REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NUMBER 36 OF 2017

PETER KIMANI MUNENE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant herein was charged with the offence of causing grievous harm contrary to section 234 of the Penal Code in Criminal case number 136 of 2016 in the Principal Magistrate's Court at Gichugu.

The particulars of the offence are that, on the 20th day of February, 2016, at Kiangwenyi trading centre, Gachigi location in Kirinyaga East Sub- County within Kirinyaga County willfully and unlawfully did grievous harm to MMP.

He denied committing the offence and the case proceeded to full hearing.

Upon hearing the case, the learned Magistrate convicted the Appellant and he was sentenced to serve five (5) years imprisonment and having been dissatisfied with the conviction and the sentence, he filed this appeal and has set out seven (7) grounds of Appeal in his Petition of Appeal dated16th of May,2017.

This being the first Appellate Court, the law enjoins this court to re-evaluate and analyze the evidence that was adduced before the trial court.

In support of its case, the prosecution called five (5) witnesses.

The Complainant testified as Pw1. He told the court that at the material time, he was 16 years old and a pupil at [particulars withheld] Primary school in standard 7. He stated that he knows the Appellant who is his biological father. It was his evidence that on 20th February, 2016, at 2.00 Pm, he was in Kiangwenyi town with his grandmother when his father approached him in the absence of his grandmother and hit him three times on the mouth with his fist. That he managed to escape and after a few steps he fell down and his front upper tooth came out as a result of which he bled profusely. He picked the tooth and put it in his pocket and later gave it to the police at Kimunye Police Post where he went to report, in the company of his grandmother. The police officers sent him to Kabare Hospital where he was referred to Kerugoya Hospital and he was treated and a P3 form issued to him.

It was his further evidence that his father was not happy because he had visited his grandmother and that prior to that day, they were not relating well with him and he used to beat him for visiting his grandmother who is the Appellant's mother.

The mother to the Appellant, Jedida Munene, gave evidence as Pw2. It was her evidence that the Appellant is his son and the Complainant is her grandson and a son to the Appellant. She stated that, on 20th February, 2016, she was in the company of the complainant at the bus stage when she went to answer a call of nature and on returning back, she found the boy had been hit by the Appellant and had been helped by some people and the Appellant had escaped. She found the complainant holding a tooth and he was breeding from the mouth. In company of the complainant, they went to Kimunye Police Station where they reported the incident and they were given a note to take the complainant to Kabare Health Centre and they were referred to Kianyaga County Hospital where he was treated. They were issued with a P3 form at the police station which they took to Kerugoya County Hospital. She stated that the complainant's teeth were shaking and had to be fastened with a wire. The Appellant catered for the medical expenses.

The mother to the complainant, Jane Muriko, gave evidence as PW3. It was her evidence that on 20th February, 2016, at about 11.00am, her son, the complainant went to visit his grandmother at Kiangwenyi. He called her and informed her that he had arrived. He waited for him but he did not go back home on that day but slept at his grandmother's place. On the following day, the complainant's grandmother called her to meet her at Kimunye Police Station because the complainant had been injured by his father, the Appellant, herein. By this time, Pw2 had

already reported the matter to the police. They recorded their statements and went to hospital where the complainant was x-rayed, and one of his tooth was found to have been uprooted and other three front teeth were loose. He was treated and the teeth fastened with a wire. The Appellant was later arrested and charged.

PC Ahmed Ali Farah, the investigating officer, testified as PW4. He stated that on 20th February, 2016, he was on patrol when the complainant went in the company of his grandmother, PW2, to report that he had ben assaulted. They told him of how the Appellant had hit the complainant in the mouth thrice causing one of his upper front tooth to come out. He referred them to hospital and issued the complainant with a P3 form which was filled and returned to him. With the help of the assistant chief he managed to arrest the Appellant within Kiangwenyi. He produced the tooth and the P3 form as exhibits before the court.

Gaston Odhiambo Owino, a Clinical Officer, testified as Pw5. He holds a Diploma in Clinical Medicine and Surgery. Referring to the P3 form and the treatment card, he confirmed that the complainant was seen as an outpatient and at the material time, he complained of a painful gum with one loose tooth and one having been knocked out. The complainant was treated and was told to go back for review. He filled the P3 form. He assessed the degree of injury as grievous harm because there was a tooth lost and referred him to a dentist for specialized treatment.

At the close of the prosecution's case, the Appellant was put on his defence. He gave a sworn statement and called two witnesses. On his part, he denied having committed the offence but admitted being the father to the complainant.

Daniel Kinyua a boda boda rider testified as DW2. He told the court that on the material day, he was given some work by a customer to take him somewhere and upon arrival he found the Appellant with other people struggling to get a child from his (Appellants) mother whom he used to see. He stated he did not know why they were struggling.

Mercy Muthoni Muchiri testified as Dw3. Her evidence was that, on 20th February, 2016, she heard noises within Kiangwenyi town and walked outside when she found the Appellant and his mother arguing about the Appellant's son, the complainant herein. The Appellant pulled his son from the matatu and the Appellant's mother alighted from the matatu who together with other passengers pulled the boy inside the matatu. The Appellant was left there complaining after the matatu drove off.

At the conclusion of the trial, the Appellant was found guilty, convicted and sentenced to serve five (5) years imprisonment and hence the Appeal herein.

The Appeal was canvassed by way of written submissions which this court has duly considered alongside the evidence on record.

The seven grounds of Appeal can be collapsed into the following d grounds;

1. The Learned Magistrate erred in failing to appreciate that there were discrepancies regarding the evidence tendered.

2. The Learned Magistrate failed to carry out voire Dire inquiry before taking the complainant's evidence.

3. The Learned Magistrate erred in failing to appreciate that the complainant's evidence was not supported by medical evidence.

4. The Learned Magistrate erred in law and in fact by disregarding the Appellant's defence.

5. The sentence was manifestly high and excessive regard being had to all the circumstances of the case.

6. The Learned Magistrate erred in failing to appreciate that the conviction was against the weight of the evidence tendered.

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

a. The identity of the perpetrator.

b. The nature of the injuries.

In his submissions, the Appellant contends that the evidence adduced by the prosecution did not support the charge and that there were discrepancies regarding the evidence tendered. That, save for the evidence of the complainant, none of the other prosecution witnesses witnessed the commission of the alleged offence, referring to the evidence of the complainant to the effect that the front tooth came out as a result of a fall and not as a result of the alleged fists. The Appellant further argued that, though the learned Magistrate conducted Voire Dire, he did not give reasons as to why he believed that the complainant understood the importance of speaking the truth as required by the law.

The Appellant further submitted that the evidence of the Complainant was not supported by medical evidence save for the P3 and general outpatient record and that, no dentist was called to tender evidence in respect of specialized treatment yet he is the only person who could have confirmed the ingredients of the offence of grievous harm as defined in section 4 of the Penal Code. He contended that the trial Court failed to consider the defence by the Appellant and his witnesses that there was a scuffle between the Appellant and his mother thus, disregarding the evidence of DW2 and DW3 yet she concluded that they were truthful.

The Appellant also submitted that the sentence is manifestly harsh and excessive considering that the assessment of the degree of injury was

not supported by evidence of a specialist and also considering that the Appellant was the father of the Complainant. He argued that the Court ought to have been lenient taking the aforegoing into consideration.

On the part of the Respondent, it was submitted that, the complainant who is the biological son of the Appellant identified him as the person who assaulted him. That the Complainant further informed the court that the Appellant was not happy to learn that he had paid a visit to his grandmother (PW2).

On whether the complainant suffered grievous harm, the Respondent cited the evidence of PW1 who testified that one of his teeth was knocked down and three others were seriously injured. The Respondent also relied on the evidence of the clinical officer who testified as PW5. On whether the Court conducted Voire Dire, they submitted that it was done with a view to ascertaining whether the Complainant knew the meaning of oath before taking the witness box.

The Court has considered the submissions and has re-evaluated the evidence as the law requires it to do.

As rightly submitted by the Respondent, the Appeal herein turns on the issue of identity of the perpetrator and the nature of injuries. On identity, it is not in dispute that the Appellant is the biological father of the Complainant. It is also not in dispute that the incident occurred in broad daylight. Though none of the prosecution witnesses witnessed the incident, the evidence of the Complainant is clear that the injuries were inflicted by the Appellant. The trial Court observed the demeanor of the Complainant and noted that he was not shaken and he gave a clear chronology of events of that day which were collaborated by his grandmother.

The evidence available on record is that the Appellant was at Kiangwenyi Trading Centre on the material day and time when the incident occurred. This has been confirmed by his own witnesses who even admitted that there was some struggle between the Complainant, PW2 and the Appellant though they have denied the Complainant was injured. There is evidence that the Appellant was never comfortable with the Complainant visiting his grandmother, who was the Appellant's mother and this was the cause of the struggle at the material time. There is also evidence that there was bad blood between the Appellant and his own mother and he had also separated with his wife, the mother to the Complainant, for four years. What is clear, however, is that there was no bad blood between the Appellant and the Complainant and therefore I see no reason why he could have framed his father as alleged.

On whether the Complainant suffered grievous harm, section 4 of the penal code defines Grievous harm as thus;

> **"An injury that seriously and permanently injures health, or which extends to permanent disfigurement or serious injury to any external or internal organ, membrane or sense."**

From the evidence available, one tooth was knocked out while three others were injured and were shaking as a result of the injuries inflicted to the Complainant. The injuries were confirmed by the Clinical officer who testified as PW5 and in the P3 dated 26th of February, 2016. They have been classified as grievous harm. I have taken note of the Appellant's submissions that no dentist was called to tender evidence in respect of specialized treatment. In this regard, I have considered the qualifications of PW5 as a holder of a diploma in Clinical medicine and surgery and his experience of five (5) years. He explained to the court the reason why he assessed the degree of injury as grievous harm is because there was loss of front incisors tooth. In addition, three other teeth were left loose. At the complainant's tender age he has been left with a gap which amounts to a permanent disfigurement of his dental formula. In his evidence the Complainant stated that he could not chew hard food like before which, as the learned magistrate observed, has a direct negative effect on his health. The Court finds that with the qualification of PW5, the P3 form and the treatment card, he was able to assess the degree of injury as he did, and the prosecution did not have to call a dentist for purposes of testifying on the degree of injury.

On the ground that the trial Court failed to carry out Voire Dire, the record Cleary shows that the same was done. In his submissions, the Appellant contends that the trial court did not give reasons why it believed that the Complainant understood the importance of speaking the truth. In this regard the court has taken time to peruse the record of the proceedings and I have noted that after conducting Voire Dire, the learned Magistrate recorded thus;

> **"Upon the examination above, I find the minor to be knowledgeable, he understands the importance of speaking the truth, he shall be affirmed to give testimony and accused will cross exam him."**

In my considered view, the learned magistrate did not have to record in specific terms that she was satisfied that the Complainant understood the importance of speaking the truth. What the Court recorded was sufficient and in my view, serves the purpose as required by the law.

The Appellant has also contended that his defence was not considered and that the sentence is harsh and excessive. In regard to the Appellant's defence, the Court notes that it was just a mere denial. His witnesses testified that he did not injure the Complainant but there was a scuffle, at least going by the evidence of DW2 and DW3. The trial Court in its evidence considered their evidence and found them to have been truthful when they stated that they did not see any injury on the Complainant but this was only because they did not intervene or draw near. The Court further observed that they were not of great use to the Appellant's case. To my mind, there was enough consideration of defence evidence. Infact, the evidence tendered by the Appellant in defence could not stand in the face of that of the Complainant, PW2 and the medical evidence.

On the excessiveness of the sentence, the Court has noted the sentence provided for under the Law and the Circumstances under which the offence was committed. The Court has also noted the mitigation by the Appellant. Though he has prayed for pardon, he caused grievous harm to his own son without any provocation and for no apparent reason. I find the sentence appropriate and I would have no reason to interfere with it.

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

Dated, Delivered and signed at KERUGOYA this 4TH day of OCTOBER, 2019.

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L. NJUGUNA

JUDGE