REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL APPEAL NO. 32 OF 2018

(Consolidated With Hccra 29 & 30 Of 2018

JOSEPH KIKUVI NGUKU.....1ST APPELLANT

CHARLES MUTISO MWANGANGI.....2ND APPELLANT

DENIS MUTUNGA KAVOI.....3RD APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the Judgment in Criminal Case No. 653 of 2015 delivered on 30th July, 2018 by Hon. J.N Mwaniki (SPM) at Makueni).

JUDGMENT

1. The Appellants were charged with the offence of **Grievous Harm contrary to Section 234 of the Penal Code**. The particulars of the offence were that on the 11th day of October 2015 at Kitile Village, Nthangu Location in Makueni Ditrict within Makueni County, the Appellants jointly did grievous harm to **Lucia Wayua Kyuli.**

2. After a full trial, the learned trial magistrate convicted and sentenced each of them to fourteen (14) years imprisonment.

3. Aggrieved by that decision, the Appellants filed separate appeals which were consolidated on 12/07/2019. Initially, the Appellants raised similar grounds of appeal through their petitions of appeal dated 13/08/2018. They later filed distinct amended grounds which accompanied their written submissions. The 1st Appellant raised 5 grounds and stated that the learned trial magistrate erred in law and fact by;

a. Convicting him on the basis of a defective charge sheet.

b. Failing to note that his rights to a fair trial had been violated.

c. Relying on sloppy recognition.

d. Failing to note that his mode of arrest was not established to the required legal standards.

e. Failing to note that the prosecution never proved their case due to critical witnesses not being called.

4. The 2nd Appellant raised 4 grounds of appeal and stated that the learned trial magistrate erred in law and fact by;

a. Convicting and sentencing him without regard to his basic right of disclosure of the prosecution evidence.

b. Convicting him while relying on single dock identification

c. Failing to consider that the prosecution did not produce essential witnesses to testify.

d. Convicting him based on the evidence on record, which was manifestly unsafe.

5. The 3rd Appellant raised 5 grounds of appeal and stated that the learned trial magistrate erred in law and fact by;

a. Failing to understand that there was a serious defect in the trial.

b. Failing to observe the regulations of the Criminal Procedure Code as required.

c. Failing to note that his rights to a fair trial had been violated.

d. Applying the doctrine of recognition without observing that the same was not affirmatively proved.

e. Failing to take into consideration that the prosecution did not call essential witnesses.

6. The Appellants canvassed the appeal by way of written submissions and the learned prosecution Counsel Mrs. Owenga responded orally.

7. PW1 was the complainant**, Lucy Wayua Kyulu.** She testified that on 11/10/2015 *(material night)* at about 9.00pm, she was asleep in her house when she heard footsteps of four persons. They jumped the terrace near her house and the dogs barked. They commanded her to open the door but she refused. She recognized their voices. The 2nd Appellant *(Mutiso)* asked her to open the door. They cut, removed the door and stood there. She screamed.

8. The 2nd Appellant and one Musembi entered the sitting room and then broke the bedroom door and gained access, as she hid behind the bedroom door. He hit her with his leg and cut her with a panga. Together with Musembi *(not charged)*, they carried and placed her outside her house. The 3rd Appellant *(Mutunga)* hit her with timber while the 1st Appellant *(Kikuvi)* cut her on the back with a panga. She seriously bled and became unconscious.

9. Further, she testified that she was cut on the shoulder, head, hands and four times on the legs. That she can't hold anything due to the injuries. She later found herself at Wote hospital. She identified the treatment notes, discharge summary, x-ray request form, medical report by Dr. Masuki and P3 form. She later reported at Makueni police station and recorded her statement.

10. She said that all the Appellants were known to her as they were her neighbors and were born in the neighborhood. That she knew their voices very well and the torch light helped her to see them.

11. On cross examination, she said that she did not record their voices but they cut her. That 2nd Appellant looked for her on the bed, bedroom curtain but did not see her until his leg hit her while behind the bedroom door and that's when he started to cut her. She stated that the 3rd Appellant hit her with timber and she was able to see him because the torchlight was on. She was with them for about 30 minutes.

12. PW2 Stephen Wambua Kimeu, a brother to PW1, testified that on the material night, he was at home when he received a call from PW1's neighbor, *(Charles Musilu)*, who informed him that his sister had been assaulted by certain persons. He went to PW1's home which is about 700 meters away and found her within the compound. She was bleeding and had cuts all over her body.

13. She recognized him and told him that she had been assaulted by Kikuvi and his group. As he took her to hospital he was joined by Musili and Bahati who got an ambulance. At the Makueni district hospital, he was joined by James and his brother Anthony Mwange. He said Kikuvi was his villager whom he had known for about 20 years and had attended the same school with him. He added that PW1's hands are permanently disabled and cannot fold.

14. Upon cross examination, he reiterated that he found Pw1 lying on the grass and she told him it was Kikuvi and his group who had assaulted her. **PW3 Stephen Somba Ndiku,** the assistant chief testified that on the material night, he received a call from Kyalo Musimbi and was informed that PW1 had been attacked. He went to her home and found her being taken to hospital. He called the police and assisted them in arresting the Appellants, who had attacked PW1 claiming that she was a witch. He found Pw1 unconscious and badly hurt.

15. PW4 Cpl Edgar Kibet, the Investigating Officer, stated that on the material night, he was on duty when the incident was reported. He rushed to the scene and found PW1 in the ambulance with multiple cuts on her head and hands. She named the Appellants as her assailants and said it was the 3rd Appellant who had told her to open the door. The 2nd Appellant attacked her first and dragged her out of the house while the others beat her with sticks and stones. He produced the discharge summary (exh 1), P3 form (exh 2), X –ray report (exh 3) and CT-scan (exh 4). On cross examination, he said that no weapons were recovered and the scene was not photographed.

16. The 1st Appellant unsworn testified as DW1. He stated that his co-appellants and PW1 were known to him as they were his neighbors. That on the material night, he was at Luani area and went back home at 6.30pm. He passed by a woman who had slaughtered a cow and when he heard screams, he went towards the scene and met people who told him that PW1 had been injured. He then left for home in the company of relatives and was arrested the next day.

17. The 2nd Appellant unsworn testified as Dw2. He stated that his co-appellants and PW1 were known to him as they were his neighbors. That on the material night, he was in Nairobi for work having left home on 15/10/2015. He returned home on 25/12/2015 and was arrested on 11/04/2016 by four people who claimed to be police officers from Makueni.

18. The 3rd Appellant unsworn testified as Dw3. He stated that his co-appellants and PW1 were known to him as they were his neighbors. That on the material night, he heard screams but slept as he was tired. On the day that followed, he heard that PW1 had been injured and he was arrested on 11/04/2016.

19. John Kimani (DW4) testified on behalf of the 1st Appellant. He stated that the Appellants were known to him as they are his village mates, and PW1 was his neighbor. He testified that there was a fight at PW1's home and the Appellant went to his home from a certain direction. He then left at 8.30pm. On cross examination, he said that the 1st Appellant went to his house at about 9.00pm. That he arrived after about 15 minutes from the start of the screams. Further that one would take 5-10 minutes from his home to PW1's home.

20. Anna Wayua testified as Dw5 on behalf of the 1st appellant. She said the said Appellant who is her nephew was at her home when they heard screams. She gave him some meat and he left. Upon cross exam, she said the 1st Appellant was at her home at 3:00pm. The screams stopped when the 1st Appellant left. She however confirmed that Pw1 is her neighbor.

21. In their submissions the 1st Appellant on the issue of defective charge sheet, submits that there is no indication of the language used and that on the day the plea was taken, it is not shown if there was an interpreter and the nature of interpretation if any. He cites *inter alia* the case of **Anthony Njeru Kathiari & Anor –vs- R (2007) eKLR** where the Court of Appeal held that;

> "The failure of a trial Magistrate to keep record of at least the name of the interpreter and nature of interpretation was a serious defect in the trial and must render the conviction of the Appellants unsafe and unsustainable."

22. On the issue of violation of rights, he submits that all along, he knew that he had been charged with mere assault and was therefore prejudiced in preparation of his defense. He cites **Sigilan –vs- R (2004) 2 KLR,480** where it was held that;

> "The principle of the law governing charge sheet is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

23. He submits that conviction of an accused person solely on the evidence of a single identifying witness poses some uncertainty. He contends that PW1 did not bring out any peculiarity in him and did not say which words he uttered to enable her recognize his voice.

24. On his arrest, he submits that PW3 did not give clear evidence as to where he got information that he *(Kikuvi)* was involved in the crime.

25. Finally, he submits that the medical officer who treated PW1 was not called to confirm the nature of injuries and treatment given to the victim. That the medical documents should not have been considered as genuine as they were produced by a police officer instead of a medical officer.

26. The 2nd Appellant submits that failure by the prosecution to provide him with witness statements in advance violated his constitutional right to a fair trial. That the magistrate made the order for the statements to be supplied but did not follow up hence prejudicing his defence preparation. He relies on the case of **Thomas Patrick Gilbert Cholmondeley –vs- R (2008)** where the Court of Appeal stated;

> "We think it is now established and accepted that to satisfy the requirement of fair trial guaranteed under our Constitution 2010, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all relevant materials such as copies of statement of witness who will testify at the trial, copies of documentary exhibits to be produced at trial and such like items."

27. On ground **(b)**, he submits that PW1 did not state the clothes he was wearing and did not demonstrate how he talked and how she could differentiate his voice from many others. That it was not possible to see somebody who was lighting a torch on her.

28. On grounds **(c**) and **(d)**, he submits that it was essential for the prosecution to call the medical doctor to testify on how the complainant was harmed. That the weapon used by the attackers was not produced to support the case. He argues that the doctor and investigating officer were vital witnesses who the prosecution chose not to call. He relies *inter alia* on **Juma Ngondia- vs- R (1982-88) KAR 454** where the Court held that;

> "The prosecution has in general discretion whether to call or not call someone to witness. If he does not call vital reliable witness, it runs the risk of court presuming that the evidence which is not produced would if produced be unfavorable to the prosecution."

29. He submits that there was no evidence to link him with commission of the crime and that Pw1's credibility has been seriously put into question due to the numerous but substantial material contradictions apparent in her testimony.

30. On ground **(a)**, the 3rd Appellant submits that the record does not indicate the language used during trial nor the presence of an interpreter on the day of taking plea. He cites *inter alia* the case of **Anthony Njeru Kathiari *(supra)*** to support this submission.

31. On ground **(b)**, he submits that the prosecutor did not make an application before introducing the amended charge sheet hence the trial was irregular.

32. Submitting on ground **(c)** he stated that all along, he knew that he had been charged with mere assault but was later charged with committing grievous bodily harm. He contends that he was thus prejudiced in preparation of his defense and relies on **Sigilan -vs- R *(supra),*** to argue his case.

33. On ground **(d)**, he submits that the law is clear on the mode of identification. That it can be done by giving a brief description of the

person seen which is later confirmed through an identification parade. That the recognition of an accused person should be tested with the greatest care and should be water tight to justify a conviction.

34. He finally submits that failure to call the medical doctor was fatal since the medical documents were not produced by an expert.

35. Mrs. Owenga for the State opposed the appeal and submitted that the evidence tendered was water tight on the offence of grievous harm. That PW1 explained everything that occurred and identified the Appellants through their voices. That the sentence is lawful and commensurate with the injuries.

Analysis and Determination

36. This is a first appeal and it is now settled that the duty of a first appellate court is to scrutinize the evidence on record, make it's own findings and draw it's own conclusions. Due allowance must be given owing to the fact that the trial court had the advantage of seeing and hearing the witnesses.

37. This was the holding in the case of **David Njuguna Wairimu –vs- Republic (2010)** eKLR where the court of appeal stated: -

> "The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions".

38. In a much earlier decision, the court of appeal similarly held in **Okeno –vs- Republic (1972) E.A 32** that:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination *(Pandya v R* [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions *(Shantilal M Ruwala v R* [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] EA 424."**

39. Having considered the grounds of appeal, the entire record and the appellants' submissions, it is my considered view that the following issues arise for determination;

a. Whether the charge sheet was defective.

b. Whether the appellants' right to a fair trial was violated.

c. Whether critical witnesses were omitted.

d. Whether the appellants were positively identified

Issue no. (a) Whether the charge sheet/trial was defective

40. Section **134 CPC** provides as follows;

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

41. The charge as drawn contains a statement of a specific offence, namely grievous harm contrary to Section 234 Penal Code, and the particulars contain information as to when and where the offence was committed as well as the name of the victim. Evidently, the charge sheet was sufficient.

42. On the issue of the amended charge sheet, it is imperative to reproduce the following extract from the proceedings of 21/03/2017;

Prosecutor: I have an amended charge sheet. May the same be read over to the accused.

Accused 1: No objection

Accused 2: No objection

Accused 3: No objection

Court: Substituted charge sheet dated 14/04/2016 read over and explained to all the accused persons in Kamba language who confirms understanding and who elects to reply as follows;

Accused 1: 'tiwo' It's not true

Accused 2: 'tiwo' It's not true

Accused 3: 'tiwo' It's not true

43. Section 214 of the Criminal Procedure Code deals with amendment of charges. The proviso thereto requires that where a charge is altered, the accused person should be called upon to plead to the altered charge and where the case is partly heard, the accused may demand that any of the witnesses be recalled.

44. From the above extract, it is evident that the Appellants were notified of the amended charge and did not object to its introduction. They were also called upon to plead to the amended charge. The complaint by the 3rd appellant about the prosecutor not making an application to introduce the amended charge sheet is not true.

46. It is also evident that the amended charge was read and explained to the appellants in Kamba language which they understood. They were therefore aware that the charge against them was grievous harm and not mere assault. I have also noted that the appellants participated in the trial in a manner which indicates that they understood the charge facing them. Accordingly, the complaint by the 1st and 3rd appellant about failure to indicate the language used and interpretation is idle.

46. From the foregoing, I find that there was no defect in the charge sheet or manner of taking plea, and this ground fails.

Issue no. (b) Whether the Appellants' right to a fair trial was violated

47. It is true that the prosecution should furnish an accused person with the evidence in their possession before commencement of the trial. In this case, the complaint by the 2nd Appellant is that the trial magistrate did not follow up on whether he had been furnished with witness statements.

48. On 15/11/2016, the matter came up for hearing and the prosecutor indicated that she had 2 witnesses and the Appellants raised the issue of witness statements. The trial court stated as follow;

> "I have noted that on the 10/10/2016, this Court made an order in the presence of the accused persons to be provided with witness statements. The accused persons are out on bond and therefore should have arranged for the witness statements by now. Consequently, this matter shall proceed at 11.30am today."

49. When the matter was later called at 12.55pm, the prosecutor applied for adjournment and the same was granted. The next hearing date was rescheduled to 21/03/2017 and all the appellants indicated their readiness to proceed. If at all the 2nd appellant had not been furnished with the statements, he should have brought the issue to the courts attention at that point otherwise the trial court cannot be faulted at that juncture. By indicating to court that they were ready to proceed, it meant they had everything they needed for their defence. I find no merit in this complaint.

Issue no. (c) whether critical witnesses were omitted

50. All the Appellants in their submissions contend that the prosecution ought to have called the medical doctor who examined Pw1 to produce the medical documents. In the case of **Republic v Cliff Macharia Njeri (2017) eKLR,** Lessit J observed that:

> **"Having considered the issue at hand I find that the prosecution failed to avail crucial witnesses in their case. I find that the prosecution failed to make available all witnesses necessary to establish the truth. The evidence adduced was barely adequate to establish the truth in this case. Consequently, I find that this court is justified to make an adverse inference that the evidence of the uncalled witnesses would have tended to be averse to the prosecution and that was the reason it was not called".**

51. Further the court of appeal in **Sahali Omar v Republic (2017) eKLR** stated thus

> **Section 143 of Evidence Act provides that: -**
>
> **"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."**
>
> **The principle used to determine the consequences of failure to call witnesses was succinctly stated in Bukenya & Others v Uganda (1972 E.A; where the court held that: -**
>
> > **i. "The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**

ii. That court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.

iii. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

52. The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turns out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the change beyond any reasonable doubt.

53. I have perused the record and noted that the medical doctor or clinical officer who may have examined Pw1 did not testify. The P3 form and medical documents were produced by Pw4 a police officer who was the investigating officer and not maker of the document.

54. Section 33 of the Evidence Act provides for instances when documents can be produced by persons who did not make them. It provides as follows: -

Section 33 of **the Evidence Act provides that:**

"Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases –"

(b) <u>Made in the course of business</u>

When the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind, or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

55. For Section 33 Evidence Act to apply a basis must be laid to satisfy the court as to the reason for the absence of the maker of the document. Secondly the court must find out from the accused person if he/she has any objection to the production of the document by a person other than the maker. The accused person must also give reasons for the objection if any.

56. In the instant case, the prosecution did not make any request to the court to have Pw4 produce the medical documents. Similarly, the court itself overlooked the known procedure. Pw4 therefore unhindered proceeded to produce medical documents not meant to be produced by him.

57. Such documents could also be produced under Section 77 evidence Act if the prosecution and defence are in agreement. Section 77 of the Evidence Act provides:

1. In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistic expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence

2. The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

3. When any report is so used the court may, if it thinks fit, summon the analyst, ballistic expert, document examiner, medical practitioner or geologist, as the case may be, and examine him as to the subject matter thereof.

58. The record shows that neither Section 33 or Section 77 of the Evidence Act was applied in this case. Failure to apply the provisions of either of these sections denied the Appellants an opportunity to ask the maker questions. The admission of the said document was unprocedural and cannot therefore be allowed to stand in particular the P3 form. It follows that the degree of the injury suffered by Pw1 was not established.

59. It is not disputed that she was injured but it's the degree of the injury that is at stake following the failure to have a medical officer produce it or have it produced by consent. That being the case the conviction for causing grievous harm contrary to Section 234 Penal Code cannot stand. My finding is that the medical doctor or a clinical officer ought to have been called to testify or the proper procedure followed in admitting the medical documents.

Issue no. (d) Whether the appellants were positively identified

60. From the evidence on record and as observed by the learned trial magistrate in his judgment, the Appellants and Pw1 were neighbors. She testified that she had known the Appellants for a long time and they were all born in the neighborhood hence she could recognize their voices.

61. The learned trial magistrate made a finding that the issue of voice recognition was not handled properly by the prosecution. In my view, that was not a contradiction as submitted by the Appellants but a further caution that he needed to look for something more to be sure that the complainant was not mistaken.

62. Contrary to the 2nd Appellant's submissions, the complainant's evidence was that the torch light was shone into her sitting room and not her eyes. The initial attack was in her bedroom after which she was dragged outside and the attack continued. She spent approximately 30 minutes with her attackers and described what each of them did. This was a case of recognition and it is generally accepted that recognition is more reliable than identification of a stranger.

63. Further to this, Pw2 was the first person to arrive at the scene and she told him who her attackers were. The names were also given to the police (Pw4) and the assistant chief who assisted in the arrest. It confirms that she knew her attackers.

64. It follows that the sentence of fourteen (14) years cannot also stand. I have considered the injuries mentioned by Pw1 – Pw3 and I am satisfied that a deterrent sentence is necessary. They will each suffer the maximum sentence for assault contrary to Section 251 of the Penal Code.

65. The upshot is that the appeal partially succeeds and I make the following orders: -

i. The conviction for grievous harm contrary to Section 234 Penal Code is set aside and substituted with a conviction for assault contrary to Section 251 Penal Code.

ii. The sentence of (fourteen) 14 years' imprisonment is set aside and substituted with one for five (5) years imprisonment from date of conviction and sentence which is 30th July 2018.

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 19TH DAY OF SEPTEMBER, 2019, IN OPEN COURT AT MAKUENI.

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H. I. ONG'UDI

JUDGE