



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCRA NO.10 OF 2019**

**FAUSTINE MUTUNGA MUTUA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence before Hon. Mayamba C. A. (SRM) in Kilungu Senior Resident Magistrate's Court Criminal Case No. 663 of 2017 delivered on 26<sup>th</sup> day of June, 2018).*

**JUDGMENT**

1. **Faustine Mutunga Mutua**, the Appellant and another were charged with the offence of robbery with violence contrary to section 296(2) Penal Code. The particulars were that the Appellant and another on the 22<sup>nd</sup> day of October, 2016 at Matua village, Kalongo sub location, Kikoko location in Kilungu sub county **within Makueni** county jointly robbed one **Alexander Kyalo Matheka** of one mobile phone make ITEL worth Kshs.5,000/= and immediately before the time of such robbery hit the said **Alexander Kyalo Matheka** with a piece of wood.
2. After a full hearing the Appellant's co-accused was acquitted while the Appellant was convicted of the offence of grievous harm and sentenced to four (4) years imprisonment.
3. He was aggrieved with the judgment and filed this appeal against sentence citing the following grounds:
  - 1) **That** he prays this Honourable court to consider the period that he spent in remand custody from 18-12-2017 to 26-6-2018 under section 333 (2) of the Criminal Procedure Code.
  - 2) **That** he is reformed through the prison fellowship rehabilitation programs and now knows the value of patience and moral uprightness.
  - 3) **That**he is deeply remorseful, repentant and regrets his action.
  - 4) **That**he also prays for a non-custodial sentence or an option of a fine.
  - 5) **That**he is ready to comply with any other opinion that the court will deem fit to his circumstance.
4. The prosecution case is that on 22<sup>nd</sup> October, 2016 around 5:00pm **Pw1, Alexander Matheka** the Appellant and another visited an injured boy at the home of Kavuluni. On their way back, the Appellant and his friend started demanding for money or alcohol from Pw1. They took his phone and hit him on the left side of the clavicle bone, and ran into the forest.
5. Pw1 went home and was taken to Kilungu hospital and later transferred to Makueni hospital. A plate was inserted in his left shoulder. He identified his medical documents. In cross examination he said it is the Appellant who hit him.
6. **Pw2 Juliana Malelu Ndanu** who is Pw1's stepmother received a report of the robbery from Pw1 on 22<sup>nd</sup> October, 2016 at 5:30 pm. She confirmed taking Pw1 to hospital and they were referred to Makueni hospital. A report was made and Pw1's phone was found with the Appellant's co-accused.
7. Medical documents and P3 form (PEXB 1 & 2) produced by Pw3 confirmed that Pw1 had been injured on the collar bone. The degree of injury was found to be maim. **Pw4 No. 111091 PC Willy** was one of the officers who arrested the Appellant on 18<sup>th</sup> December, 2017. **Pw5 No.46948 Corporal Raphael Terer** the investigating officer confirmed receiving Pw1's report on vide Occurrence Book number 6/20/10/16 at Kilungu police station. He issued Pw1 with a P3 form on 21<sup>st</sup> November, 2017 at 2:00 am.

8. When placed on his defence, the Appellant who gave a sworn defence testified that he could not tell what happened on 22<sup>nd</sup> October, 2016. He was arrested on 16<sup>th</sup> December, 2017 and was charged on 20<sup>th</sup> December, 2017 for injuring Pw1 which he denied. He stated that Pw2 was the one behind the framing of this case.

9. In his written submissions in respect to the appeal the Appellant asks for leniency, saying he is now a reformed person. He requests the court to consider the period he was in custody before the case was finalized.

10. The State through learned prosecuting counsel opposed the appeal while wholly relying on the evidence on record.

**Analysis and Determination**

11. This being a first appeal, I am duty bound to re-consider and re-evaluate the evidence on record and arrive at a conclusion while giving an allowance based on the fact that I did not hear or see the witnesses. **See Okeno –vs- Republic (1972) E.A**

**32; Kiilu & Anor –vs- R (2005) IKLR 174; Simiyu & Anor (2005) IKLR 192.**

12. I have carefully considered the evidence on record, grounds of appeal and the submissions by both parties. I also bear in mind that the Appellant has only appealed against sentence. This court must however satisfy itself as to the legality of the conviction. From the evidence on record, it's clear that the Appellant and his co-accused were together throughout this incident. A phone was taken and Pw1 was injured. The parties being relatives worked out things and the phone was returned.

13. That left the court with the complaint of the injury on Pw1. It was confirmed by Pw2 that Pw1 was injured and was taken to hospital. Pw3 confirmed the injury while Pw4 said Pw1 knew his assailants and gave out the names and that's how Pw4 arrested the Appellant. The Appellant's defence was a mere denial. He did not say anything about 22<sup>nd</sup> October, 2016 when he is alleged to have committed the offence. I am satisfied that the conviction for grievous harm contrary to section 234 Penal Code which is one of the ingredients of robbery with violence is proper and I uphold it.

14. Under Section 234 Penal Code, the maximum sentence provided is life imprisonment. The Appellant was said to be a first offender. In mitigation, he told the court he was young with a young family. I do consider the fact that the Appellant assaulted Pw1 for no apparent reason. He had not been provoked but was demanding for money for buying alcohol.

15. I have however taken note of the fact that he appears to have picked up a few lessons here and there while in prison. I will therefore reduce his sentence by one year only.

16. The upshot is that the appeal against sentence succeeds. I therefore make the following orders:

**i. Conviction is confirmed.**

**ii. Sentence of four (4) years is set aside and substituted with one of three (3) years imprisonment from the date of conviction (26/06/2018).**

Orders accordingly.

**Delivered, Signed & Dated This 1<sup>st</sup> day of November 2019, in Open Court at Makueni.**

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**H. I. ONG'UDI**

**JUDGE**