



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 65 OF 2016.**

**PETER MUTSOLI ALIAS KUMAMI .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(from the original conviction by S.K. Ngetich, SRM and sentence by N. Nambafu, SRM in Mumias SPM CCA. Case No. 701 of 2014)***

**JUDGMENT**

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 serve 8 years imprisonment. He was aggrieved by the conviction and the sentence and filed this appeal. The grounds of appeal as per the petition of appeal are that:-

- (1) The learned trial magistrate erred both in law and fact in failing to note that there was no evidence with probative value to warrant a conviction.
- (2) That the learned trial magistrate erred in law and fact in reopening the prosecution case by allowing the complainant to address the court in person after judgment had been delivered rather than using the services of the probation office hence caused a miscarriage of justice.
- (3) The learned trial magistrate erred both in law and fact in failing to frame the judicial issues for determination and by failing to analyze the evidence properly and considered extraneous issues thereby causing a miscarriage of justice.
- (4) The learned trial magistrate erred both in law and fact in failing to grant the appellant an opportunity to make submissions before being placed on defence and final submissions thus trampling upon the appellant's constitutional rights of a fair trial.
- (5) The learned trial magistrate erred both in law and fact in handing the appellant excessive and harsh sentence in the circumstances without considering the mitigation and the fact that the appellant and the complainant are husband and wife respectively with children.

2. The appellant also filed supplementary grounds of appeal in which he raised further grounds, inter alia, that:-

- (1) The appellant was convicted on fabricated, inadequate, misinformed and contradictory evidence.
- (2) The trial magistrate failed to consider that the investigating officer had received several cases between the appellant and the complainant.
- (3) The prosecution failed to call key witnesses including an expert doctor.
- (4) The trial magistrate erred in law and in fact by rejecting his defence.
- (5) The trial magistrate imposed too harsh a sentence.

3. The appeal was opposed by the state.

4. The particulars of the charge against the appellant were that on the 18<sup>th</sup> day of May, 2014 at Ground 2000 at Sharango B village in Shianda location in Mumias District within Kakamega County he unlawfully did grievous harm to Mercy Makali Salasia (herein referred to as the complainant).

## **Prosecution Case.**

5. The case for the prosecution was that the appellant and the complainant had lived together as husband and wife for a period of 10 years. The complainant has 2 children.
6. That on the material day, the complainant returned home from work at 8 p.m. She found the appellant in their house with the children, Eugene PW2 and Daisy. Previously, the appellant had confiscated 3 mobile phones from the complainant. The complainant demanded that the appellant give her back the phones. The appellant thereupon retrieved a panga from underneath the chair he was sitting on. He cut the complainant on the left leg and fled.
7. The complainant called at her son Eugene whom she had sent to the kitchen and told him to call neighbours. Eugene called neighbours who took the complainant to Hamadia Hospital at Shianda. The injuries were found to be too serious for them to handle and she was referred to St. Mary's Hospital, Mumias. She was taken there and she was admitted. She was thereafter referred to Moi Teaching and Referral Hospital Eldoret where she was admitted from 19<sup>th</sup> May, 2014 to 5<sup>th</sup> June, 2014.
8. The matter was reported at Shianda police Patrol base. PC Mbarak PW4 investigated the case. He visited the house of the complainant. Thereafter the complainant was re-admitted at Kakamega Provincial General Hospital. PC Mbarak issued a P3 form to the complainant. It was completed by a consultant/orthopaedic trauma surgeon doctor PW3 at Kakamega Provincial General Hospital. The doctor found the complainant to have sustained a compound fracture of the left tibia and fibula. An extension fixator was inserted in the leg. The doctor assessed the degree of injury as grievous harm. PC Mbarak thereupon charged the appellant with the offence. During the hearing the doctor PW3 produced the following documents as exhibits - treatment notes from St. Mary's Hospital, X-ray film, discharge summary from Moi Teaching and Referral Hospital, discharge summary from Kakamega Provincial General Hospital and the P3 form.

## **Defence Case.**

9. When placed to his defence the appellant gave a sworn statement and called two witnesses. He stated in his defence that the complainant is his younger wife. That on the 18<sup>th</sup> May, 2014 he left the home of his senior wife at 5 p.m. and went to the house of the complainant. He found the children alone in the house. The children told him that their mother had left but had not told them when she would be coming back. That he returned to the house of his senior wife at 6.30 p.m. He later slept.
10. That at 11 p.m. the chairman of *nyumba kumi* went to his house and told him that there was an issue at his younger wife's house. He accompanied him to the place. The children told him that some people had attacked their mother and that she had been taken to Hamadia Hospital. He went there but found her having been referred to St. Mary's Hospital. He had no money to travel there. He tried to call her but she was unreachable. He went to sleep. On the following morning he was told that she had been taken to Eldoret. On the following day she called him and accused him of being behind the people who had attacked her. When the complaint was discharged from hospital, she went back to her parents. He denies that he was present when the complainant was injured.
11. The appellant further stated that he had a grudge with the investigating officer over the complainant and that the investigating officer had warned him that he would fix him. The investigating officer arrested him on the 21<sup>st</sup> July, 2014 and charged him with the offence.
12. The appellant's wife, DW2, testified that on the 18<sup>th</sup> May, 2014 her child was sick. She called at the appellant to go and check on the child. The appellant went home. They remained in the house. At 11 p.m. they heard a knock on the door. Her husband went to answer the knock. He then went away with the person who had knocked the door who was the chairman of *nyumba kumi*. He later went back and told her that her co-wife had been injured and had been taken to hospital.
13. The chairman of "*nyumba kumi*" DW3 testified that on the material day between 10-11 p.m. he was sleeping at his home when he heard screams emanating from the house of the complainant. He went there and found the complainant having been injured on the leg. Neighbours were assisting her to go to hospital. He was told that the appellant was at his other house. He went there to call him. The appellant's other wife told him that the appellant was too drunk. He did not see the appellant. In cross-examination, the witness stated that Eugene (PW2) told him that his mother and his father (the appellant) had fought and that his mother had been injured.

## **Findings by the Trial court:-**

14. The trial magistrate found the evidence of the complainant and that of her son PW2 to have been credible and hence held that it is the appellant who assaulted the complainant. The magistrate dismissed the alibi of the appellant and said that it was unbelievable as the appellant was placed at the scene of the attack by the complainant and PW2.

## **Submissions by the appellant**

15. The appellant made written submissions. The state did not make any submissions but relied on the record of the lower court.
16. The appellant submitted that the P3 form was produced in court by Dr. Alushula who was based at Busia County Referral Hospital when the doctor who attended to the complainant was one Dr. Nyabera. That it was not explained why Dr. Nyabera did not come to produce the P3 form as exhibit.
17. The appellant submitted that there was no corroboration on the evidence of the complainant. That Eugene PW2 told the chairman of *nyumba kumi* that the complainant had been attacked by some people and did not mention the appellant.

18. The appellant contended that there were key witnesses who were mentioned by the prosecution witnesses such as Charles and his wife who were not called to testify in the case. That the other police officers who arrested him in company of PW4 also did not testify in the case.
19. Further that the trial magistrate wrongly rejected his defence that at the material time when the offence was committed he was at the house of his other wife.
20. It was submitted that the complainant did not make a report of the incident to the police. That it is the complainant's son and a village elder who reported the matter to the police.
21. The appellant submitted that the trial did not comply with the provisions of article 50 (2) (g) and (h) of the Constitution.

### **Duty of first appellate court**

22. 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, re-evaluate and examine the same and reach its own conclusions while at the same time bearing in mind that it did not have the opportunity to see the witnesses as they testified – see **Kinyanjui vs. Republic (2004) KLR 364**.

### **Analysis and Determination**

23. The grounds of appeal are in summary that there was insufficient evidence to sustain a conviction against the appellant and that the trial court erred in rejecting the defence that was adduced by the appellant.

24. The appellant submitted that there were contradictions in the evidence adduced by the prosecution. The instances given were on the time that the complainant returned home on the material night. That the complainant stated that she arrived home at 8 p.m. while the investigation officer PW4 stated that she had arrived at 9 p.m. The other contradiction was on what the complainant's son PW2 told the chairman of *nyumba kumi* as to who had assaulted his mother.

25. The complainant in her evidence stated that she on the material day arrived at her house at 8 p.m. Nowhere in the evidence of the investigating officer did he state that he was told that the complainant had arrived home at 9 p.m. That contention is therefore not supported by the evidence.

26. The appellant alleged that the key witnesses in the case were not called. The complainant's evidence was that when the appellant cut her, she sent Eugene to call her neighbours to come and assist her. That Eugene called Charles and Alex who took her to hospital. Both the complainant and Eugene stated that the appellant had escaped after cutting the complainant.

27. It was not contended that the complainant was not injured and taken to hospital. The appellant himself stated in his evidence that he received a report that she had been taken to hospital. The evidence of Charles and Alex would not have added any value to the prosecution evidence as they only took the complainant to hospital and did not find the assailant at the scene. The failure to call the said people as witnesses for the prosecution was therefore not fatal to the prosecution case.

28. The investigating officer PW4 testified that he and a colleague, PC Biwott, visited the home of the complainant on the same night of the assault after receiving the report from Eugene PW2 and a village elder. He stated that he was with other police officers when he arrested the appellant on the 21<sup>st</sup> July, 2014. It was not necessary for the prosecution to call as witnesses the other police officers who were with the investigating officer when he arrested the appellant. The evidence of the investigating officer was sufficient on its own to prove the act of arrest.

29. The doctor who produced the P3 form PW3 testified that he is a consultant/orthopaedic trauma surgeon at Busia County Referral Hospital and that he also works as a consultant at Kakamega Provincial General Hospital. That on the 16<sup>th</sup> June, 2014 he was working at Kakamega Provincial General Hospital when he examined the complainant, reviewed her hospital documents and completed her P3 form. That the complainant's attending doctor at Moi Referral and Teaching Hospital was Dr. Nyabera who is also an orthopaedic surgeon and who is known to him as they work together and they trained together in orthopaedics. There is then no substance in the contention that Dr. Alushula was not a proper person to complete the P3 form. The doctor works with Dr. Nyabera who attended to the complainant at Eldoret. The doctor is an expert in orthopaedics. He examined the complainant and completed that the P3 form in reliance of the available hospital documents. An internal fixator was inserted in the leg which was a clear indication that the injuries were severe. There was thereby no reason to differ with the findings of the doctor that the degree of injury amounted to grievous harm.

30. The appellant alleged that the evidence against him was fabricated in that the investigating officer had admitted that he had received several cases between him and the complainant. The investigating officer stated that he could recall handling two cases between the complaint and the appellant. There was nothing in the evidence to suggest that the case was a fabrication. The complainant gave straight forward evidence that she arrived home and demanded for the appellant to return her mobile phones that he had confiscated. The appellant then produced a panga and cut her. The appellant cross-examined the complainant and there was no inkling that the evidence was fabricated. There is thereby no truth in the allegation that the evidence was framed up.

31. The appellant contended that the trial court did not consider his defence. However, the trial court did consider the appellant's alibi defence and stated that the defence was displaced by the prosecution evidence. The magistrate held that the appellant's witness DW3 arrived at the scene after the appellant had left and hence his evidence does not remove the appellant from the scene at the material time.

32. The trial court was correct in dismissing the appellant's defence. The appellant's defence and that of his wife that the appellant went away with the chairman of *nyumba kumi* when the said person went to call him was refuted by DW3 who stated that the appellant's wife told

him that the appellant was too drunk to leave the house. This contradiction meant that the evidence was a fabrication. The appellant never went to the scene with DW3. Why would he refuse to go to see his injured wife if he is not indeed the one who had assaulted her? There was credible evidence that the appellant is the one who assaulted the complainant.

33. It was alleged that Eugene told the chairman of *nyumba kumi* that his mother was assaulted by some other people. Nowhere in his evidence did the chairman of *nyumba kumi* DW3 say anything to that effect. DW3 stated in his evidence that Eugene told him that his parents had fought and that his mother had been injured.

34. The appellant alleged that he was not given an opportunity to make submissions on no case to answer before he was placed to his defence. The appellant did not make such a request to the trial court and no such request was denied.

35. The report of assault was made to the police by the complainant's son PW2 and a village elder. The complainant was said to have been admitted in hospital at the time the report was made to the police. There is no law that states that only a complainant can make a report to the police.

36. Upon keenly analysing the evidence adduced in the lower court, it is my finding that the appellant was convicted on water-tight evidence that he assaulted the complainant and occasioned her grievous harm. The complainant had an argument with the appellant before the appellant attacked her with a panga. The complainant's son PW2 had left the appellant and the complainant together before he went to the kitchen. When he went back he found his mother injured and the appellant missing. The appellant can only be the person who injured his mother. The evidence adduced against the appellant was not shaken in cross-examination. The trial court rightly dismissed the appellant's defence.

37. The appellant urged that the sentence imposed on him was harsh. The maximum sentence for the offence of occasioning a person grievous harm is life imprisonment. In **Shadrack Kipchoge 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 a n error in principle must be inferred.”**

In **Ambani Vs Republic (1990) eKLR 161**, the court stated that sentence imposed on an accused person must be commensurate to the moral blame **worthiness** 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 entirety before settling for any given sentence.

38. The appellant was sentenced to serve 8 years imprisonment. The appellant occasioned the complainant serious injuries that led to a metal being inserted into her leg. Considering the facts and the circumstances of the case, and putting into mind the many cases of domestic violence that have been raising concern in the country , it is my view that the sentence imposed on the appellant was neither harsh nor excessive.

In the foregoing the appeal is bereft of merit and is accordingly dismissed.

**Delivered, dated and signed in open court at Kakamega this 19<sup>th</sup> day of September, 2018.**

**J. NJAGI.**

**JUDGE.**

In the presence of:-

Appellant .....Appearing in person.

Miss Omega.....For the state.

George.....Court Assistant.

14 days Right of Appeal.