REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 72 OF 2016

STEPHEN GATUNGU MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the original conviction in Criminal Case No. 56 of 2016 in the Principal Magistrate's Court at Kangema by D. M. Kivuti, Senior Resident Magistrate, dated 2nd September 2016]

JUDGMENT

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

2. The particulars were that on 21st January 2016 at Gakurwe trading centre within Murang'a County, he *"unlawfully did grievous harm to Zacharia Kangethe Njengo"*.

3. The petition of appeal raises *three* grounds: First, that the sentence was harsh and excessive; secondly, that the evidence was contradictory or based on hearsay; and, lastly, that a number of witnesses who witnessed the attack never took to the stand.

4. At the hearing of the appeal, learned counsel, *Mr. Gacheru,* opted to argue *only* the first two grounds.

5. The appeal is contested by the Republic. Learned Prosecution Counsel submitted that all the ingredients of the offence were proved beyond any reasonable doubt. He also submitted that the sentence was well within the law.

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.

7. The complainant (PW1) told the lower court that he was enjoying a drink at a bar at Gakurwe when the appellant sauntered in at 9:00 p.m. The complainant *knew* the appellant as a resident of the village. He demanded a drink from the complainant. The latter declined. When the appellant persisited, PW1 told him that he was short of cash.

8. The appellant left the bar at about 10:00 p.m. At about 10:30 p.m., the appellant accosted the complainant 300 metres from the bar. The appellant told him he would *"teach him a lesson"*. The appellant tried to drag away the appellant but he was repulsed by three women. The three women were described by the appellant as *"Mama Wangui, Mama Mwangi and Waititu's wife"*. None of them testified at the trial.

9. PW1 said that before he got to his home, the appellant re-appeared brandishing a *panga*. The complainant tried to block the *panga* with his *right* hand. He sustained a cut on the hand. He managed to run away into his compound. He informed his mother (PW2) who took him to Kiria-Ini Mission Hospital. By the time he reached the hospital, he was unconscious. He was admitted for two days.

10. PW2 said the complainant's clothes were soaked in blood; and, that "his *left* hand was cut". PW2 and her husband reported the matter to Kiria-Ini Police station. PW2 confirmed the appellant was their neighbour.

11. PW3 was Ronah Waithima. He is a clinical officer at Kangema Hospital. He produced the P3 form made by his colleague, Robert Mwangi (exhibit 2). The P3 was based on the doctor's notes from Kiria-Ini Mission Hospital. The x-ray films confirmed a fracture and cut on the *left* forearm. The patient was put on an arm sling and *Plaster of Paris*. PW3 classified the injuries as *maim*.

12. On 29th January 2016, the appellant was arrested by Police Corporals Rop (PW4) and Dekow and booked into Kiria-Ini Police Station.

13. When the appellant was placed on his defence, he gave an *unsworn* statement. He said the appellant was his friend. He said that the complainant hit him inside the bar knocking out his two teeth. He said he hit the complainant in defence. He said there were witnesses but they declined to testify on his behalf.

14. I agree with the learned counsel for the appellant that there was conflicting evidence. Whereas the complainant said he was cut on the *right* hand, PW2 and PW3 said the injuries were on the *left* fore arm. But the appellant admitted he hit the complainant with an object. I do not think the discrepancy was material. In any trial, there are bound to be such discrepancies. See *Joseph Maina Mwangi v Republic*, Court of Appeal, Criminal Appeal No. 73 of 1993.

15. Like I stated, none of the three women who witnessed the attack testified. But that ground of appeal is without merit: Under section 143 of the Evidence Act, no particular *number* of witnesses was required to *prove* the charge.

16. Was the evidence at the trial *sufficient?* My answer is in the *affirmative*. The complainant *knew* the appellant: They were neighbours. That fact was confirmed by his mother (PW2). Although the incident took place at night, the complainant and appellant had spent considerable time at the bar. The complainant *positively* identified the appellant as the person who accosted him outside the bar; and, who eventually cut him with a *panga*. The injuries to his hand were *corroborated* by PW2; and, by the *medical evidence* from PW3. The appellant *conceded* that he hit the complainant with an object albeit in self-defence.

17. The alleged fight between the appellant and the complainant *inside* the bar is a red herring. Like the learned trial magistrate, I did not believe it. The appellant was merely peeved by the complainant's refusal to buy him a drink. The appellant overeacted by ambushing and cutting the complainant with a *panga*.

18. I thus find that the appellant was properly convicted of the offence of *causing grievous harm* contrary to section 234 of the Penal Code.

19. I will now turn to the appeal on *sentence*. Section 354 (3) of Criminal Procedure Code 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"*.

20. 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……The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence."*

21. The learned trial Magistrate considered that the appellant was a *first offender* and the sole bread winner for his family. He pleaded for *leniency*. The learned trial magistrate found that the offence called for a *deterrent* sentence.

22. Despite the fresh clamour for leniency, this was a *felony*. Section 234 of the Penal Code provides that any person who commits grievous harm to another is liable to imprisonment for *life*.

23. The vicious attack on the complainant was unwarranted. But considering that the appellant was a *first offender*, the sentence of *twenty years* was in the circumstances *too* harsh.

24. I will allow the appeal on sentence. The sentence passed against the appellant is *set aside*. The appellant shall now serve *four (4) years imprisonment*. For the avoidance of doubt, the term of imprisonment *shall* take effect from *2nd September 2016*, the date of his original conviction.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **MURANG'A** this 19th day of September 2018

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant.

Mr. Gacheru for the appellant.

Ms. Otieno holding brief for Mr. Mutinda for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.