REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 2 OF 2019

MAIDA ADUNG MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Misc. Cr. Case No. 617 of 2015 by the Senior Resident Magistrate – Hon. C.M. Wekesa delivered on 29th August, 2017 at Lodwar)

JUDGEMENT

1. The Appellant was charged with the offence of causing grievous harm contrary to **Section 234** of the **Penal Code** the particulars of which were that on the 25th day of March 2015 at Kambi Swahili Area in Turkana Central Sub-county within Turkana County unlawfully did grievous harm to **IREE IMANA**.

2. He pleaded not guilty to the said charge, was tried, convicted and sentenced to serve four (4) years imprisonment. Being aggrieved by the said conviction and sentence, he filed this appeal and raised the following summarized grounds of appeal:-

a) The motive of the alleged offence was not established by the prosecution.

b) He was wrongfully implicated in the commission of the offence due to family conflicts.

c. He was not properly identified.

3. When the appeal came up for hearing before me, the Appellant who was not represented filed an amended grounds of appeal together with written submissions which he relied upon.

SUBMISSIONS

4. It was submitted by the Appellant that the conditions prevailing at the time of the alleged commission of the offence were not ideal for identification as the testimony of **PW1** was that though the lights were on he did not see the Appellant. It was submitted further that the evidence of **PW2** and **PW3** were inconsistent and did not corroborate **PW1's** evidence as regards lighting at the scene and the date of the commission of the offence. In support of the said submissions reliance was placed on the case of **MAITANYI v REPUBLIC [1986] KLR 198**. It was contended that there was contradiction as regards the names on the P3 form produced by **PW4** the Clinical Officer and therefore the prosecution failed to prove that it was the complainant that was harmed. It was finally submitted that the prosecution case was not proved beyond reasonable doubt as no exhibit was produced in support of the complainant. It was the Appellant's submissions that his defence to the extent that they were both fighting and should have been charged with affray was not considered.

5. On behalf of the Respondent it was submitted by Mr. Kahuthu that there was no grudge between the Appellant and the complainant and therefore his conduct was not justifiable. It was submitted that there was sufficient lighting as per the evidence of **PW1, PW2** and **PW3** and therefore the Appellant was positively identified. It was contended that it was not mandatory to produce all exhibits as per **Section 63 (3)** of the **Evidence Act** and that the P3 form confirmed the injuries sustained by the complainant.

PROCEEDINGS

6. This being a first appeal the court on the basis of the authority of **OKENO v REPUBLIC [1972] EA 32** is under a legal duty to re-evaluate the evidence tendered before the trial court to come to its own conclusion though giving allowance to the fact that unlike the trial court it did not have the advantage of seeing and hearing witnesses.

7. The prosecution's case against the Appellant was that **PW1 'IJI'** a child aged 11 years was together with her sister **'K'** and **MAMA UBI**

when they went to the compound of the Appellant at 8.00 p.m. to get their sheep which had strayed therein, when the Appellant hit her with stones causing her to fall down. It was her evidence that there was electric light on but she did not see the Appellant when she was hit with a stone.

8. Her evidence was corroborated by **PW2 IBRAHIM CHEGE** who stated that he heard some noise form a neighbour saying "*mbuzi mbuzi'* and when he responded to the noise, he saw **PW1** and the Appellant arguing. The Appellant threw a stone causing her to fall down. He then took her to Lodwar District Hospital. He confirmed that there was security lights and that the two were arguing over a goat. It was his evidence that the Appellant was drunk at the time.

9. **PW3 GEOFFREY KIBUYA** testified that he found the Appellant fighting with one Suleiman who was with his wife in his compound and as they were leaving he threw a stone at them hitting **PW1** who was injured as per the evidence of **PW4 BEN KEMBOI** who produced P3 form in the name of complainant who was assaulted on 15/03/2015 and classified the degree of injury as grievous harm and the weapon used stone.

10. **PW5 CORP. PETERSON ESINYEN** testified that he received the complainant in the company of her sister **R.K.** who reported a case of assault. He recorded statements from witnesses and arrested the Appellant who was duly charged with the offence.

11. When put on his defence the Appellant exercised his constitutional right to remain silent. The trial court in convicting the Appellant held that the prosecution had proved its case against the Appellant beyond reasonable doubt as its evidence was consistent, well corroborated and had not been shaken in any way since the Appellant never put up any defence.

ANALYSIS AND DETERMINATION

12. From the submissions and proceedings herein, I have identified the following issues for determination:-

a) Whether Appellant was positively identified.

b) Whether the prosecution case against the Appellant was proved beyond reasonable doubt.

13. On the issue of identification of the Appellant, all the prosecution witnesses put the same at the scene. There is evidence that the sheep or goats of the complainant's family had strayed into the Appellant's compound and when the family went for them there arose a fight between the Appellant and the father of the complainant one Suleiman as per the evidence of **PW3**. However his evidence is contradicted by that of **PW2** whose evidence was that the Appellant was arguing with **Karenga** the mother of the complainant. The said witness did not place Suleiman at the scene and neither did **PW1** place Suleiman at the scene.

14. However from the totality of the evidence tendered, I am satisfied that the said contradictions were of minor nature and did not go to the root cause of the prosecution case as all the prosecution witnesses put the Appellant and the complainant together and actually saw the Appellant hit her with a stone. The court must take into account that there will also be variation on the witnesses' account of what happened. I am therefore satisfied that the Appellant was positively identified and placed at the scene.

15. On whether the prosecution case was proved beyond reasonable doubt, there is un-contradicted evidence that the Appellant threw a stone which hit the complainant causing her depressed skull injuries to the same as supported by **PW4's** evidence. I therefore find and hold that the prosecution proved beyond reasonable doubt the charge against the Appellant and therefore his conviction was safe. On sentence it is noted that the maximum period available is life and the Appellant was given only four (4) years imprisonment which is very reasonable and since sentencing is an exercise of the trial court's discretion notwithstanding the injuries sustained by the complainant, I will not interfere with the same as the Appellant was not put on notice on the possibility of enhancement. In the final analysis I find no merit on the appeal herein which I hereby dismiss and affirm the conviction and sentence by the trial court. The Appellant has a right of appeal to the court of appeal.

Dated, delivered and signed at Lodwar this 1st day of October, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

_____ *for the Respondent*

_____*for the Appellant*

Accused - _____

_____ *- Court assistant*