REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO 229 OF 2011

JAMES OBAYO MAGOVI……..… APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(*appeal arising from the original conviction and sentence by T.N. Bosibori , RM ,in Vihiga SPM'S Criminal Case No. 433 OF 2009 dated 18th October,2011)*

R U L I N G

1. The appellant was convicted of the offence of causing a person grievous harm contrary to section 234 of the penal code and sentenced to life imprisonment. He was aggrieved by the decision of the lower court and filed this appeal. The grounds of appeal are that :

1. The learned trial magistrate erred in law and in fact by giving an excessive sentence.

2. The learned trial magistrate erred in law and in fact by admitting and relying on hearsay and afterthought evidence that was not watertight as the basis of the conviction.

3. The trial magistrate erred in law and in fact by arriving at a judgement while relying on contradictory evidence.

4. The trial magistrate erred in law and in fact by failing to consider that the prosecution did not call as witnesses the girls who were mentioned to have been at the scene.

5. The trial magistrate erred in law and in fact by shifting the burden of proof to the appellant.

2. The particulars of the offence against the appellant were that on the 24th March 2009 at Chambiti village, Chambiti sub location in Vihiga District he unlawfully did grievous harm to Gregory Magenya (herein referred to as the complainant).

3. The prosecution case was that the complainant and the appellant are residents of the same village and are clanmates. That on the material day at 4.30 p.m. the complainant was arriving at his home from Mbale town. On reaching his gate he found the appellant blocking some girls from passing to go to the river. The complainant asked him to leave them. He moved towards his house. He heard the appellant talking from his behind and saying that he had been looking for him for a long time. He turned to check on the appellant and the appellant hurled a stone at him that hit him on his left eye. The complainant lost consciousness. The incident was witnessed by a fellow villager Aston Mugwang'a PW5. PW5 chased the appellant but he disappeared into the bush.

4. The complainant's mother PW3 who was in her house nearby heard a loud bang and the complainant crying out. Her son crawled towards their gate. He was bleeding. She called her husband PW2 and informed him. PW2 went home and found his son injured. He took him to Vihiga District Hospital where he was admitted. The report of the assault was made at Mbale police station. Sgt Ngome PW6 visited the complainant at the hospital and found him admitted in critical condition. He issued a P3 form to him. The P3 form was completed by a clinical officer PW4 of Vihiga District hospital. His evidence was that complainant had a swollen bleeding left eye which was stitched and the patient was transferred to Sabatia eye hospital for specialized treatment. The eye was found to have been pierced on the cornea. It was removed through surgery. The clinical officer classified the degree of injury as grievous harm.

5. Sgt Ngome investigated the case. On 28.3.2009 he arrested the appellant at his home. He charged him with the offence. The appellant denied the charge. He was tried. The clinical officer PW4 produced the discharge summary from Vihiga District Hospital and the P3 form as exhibits – Exhibit 1 and 2 respectively.

6. When placed to his defence the appellant opted to give unsworn statement. He stated in his statement that on the 28/3/2009 he was at his home when a police officer in company of the complainant went to his home and arrested him. He was taken to Mbale police station and he was accused of harming somebody. He denied it. He was then charged.

7. The appellant tendered in written submissions. He submitted that there was conflicting evidence from the prosecution witnesses. That the complainant stated that the incident occurred on 24.3.2010 while PW3 stated that it was 24.3.2009. That the complainant stated that the incident occurred at 4 p.m. while PW5 said it was at 6 p.m.

8. The appellant further submitted that the stone he was alleged to have hit the complainant with was not produced in court. That the police officer PW6 who visited the scene did not make enquiries about the stone. That this points to evidence which was fabricated.

9. The prosecution counsel Mr. Ng'etich opposed the appeal but made no submissions. He relied on the decision of the trial court.

10. This is a first appeal. It is the duty of a first appellate court to look at the evidence presented before the trial court afresh, revaluate and re-examine the same and reach its own conclusions. The court must bear in mind that it did not have the opportunity to see the witnesses as they testified. The court should also look at the grounds of appeal put forward by the appellant – See ***Kinyanjui Vs Republic*** (2004) 2KLR 364.

11. The complainant stated that the incident took place on 24.3.2010. His father PW2, his mother PW3, the clinical officer PW4 and PW5 all stated that the incident took place on 24.3.2009. Sgt Ngome PW6 testified that he received the report on 26.3.2009 and that they arrested the appellant on 27.3.2009. The appellant testified in court on 7.12.2009. It can therefore only have been a slip of the tongue or the pen that the incident took place on 24.3.2010 instead of 24.3.2009.

12. The complainant stated that he was assaulted at 4.30 p.m. His parents PW2 and PW3 did no state the time that the incident took place. PW5 stated that the incident took place at 6 p.m. The appellant contends that since the complainant and PW5 have given contradictory evidence as to the time that the incident took place, it means that the witnesses are lying that they saw him hit the complainant with a stone.

13. In my view, the contradictions in the time the incident took place is not so grave that it should lead to the evidence of the complainant and PW5 being rejected. It is not all contradictions in the evidence of the prosecution witnesses that should lead to the evidence being rejected unless the evidence goes to the substance of the case.

In **Jackson Mwanzia Musembi Vs Republic 2017 eKLR** the Court of Appeal cited approval the

Ugandan case of **Twahangane Alfred Vs Uganda CR. Appeal No. 139 of 20021 (2003) UGCA,6** where the court held that:

> ***"with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".***

The contradictions on the time the offence was committed is a minor contradiction. The court will ignore it.

14. The complainant and PW5 had no grudge against the appellant. The witnesses knew the appellant very well. The incident occurred in broad day light. The complainant talked to the appellant. PW5 saw the appellant and chased him. There was thereby no reason to doubt that it is the appellant who hit the complainant with a stone.

15. The appellant took issue with the fact that the girls who were mentioned by the complainant did not testify in the case. It was important for the prosecution to call any of the girls to testify. However, the fact that none of those girls testified in the case is not fatal to the prosecution case. There was sufficient evidence even without the evidence of the girls to sustain the charge. The evidence of the girls was not so crucial in the case that without it the case had to collapse.

16. It was not necessary that the weapon the appellant used to assault the complainant had to be produced in court. The complainant did not state that he collected the stone. He in fact stated that he lost consciousness so there was to time to collect the stone. PW5 on his part chased the appellant and did not seem to concern himself with the stone. I thereby find no substance in this urguement.

17. The appellant contends that his constitutional rights under article 50(2) of the constitution were violated in that:

> (i) He was not given adequate time and facilities to prepare his defence;
>
> (ii) He was not informed by the trial court of his right to choose and be represented by an advocate at state expense.
>
> (iii) He was not supplied with witness statements in advance and the court did not enforce this provision.

18. There is nowhere during the trial that the appellant complained to the trial court that he had not been issued with copies of witness statements. He cross- examined all the prosecution witnesses and there is no time that he requested to be supplied with copies of witness statements. There is thereby nothing to prove that the appellant suffered prejudice during the trial.

19. Article 50 (2) (h) of the constitution grants an accused person the right to have an advocate assigned to him and at state expense if substantial injustice would otherwise result. In **Republic Vs Karisa Chengo & 2 others**(2017)eKLR the supreme court held that the said right is not open ended but is only available " if substantial injustice would otherwise result." The appellant did not show that he had any difficulties in conducting his defence. He did not show that there were complex issues of law in the case to the extent that failure to provide him with an advocate at state expense caused substantial injustice to him. I thereby decline to accede to this ground of appeal

20. The appellant further alleged that trial court erred by shifting the burden of proof to him. He however did not point out not even a single instance where the court did so in its judgment.

Upon keenly going through the evidence of the lower court, I find that the appellant was convicted on the

basis of credible and reliable evidence. The appellant hit the complainant with a stone on the left eye that led to the inner part of the eye being perforated as a result of which the complainant lost the eye. The appellant undoubtedly occasioned the complainant grievous harm. The defence of the appellant was only a mere denial and did not raise any issue. The appellant was correctly convicted of the offence. The appeal against conviction is therefore dismissed.

The maximum sentence provided by section 234 of the penal code is life imprisonment. The appellant was given the maximum sentence.

Sentencing in a criminal trial is a discretion of the trial court. In ***Shadrack Kipchonge Kogo Vs Republic, Eldoret Criminal Appeal*** *No.253 of 2003* (cited in **Arthur Muya Muriuki Vs Republic (2015 eKLR**), the Court of Appeal stated the following on principles of sentencing:

> ***"Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred"***

20.In ***Ambani Vs Republic*** (1990) KLR 161, the court stated that sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that it is not proper exercise of discretion in sentencing for the court to fail to look at the facts and circumstances of the case in their entirely before settling for any given sentence.

21.It is also a general rule in sentencing that a maximum sentence should not be imposed on a first offender – see ***Otieno Vs Republic*** **(1983) KLR 295**. Also that a maximum sentence is intended for the worst kind of offenders.

The appellant was a first offender. The act of injuring the complainant to the extent of losing the eye was not premeditated. It was not proper to give the appellant the maximum sentence. Considering all the circumstances of the case, I will reduce the sentence to ten years imprisonment.

In the foregoing the appeal on conviction is dismissed while the appeal on the sentence succeeds to the extent that the same is reduced to ten years imprisonment.

Delivered, dated and signed in open court at Kakamega in open court this 19th day of July, 2018.

J. NJAGI

JUDGE

In the presence of:

Mr. Juma..... for state

Appellant.....Appearing in person

George.....Court clerk

14 day of Right of appeal.