



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL CASE NO. 68 OF 2017

DISMAS KARIUKI NYAGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant herein was charged with the offence of Grievous Harm contrary to Section 234 of the Penal Code. The particulars of the offence are that on the 30th day of July 2015 at Kiamutugu Village, Thirikwa Sub-Location in Ngariama Location, Kirinyaga East Sub-County he unlawfully did grievous harm to Kenneth Kamau Muchira. He pleaded not guilty to the charge and the matter proceeded to full hearing.

Upon hearing the case, the trial Court in its judgment delivered on the 19th October, 2017 convicted the Appellant and was sentenced to serve Five (5) years imprisonment. Being dissatisfied with both the conviction and the sentence, he has appealed to this court and has listed four grounds of Appeal in the Petition of Appeal dated the 2nd day of November, 2017.

This being the first Appellate Court, the Court is enjoined to re-evaluate and analyze the evidence that was adduced before the trial Court and come up with it's own conclusion but take into account the fact that it did not have the benefit of seeing the demeanor of the witnesses.

In support of it's case, the prosecution called a total of eight witnesses while the Appellant called one witness in support of the defence.

The complainant, Kennedy Kamau Mwarua, gave evidence as PW1. It was his evidence that he is a Serviceman with Kenya Defence forces. He stated that on the 30th July, 2015, at around 10.00Pm he was at Githure Market, in Relax Bar where he was taking some drinks. He left and went to an Mpesa shop to withdraw some money and to buy some cigarettes from an adjacent shop which was about 20 meters. On reaching at a stage where there is a junction, he saw two men approaching whom he recognized as Sergeant Mburia and Corporal Nyaga, the Appellant herein. He decided to greet them before proceeding to the shop as they are both known to him. The Appellant called him by his name and asked him why he had refused to bring to him the things he had asked from him. The Appellant tripped him on the leg and he fell down. He hit him on the chest and the right eye with a wooden plank that he was using as a walking stick. He thought it was a joke and told him to stop joking but the Appellant removed handcuffs and handcuffed him and when he noted it was not a joke he started screaming as he was in pain.

The Appellant then started pulling him and they led him to the AP camp. The Appellant got a plastic whip from Sgt. Mburia that he had with him and he used it to hit the complainant until they got to the station. He was then screaming due to pain and Sergeant Mburia slapped him and told him to keep quiet. As they proceeded to the Camp, the Appellant was whipping him on the shoulders and on reaching the Camp, he was placed outside the Cell and while there, the Appellant hit him with a plastic whip on the left shoulder. It's tail caught his right eye and he started bleeding from the said eye and it is at this point that Sgt Mburia removed the handcuffs. The Appellant and Sgt Mburia took him to ACK dispensary where he was given first aid and a bandage was put on the right eye.

The same officers called his father, Haniel Peterson Muchira on phone who went to the dispensary and he explained to him how he had been injured. His father hired a taxi home. The following day he went for a referral letter which he was given by Sgt Mburia dated 31st July, 2015 and he went to Embu Level 5 Hospital where he was admitted for three days. He later went to Defence Forces Memorial Hospital where he was admitted between 3rd -14th August, 2015. After he was discharged, he attended Moi Airbase at Eastleigh for further management of the eye and on doing an x-ray, he was told that a component of the eye had been affected and that the eye could not be repaired. He was referred to Upper Hill Medical Centre for a second opinion who confirmed that he had lost the eye. He was issued with a P3 form which was completed at Embu Level 5 Hospital.

The father to the Complainant, Haniel Peterson Muchira, testified as PW2. It was his evidence that on 31st July,2015 at around 12.30 am he

was asleep in his house when he received a call from the Appellant herein who told him he was with his son, the Complainant, and that they had picked him from a trench and had taken him to ACK Clinic, Githure. The Appellant told him to hasten as the Complainant had been injured on the eye. That, in the company of his wife they went to the said clinic and on reaching there, they found Sgt Mburia, the Appellant and the Complainant who was lying on the floor of the veranda. His son told him he had been injured by the Appellant on his right eye but the Appellant refuted the same saying that he could not injure him and take him to Hospital but the Complainant insisted that it was the Appellant who had done it. That since the eye was badly damaged he was asked to take him to a bigger hospital for more specialized management of the eye.

The following day, he went to Githure AP post and was given a referral letter by Sgt Mburia to take to Embu Hospital and on arrival at the said Hospital, the complainant was admitted but at his request, he was discharged and went to Defence Forces Memorial Hospital where he was admitted. That he (PW2), made a report at Kianyaga Police Station where he also recorded his statement and the Appellant was later arrested and charged.

Dickson Kariuki Ireri, testified as PW3. He stated that on 30th July, 2015, at about 10.50 Pm, he was on his way home from Githure Market when he heard movement of people behind him. He looked back and saw two AP officers whom he recognized as Sgt. Mburia and the Appellant herein. He also saw the Complainant who was slightly behind the two AP officers. That he could clearly see as there was enough lighting from electric lights from a nearby building. The officers ordered the Complainant to stop and immediately, they pushed him to the ground, handcuffed him and went on to beat him with a piece of wood that the Appellant was holding. That they were telling him to call KDF Colleagues to help him.

Robinson Kariuki Mugo, testified as PW4. He stated that on 30th July, 2015 at 10.40 Pm he had gone to buy cigarettes at Githure Market and at the bus stage, he found a crowd of people and drawing nearer he saw the Complainant lying down while the Appellant was beating him with a piece of timber. He was beating him all over the body aimlessly as Sgt Mburia was pleading with the Appellant to stop beating him. The Appellant grabbed the whip from Sgt Mburia, raised the Complainant up and went with him to the Police Post as he continued to beat him. The Complainant said he had been injured on the eye. That the incident was at night but there was light from the building housing the bank and also from the Petrol Station.

Alfred Kinyua Muchira, the brother to the Complainant, testified as PW5. It was his evidence that on 30th July, 2015, at about 6 Pm, he went to Githure in the company of the Complainant to take some tomatoes to the Appellant. They did not find him at his place and they placed them on the doorstep and they proceeded to Darts Club where they took some beer. He left his brother at Relax bar because he was going to work and at 6 am the following day he was woken up by his father who asked him what happened to his brother, the Complainant, the previous day. He visited his brother the following day and his right eye was bandaged. The brother told him that he was assaulted by the Appellant.

Freshia Wangari testified as PW6. She stated that on 30th July, 2015 at about 8 Pm she was at Relax Bar selling liquor to customers when the Complainant who was in the company of his brother requested to be sold for beer and she did so. After finishing he paid by Mpesa and went outside but shortly after, he went back to the bar and started quarrelling and pulling tables. When she asked him what was wrong, he told her not to ask and that she will know that he went for training for six months. She called Sgt Mburia and the Appellant who went to the bar and told the complainant to go away after which she closed the bar and went to sleep. The Appellant later called her on 2nd July, 2015 asking about his charger and told her he was in Hospital but he did not tell her what had happened to him.

Patrick Munene Ndambiri, gave evidence as PW7. He is a Clinical officer at Kimbimbi Sub-County Hospital and also on part time in Githure ACK Clinic. He stated that on 31st July, 2015, at about 1am, he was at home in Githure ACK when a patient was brought by police officers and he attended to him. He was escorted by the Appellant herein and Sgt Mburia and complained about his eye which was discharging some bloody substance and it was swollen. He gave him pain killers and since it was a serious case, he referred him to Embu Provincial General Hospital for specialized treatment. According to him, he sustained a cut on the eye. He asked the patient what had happened to him and he mentioned the name of the Appellant and one Mbugo as those who injured him.

Doctor Phyllis Mwaura, gave evidence as PW8. She is stationed at Embu level 5 Hospital. She produced a P3 form that was issued to the Complainant. She stated that according to the same, the history of the patient was an eye injury after an attack. It had vitreous hemorrhage and a cataract and after the surgery was done it was reported to be irreparable which meant it could not restore the vision. The right eye had coloured red and the right orbital area of the scalp (Front) was deformed and depressed. He was unable to see with the right eye and according to the doctor who prepared the P3, it looked liked it had been hit with a whip. He assessed the degree of injury as maim, which is a permanent disfigurement of an organ, the eye was irreparable thus could not function normally.

Inspector James Soita, PW9, was the Investigating Officer. He stated that on 1st August, 2015, he reported at the Police Station and upon going through the OB, he noted one Muchira had reported an assault case on behalf of his son, Kenneth Kamau. He called the reportee and confirmed that his son was admitted at Embu Level 5 Hospital. He went to the said Hospital and found the Complainant admitted there with his right eye bandaged but he only talked to him briefly as he was in pain but he said he knew his attacker who was an AP at Githure AP Camp. He recorded the statements of the witnesses and that of the Appellant. He issued the Complainant with a P3 form and wrote a memo forwarding the file to the DPP's office at Kerugoya on 16/12/2015 and to the DCIO. He was instructed to arrest the Appellant and charge him with the offence of grievous harm.

When he was put on his defence, the Appellant denied having assaulted the complainant on the 30th July, 2015 but admitted that he was at Githure market on the same night in company of Sgt. Mburia after they were called by PW6 who reported to them that the complainant was creating disturbance at Relax bar. On arrival at the bar, they ordered the complainant to get out of the said bar and he complied after which the Appellant and Sgt Mburia went on with their official duties of checking bars that were selling liquor after official hours. After sometime, they heard the complainant making noise and asking why the bars were being closed yet he had money to buy beer. That the complainant tried to hit Sgt. Mburia but in the process he slipped and fell because the ground was slippery and he was drunk.

That they went to his rescue, lifted him and took him to ACK dispensary as he was bleeding on his face. They later called his father who went for him from the dispensary and hired a taxi home. He stated that he did not assault the complainant and that he was his good friend and also a friend to the family of the complainant and that is why he helped him. It was also his evidence that there was no grudge between him and the complainant and he did not know why he had complained against him.

Sgt. Mburia testified as DW2 in support of the Appellants defence and gave an account similar to that of the Appellant and denied that they assaulted the complainant.

At the conclusion of the trial the Appellant was convicted and sentenced to imprisonment for five (5) years and being dissatisfied with the same, he filed the present appeal. In his Petition of Appeal filed on the 2nd November, 2017, he has listed four (4) grounds of appeal which can be collapsed into three grounds as follows;

1. The Learned Magistrate erred in law and in fact in sentencing the Appellant of the offence of grievous harm when there was no adequate evidence to prove the charge.
2. The Learned Magistrate failed to consider the Appellant's defence.
3. The Learned Magistrate erred in law and in fact by failing to appreciate the mitigation given by the Appellant.

The appeal was disposed off by way of written submissions which the court has duly considered. Under the 1st ground of appeal and in the submissions, the Appellant submitted that the trial court erred by failing to observe the mandatory provisions of Section 200 (3) of the Criminal Procedure Code in that the case was taken over by another Magistrate but the Appellant was not informed of his right under the aforesaid section to demand that any witness be re-summoned and/or reheard.

The Respondent on its part did not address the court on this issue in its submissions.

This is a legal issue and it's imperative that the court considers the same before delving into the merits of the appeal.

Section 200(3) of the Criminal Procedure Code provides as follows;

“where a second magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard as the succeeding magistrate shall inform the accused person of his right. “

The Appellant avers that this Section was not complied with and that other than directing that the proceedings be typed before taking the evidence of the remaining three(3) witnesses, he failed to observe the mandatory provisions of the aforesaid Section thus occasioning a miscarriage of justice to the Appellant.

The court has perused the record and it shows that the case was initially being handled by Hon. Onkoba but on the 9th day of June, 2016, it was taken over by Hon. Makau. It would be prudent for this court to set out part of the proceedings of that date in verbatim;

‘Ms. Beril Kalamwa for the accused, under Section 200 CPC. We wish the matter proceeds from where it had reached’

The record further shows that Ms. Beril Kalamwa was the counsel on record for the Appellant since the hearing of the case started. My considered view is that she had instructions to conduct the defence and she must have taken instructions with regard to Section 200 of CPC and to the position of the appellant as to whether he could have wished the matter do start denovo or proceed from where it had reached. The court therefore, takes it that she spoke on behalf of her client as duly instructed counsel. If the Appellant had wished to re-call any of the witnesses, his counsel would have informed the court and by failing to do so, it only meant that he didn't wish to. I therefore reject the contention by the Appellant's counsel that there was a miscarriage of justice.

I now proceed to consider the merits of the appeal.

In order to prove a case of grievous harm, the prosecution is required to prove the following:

1. The identify of the perpetrator,
2. The nature of injuries.

In this regard I propose to consider the grounds of appeal together. In his submissions, the Appellant submitted that, the prevailing circumstances were not favorable for proper identification of the Appellant by the complainant in that there is no indication of intensity of the light at the scene and hence there was a likelihood of error on the part of the complainant in identifying the Appellant. He relied on the case of ***John Nduati Ngure Vs. Republic, (Criminal Appeal No. 121 of 2014 and that of Wamunge Vs. Republic (1989) KLR 424.*** In which the court held that ***“evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger”***.

He further submitted that the complainant was intoxicated at the material time when he purportedly identified the Appellant as his assailant.

The Respondent on his part submitted that though the offence was committed at night, there was security light from the adjacent building which made it easy for the complainant to identify the Appellant.

The court has considered the parties submissions in this regard. The evidence available to the court is that the Appellant and the complainant were friends and they knew each other well. Infact, on the material day, the complainant had in the company of his brother taken tomatoes to the Appellant in his house but they did not see him as he was in the bathroom and he instructed them to leave them on the doorsteps to his house. The complainant and the Appellant again met at Relax Bar on the same day not long before the alleged incident. What then the court is dealing with is the evidence of recognition and not identification. The complainant on his part told the court that he recognized the Appellant as the person who assaulted him and they even had a conversation before the incident. His evidence was corroborated by that of PW3 and PW4 who told the court that there was enough light emanating from the adjacent buildings. In fact, PW3 in his evidence stated that he recognized the Appellant and Sgt Mburia who were APs at Githure AP Post and he could see them clearly. He saw the Appellant beat the complainant and when he asked the Appellant why he was beating the complainant he was told he could also be a victim.

The evidence of PW4 corroborated that of PW3 and the complainant. He saw the Appellant beat the complainant with a piece of timber and a whip and that though the incident took place at night there was light from the Bank and a Petrol Station that is nearby. He knew the Appellant before the date of the incident and he was able to recognize him at the scene. In view of the evidence by the complainant, PW3 and PW4, I do not hesitate to find that the Appellant was properly identified by the witnesses.

On the nature of injuries the Appellant was charged with causing grievous harm to the complainant. Section 4 of the Penal Code defines grievous harm as follows ***“An injury that seriously and permanently injures health, or which extends to permanent disfigurement of serious injury to any external or internal organ, membrane or sense”***

In that regard, the evidence of PW7 and PW8 is very crucial. PW7 in his evidence confirmed that the complainant had sustained injury to his eye and it was discharging some bloody substance and it was swollen. In his assessment, it was serious case and he referred him to Embu Provincial General Hospital for specialized treatment.

PW8 is a Doctor stationed at Embu Level 5 hospital. She produced a P3 which was filled by Dr. Christine Nyangilo. According to the P3 form, the complainant sustained a rapture of the eye globe (eye ball). The eye had a vitreous hemorrhage and a cataract.

A surgery was done and the eye reported to be irreparable which meant it could not restore the vision.

He is unable to see with the right eye. The right orbital area of the scalp (front) was deformed and depressed. The degree of injury was assessed as maim. From the evidence of PW7 and PW8 I need not say more on the nature of injuries.

The Appellant also contended that his defence was not considered by the Learned Magistrate. A cursory perusal of the judgment shows that the same was considered and the Learned Magistrate observed that although the evidence of the Appellant and that of his witness corroborates each other, it was total denial and only aimed at exonerating themselves from the alleged actions which led the complainant to lose his eye even as he reminded himself that the Appellant had no legal obligation to prove his innocence as the burden remains with the prosecution.

The court has looked at the Appellant’s defence and the evidence of DW2. First, I would like to state that both of them were together when the incident occurred and in fact the evidence available is that DW2 to some extent assisted the Appellant in committing the offence. It is no wonder that he gave evidence in support of the Appellant’s defence.

As the Learned Magistrate rightly observed, the complainant could not have confused the person who injured him and in any event his evidence on identification was corroborated by PW3 and PW4. I find that the prosecution evidence was water tight and well corroborated by other material evidence and this court would have no reason to interfere with his finding both on conviction and sentence.

In the end, I come to the conclusion that the appeal has no merits and it is hereby dismissed.

Signed, Dated and Delivered at KERUGOYA this 4TH Day of OCTOBER, 2019.

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L. NJUGUNA

JUDGE