentence which is manifestly inadequate or manifestly excessive. The offence of causing grievous harm attracts a punishment of life imprisonment as provided under Section 234 of the Penal Code. The trial court noted that the Appellant assaulted PW1 without provocation and noted that he was a threat to the society. Although I agree with the trial court's finding and that the appellant deserved a long sentence, I find that life imprisonment is harsh bearing in mind that he is a first offender. The maximum sentence though within the law, is harsh in the circumstances. In that regard, I am satisfied that the said sentence ought to be interfered with. It is noted that the Appellant has been serving sentence from the date of conviction namely 10/04/2015. This court ordered for a Post Sentence Report from the Machakos County Probation Officer. The report is dated 2/5/2019. The same reveals that the Appellant hails from a family who exhibit mental illnesses. The report further revealed that his family and community ties are still good and who are ready to receive him back and assist in his rehabilitation and treatment. The local community does not consider him as a threat since they lived with him with his condition in the past. I find the report to be favourable for a non-custodial sentence. The Appellant has been in custody since 6/6/2014. I find that the period in custody is sufficient atonement for the crime and that the Appellant should now rejoin his family and community for purposes of rehabilitation and treatment.

11. In the result the Appellant's appeal partially succeeds. The conviction by the trial court is upheld while the sentence is set aside and substituted with an order that the period already spent in custody is sufficient punishment. He is to be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Machakos this 15<sup>th</sup> day of May, 2019.

**D.K. KEMEI**

**JUDGE**