REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 54 OF 2017

J W M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the original conviction in Criminal Case No. 142 of 2016 in the Chief Magistrate's Court at Murang'a by M. Wachira, Chief Magistrate, dated 17th August 2017]

JUDGMENT

1. The appellant was adjudged guilty of *causing grievous harm* to the complainant contrary to section 234 of the Penal Code. She was sentenced to *three years* imprisonment.

2. The particulars were that on 2nd January 2016 at Geitwa village, Gaturi Location within Murang'a County, she *"wilfully and unlawfully did grievous harm to JMG [particulars withheld] by hitting him using a stick"*.

3. The petition of appeal raises eight grounds. They can be condensed into four. First that the evidence of PW1 and PW2 was not corroborated. Secondly, that the entire evidence was "flimsy". Thirdly, that the learned trial magistrate failed to properly evaluate the evidence; and, fourthly, that the sentence of imprisonment without the option of a fine was too harsh. In a synopsis, the appellant contends that that the charge was not proved beyond reasonable doubt.

4. At the hearing of this appeal, learned counsel for the appellant, *Mr. Njoroge*, submitted that PW1 and PW2 were minors. He opined that there was no corroborating evidence; and, that the learned trial magistrate did not warn herself of the danger of relying on their evidence. He submitted that all the allegations made against the appellant were "a sham".

5. The appeal is contested by the Republic. The learned Prosecution Counsel, *Mr. Mutinda*, submitted that all the key ingredients of the offence were proved beyond reasonable doubt. He submitted that the evidence by the minors was corroborated by medical evidence. Finally, he was of the view that the sentence handed down was too lenient. I was implored to dismiss the appeal.

6. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.

7. PW1 and PW2 were aged *10* and *11 years* respectively. After a detailed *voire dire* examination, the learned trial magistrate formed the opinion that they did not understand the nature of an oath. The questions posed by the court to the minors and their answers are recorded. The two witnesses gave unsworn evidence.

8. I am satisfied that the trial court complied *fully* with the procedure of taking the evidence of the minors. See *Republic v Peter Kiriga Kiune* Criminal appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445.

9. PW1 said that his grandmother had instructed him not to give PW2 food as the latter had refused to undertake certain chores. When he snatched away her food and pinched her, she cried. His aunt (the accused) emerged with a stick and hit him on the back and private parts. He suffered injury on his penis. He took off along a path leading to the main road. In cross examination, he denied that he was injured by a tree stump or in the process of jumping over a barbed wire fence.

10. PW1 reported the matter to his mother (PW3) who took him to hospital. She reported the matter to the police. The appellant was arrested on 30th March 2016 by Police Constable Gitonga. PW1 said that the wound was infected. After a week, the doctor recommended that the complainant be circumcised. The incision was done on 12th January 2016.

11. That narrative was largely confirmed by PW2. She said the appellant hit PW1 on his genitalia. The accused ran away but fell after a short

distance. The appellant caught up with him and continued to beat him on the back. In cross examination, she denied that there was a fence along the path the complainant took to the main road.

12. PW3 was the complainant's mother. She said that the doctor recommended that PW1 be circumcised to expedite healing of the wound. PW1 underwent circumcision in a private hospital on 12th January 2016 (exhibit 3). She also referred to the earlier treatment notes and P3 form (exhibits 1 and 2).

13. PW4 was Linus Muturi. He is a clinical officer at Murang'a Hospital. He said there was a bloody discharge from the complainant's penis. He said the injury was occasioned by a blunt object. He classified the injury as *harm*. He produced the treatment notes and P3 form (exhibits 1 and 2).

14. When the appellant was placed on her defence, she made an *unsworn* statement. She claimed that she caught PW1 and PW2 doing "bad manners". They ran away. She said the complainant was injured when he jumped over a *"barbed wire fence which had plants that produce poisonous liquids"*. She also said there was a grudge between her and the complainant's family.

15. From that evidence, it is obvious that the complainant and the appellant were *not* strangers. The appellant was the aunt to PW1 and PW2. The appellant admitted she was at the *locus in quo* at the material time. The offence took place in broad daylight. She had a clear opportunity to commit the offence. It amounts to further corroboration. See *Opo v Republic* [1976-80] 1 KLR 1669.

16. I thus concur with the learned trial magistrate that the appellant was the person who attacked the complainant with a stick. See *Wamunga v Republic* [1989] KLR 424, *Republic v Turnbull & others* [1976] 3 All ER 549.

17. The injuries to the complainant were further *corroborated* by medical evidence from PW4. So much so that the evidence from the two minors was *not* the *sole* convicting evidence. PW4 said there was a *bloody discharge* from the complainant's penis. He said the injury was occasioned by a *blunt object*. He classified the injury as *harm.* That supports the evidence that the appellant hit the complainant with a stick.

18. I have also considered the defence mounted by the appellant. She posited that the complainant was injured when he jumped over a *barbed wire fence which had poisonous plants.* That was flatly denied by PW1 and PW2. There was *no* such fence. Their evidence was not shaken in the cross examination. True, the children may have been engaged in what the appellant calls *"bad manners"*. True, there may be a grudge between the two families. But it does not excuse the assault.

19. In the end I am satisfied that the prosecution discharged its legal burden of proof. See *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166. The totality of the evidence *proved* the culpability of the appellant for the offence of *causing grievous harm*.

20. I will now turn to the appeal on *sentence*. Section 354 (3) of Criminal Procedure Code empowers the High Court to *"maintain the sentence, or with or without altering the finding reduce or increase the sentence"*.

21. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

> *"The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors."*

22. The charge facing the appellant was a *felony*. Section 234 of the Penal Code provides that any person who commits grievous harm to another is guilty of a felony and is *liable to imprisonment for life*. The lower court considered the mitigation and the fact that the appellant was a first offender. Bearing in mind the nature of the injuries and the age of the complainant, the sentence of *three years* was quite lenient. The lower court was *not* obligated to grant the option of a fine.

23. I cannot then say that the learned trial magistrate failed to look at the facts and circumstances of the case in their entirety before settling for the sentence.

24. The appeal is devoid of merit. It is *dismissed*.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **MURANG'A** this 5th day of July 2018.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant.

Mr. Njoroge for the appellant.

Mr. Mutinda for the Republic.

Mr. Kiberenge and Ms. Dorcas, Court Clerks.