REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 41 OF 2018

BENJAMIN KATHUKU MUTUSE...APPELLANT

-VERSUS-

REPUBLIC...RESPONDENT

(An Appeal from Original Conviction and Sentence in Makueni SPM Criminal Case No. 537 of 2013 delivered before Hon. J. Mwaniki on 6th September, 2018)

JUDGMENT

1. **Benjamin Kathuku Mutuse** the Appellant herein was charged and convicted of the offence of Grievous Harm contrary to section 234 of the Penal Code. The particulars being that the Appellant on the 27th day of September 2013 at Mkombozi bar, Wote township in Makueni district within Makueni county unlawfully did grievous harm to **Benedict Mutua Mukavi**.

2. Upon conviction he was sentenced to seven (7) years imprisonment.

3. Being aggrieved with the judgement, he filed this appeal through R. M. Mutune advocate raising the following grounds;

> **a) That,** the trial Magistrate erred in law and fact in convicting the Appellant when there was no sufficient evidence tendered against the accused thus a miscarriage of justice.
>
> **b) That,** the trial Magistrate erred in law and fact in failing to analyze the evidence as the alleged offence was said to have been committed during the day yet the person called Kitinye Mwendwa who allegedly was given the knife and who was known was never called as a witness.
>
> **c) That,** the trial Magistrate erred in law and in fact in convicting he Appellant for an offence of assault causing actual bodily harm when the ingredients of the offence were not satisfactorily proved against the Appellant.
>
> **d) That,** the learned trial Magistrate erred in law and fact by shifting the burden of proof to the Appellant.

4. A summary of the case is that the complainant **Benedict Mutua Mukavi** who testified as Pw1 stated that on 27th September 2013 he was with the Appellant and Ketinye Mwendwa drinking at Ganza club Wote. He left the said club for home but went to Mkombozi club at 12.00 p.m. The Appellant followed him at Mkombozi club threatening on how he would ensure he bleeds.

5. In the process, he stabbed him with a knife on the left rib and he became unconscious and regained the same after three (3) days.

He was treated at Makueni district hospital and later referred to Kenyatta national hospital where he attended medication for three (3) years. He identified his P3 form (EXB1). In cross examination he said that the Appellant had followed him with a friend of his to Mkombozi club. That he was arrested from there.

6. **Pw2 Francis Kamwita Mutange** was at the Mkombozi club when Pw1 arrived followed by the Appellant. The Appellant was heard telling Pw1 that he would bleed that day. He then produced a knife from his right pocket and stabbed Pw1 on the left side of the chest and gave the knife to a friend he had come with. The said friend ran away with the knife. They took Pw1 to Makueni police station and then Makueni district hospital. The Appellant was arrested at the said club as he tried to escape and was taken to Makueni police station.

7. **Pw3 Joseph Muthini Mutisya** was at Mkombozi club and he gave similar evidence to that of Pw1 and Pw2. He identified the Appellant as the person who had injured Pw1 and was arrested by those present. **Pw4 Dr. Emmanuel Loiposha** produced the P3 form on behalf of **Dr. Anthony Kibore** who had left employment. He went on to produce the P3 form as EXB1. The doctor found Pw1 to have had a stab

wound on the left side of the chest and was sickly looking. The injury could have been fatal, due to its positioning. It was assessed as grievous harm.

8. The Appellant in his unsworn defence stated that on 27th September 2013 he was at Wote stage as a boda boda operator when he carried some customer to a bar. He was later told by some people that he had injured Pw1. They beat him up as they searched for a knife which they did not find. He was taken to the police station. He was released and re-arrested after a month. He said Pw1's family was demanding for some money which he declined to pay. He admitted having known the complainant (Pw1).

9. In his written submissions, Mr. Mutune for the Appellant argues that the evidence of Pw1 who had been unconscious was not corroborated by Pw2 and Pw3. Secondly, that the crucial witnesses were not called to testify. He mentions Kitinye Mwendwa and Muweu who were allegedly present during the incident. He also mentions the investigating officer who did not testify to explain how the charges were preferred and how the investigations were done.

10. He refers to the case of **Bukenya & Others 1972 EA 549; Said Awadg Mubarak – Vs – Republic [2014] eKLR** on the crucial witnesses not being called he also referred to one Kitinye Mwendwa who was allegedly given the knife used in the attack. That the investigating officer should have testified to explain the efforts made to recover the knife.

11. Learned counsel for the State Mrs. Owenga opposed the appeal saying the evidence was overwhelming. That Pw1 and Appellant knew each other well and the latter had warned the former about causing him to bleed. The seven (7) years imprisonment was sufficient and lawful, she contends.

Analysis and Determination

12. This being a first appeal this court has a duty to reconsider and re-evaluate the evidence on record and come to its own conclusion. An allowance must be given owing to the fact that this court did not see nor hear the witnesses. See **Okeno –Vs- Republic [1972] E.A 32. In Kiilu –Vs- Republic [2005] I KLR 174** the court of Appeal stated thus of this requirement;

> ***"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.***

13. I have considered the evidence on record, grounds of appeal and the submissions by both parties. I find the following to be the issues for determination:-

> *i. Whether the prosecution failed to call crucial witnesses and whether the court should make an adverse inference against the prosecution for failing to call certain witnesses.*
>
> *ii. Whether in the final analysis the prosecution proved the case against the Appellant beyond any reasonable doubt.*
>
> ***Issue no. (i) whether the prosecution failed to call crucial witnesses and whether the court should make an adverse inference against the prosecution for failing to call certain witnesses.***

14. It is the Appellant's submission that crucial witnesses were not called to testify e.g. the investigating officer, Mucheu and Kivinye Mwendwa. In the case of **Republic –Vs- Cliff Macharia Njeri [2017] eKLR Lessit J.** observed as follows;

> ***"The issue for determination is whether the prosecution failed to call crucial witnesses because it is only on such***
>
> ***basis that an adverse inference can be made against the prosecution case. The principles to consider in determining the issue of crucial witnesses was dealt with in the leading case of Bukenya and Others –vs- Uganda 1972 E.A 549 LUTTA Ag. VICE PRESIDENT held:***
>
> ***"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.***
>
> ***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.***
>
> ***29. The prosecution's burden in regard to witnesses is to call witnesses who are sufficient to establish a fact. It is not necessary to call all the people who know something about the case. The issue is whether those called are sufficient to aid the court establish the truth, whether the evidence is favourable to the prosecution or not."***

15. In another case of **Sahali Omar –Vs- Republic [2017] eKLR** the court of Appeal stated thus;

> ***"Section 143 of the 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 –vs- Uganda (1972) E. A549; 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."***

16. The prosecution therefore 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 charge beyond reasonable doubt. **See also Keter –Vs- Republic [2007] I E. A. 135).**

17. In the instant case, the testimony and evidence adduced by the four prosecution witnesses *(three of whom were eye witnesses),* was sufficient. There was no need of calling other eye witnesses to come and repeat the same thing. The fact that the Appellant was arrested and taken to the police station and re-arrested by the police who charged him after two months confirms the case was investigated.

18. Witnesses were presented to the court by the police through the DPP. I therefore find no adverse inference to be made in regard to uncalled witnesses.

Issue no. (ii) whether in the final analysis the prosecution proved the case against the Appellant beyond any reasonable doubt.

19. In the instant case the evidence of Pw1 was corroborated on all fours by that of Pw2 and Pw3. They were at Mkombozi club when they saw Pw1 enter, followed by the Appellant and another who took off with the knife, after the assault. This happened in broad daylight. Nobody mentioned Kivinye Mwendwa as having been at Mkombozi club. He did not therefore witness the incident.

20. It is clear that the Appellant was arrested at the scene and taken to the police station. Even the original charge sheet confirms he was arrested on the same date of incident i.e. 27th September 2013.

21. The findings by the doctor confirm that Pw1 had a stab wound on left side of his chest, and the object used was sharp. The injury was assessed as grievous harm. The person who disappeared with the knife was the Appellant's friend and not Kivinye Mwendwa as suggested by Mr. Mutune in his submissions.

22. There is no law that states that if the offending weapon is not traced/found, no offence has been committed. The defence by the Appellant was a mere denial of the offence. He said he took a client to some bar and later he was told he had injured Pw1. The Appellant and Pw1 knew each other well. There is no reason given as to why Pw1 would frame up the Appellant on such a serious issue. There is also no reason showing why Pw2 and Pw3 would be against him. He was arrested by people at the Mkombozi club who saw what he had done.

23. I find the evidence against the Appellant to be so overwhelming, and not worth any interference by this court.

24. Section 234 of the Penal Code provides that anyone convicted of the offence of grievous harm is liable to life imprisonment. The Appellant was given seven (7) years. This is what the doctor (Pw4) said of the injury suffered by Pw1 at page 13 of the Record of Appeal.... ***"The stab wound could have easily been fatal as the left side of the chest has the heart and left side of the lungs which if stabbed can lead to immediate death."*** Pw1 survived by the mercies of God. I will therefore not interfere with that sentence.

25. **The upshot is that the appeal lacks merit and is dismissed. The conviction and sentence are upheld.**

Orders accordingly.

Delivered, signed & dated this 14th day of November, 2019 in Open Court at Makueni.

…………………………..

Hon. H. I. Ong'udi

Judge