REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 21 OF 2016

WILSON KYALO MWENDWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from the Sentence in **Kitui Chief Magistrate's Court Criminal Case No. 653 of 2013** by **E. Boke P M** on **24/03/16**)*

J U D G M E N T

1. **Wilson Kyalo Mwendwa,** the Appellant, was charged with the offence of **Attempted Murder** contrary to **Section 220(a)** of the **Penal Code.** Particulars of the offence were that on the **21st** day of **Otober, 2013** at about **7.15 p.m.** at **Site Estate, Township Sub-Location, Township Location** in **Kitui County,** unlawfully attempted to cause the death of **Martha Mwende Mbulungo** by cutting her three times on the head, breast and cut off her hands and the wrist.

2. In the alternative he faced a charge of doing **Grievous Harm** contrary to **Section 234** of the **Penal Code.** Particulars of the offence were that on the **21st** day of **Otober, 2013** at about **7.15 p.m.** at **Site Estate, Township Sub-Location, Township Location** in **Kitui County,** unlawfully did grievous harm to **Martha Mwende Mbulungo.**

3. Facts of the case were that on the **21st** day of **October, 2013, Martha Mwende Mbulungo** (PW1) the Complainant was at home with her mother PW4 **Mary Joseph Mbulungo** and sister, PW3 **Agnes Musenya Mbulungo.** At about **5.30 p.m.** she escorted **Agnes** who was going back to school. While at **Kunda Kindu Stage** the Appellant talked to her on phone seeking to see her. They met along the Ginnery Road. As they walked along the **Resort Club Road** towards the District Hospital she got tired and sat on some bricks at a construction site as the Appellant stood behind her. All over a sudden an object hit her on the top part of her head. She asked the Appellant what was happening only to hit again. She ran and fell. She managed to see the Appellant who had a panga cut her thrice on the head then hands as she tried to shield herself. She was left for dead. She attempted to walk home but had dizzy spells and fell down. She was rescued by a passerby who notified her family and teachers. She was taken to Kitui District Hospital, where she was admitted for 2 months. Thereafter she was moved to Nairobi Women Hospital and admitted for two (2) weeks. The Appellant was arrested and a panga and T-shirt were recovered. Investigations were concluded and the Appellant was charged.

4. When put on his defence the Appellant stated that on the material date he was away in Lower Yatta at his grandparents' home. That he returned home at **8.45 p.m.** as he was to sit for his form four examination the following day, the **22nd** day of **October, 2013.** He found his father **Samuel Kyalo,** mother **Florence Kyalo** and one **Agnes Muio** at home. While studying he heard voices. They were police officers who arrested him.

5. The learned trial Magistrate considered evidence adduced and reached a finding that the Appellant did commit the act that resulted into the injuries that the Complainant sustained. She found him guilty of the alternative count, convicted and sentenced him to **life imprisonment.**

6. Aggrieved by the conviction and sentence he appealed on grounds that:

- **Section 150** of the **Criminal Procedure Code** was violated.
- Relevant matters were not taken into account when the alibi defense was rejected.
- Convicting on the alternative count instead of the main charge was erroneous.
- The charge was defective.
- The learned Magistrate failed to appreciate that there was no eye-witness to the act.

· Evidence adduced was inconsistent and contradictory.

7. The Appellant canvassed the Appeal by way of written submissions which he highlighted during hearing and added that his constitutional rights were violated.

8. In response the State through learned Counsel **Mr. Mamba** orally opposed the Appeal. He urged that the Appellant was at the scene of the incident. That his rights were not violated. That he committed the offence and fled.

9. This being the first Appellate Court, I am duty bound to re-evaluate and re-consider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. **(See Okeno vs. Republic (1973) EA 32).**

10. It is argued that the Court violated **Section 150** of the **Criminal Procedure Code** which provides thus:

> ***"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:***
>
> ***Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."***

11. It was the contention of the Appellant that the Court should have called vital witnesses like **Jeremiah Munyalo** and **Hellen,** the motorcycle man and **Mrs. Kilonzo,** PW3's cousin **Maundu,** PW2's sons **Mbiti** and **Mwanzia, Mrs. Kamau, David Wambua, Emmanuel,** the Bodaboda rider and the village elder who were mentioned in the proceedings. This, according to the Appellant would have established that they existed and that the Court would have been justified in concluding that the problem emanated from a love affair.

12. In response the learned State Counsel urged that the Prosecution called some witnesses namely PW1, PW2, PW3 and PW5 who were consistent.

13. In the case of **Keter vs. Republic (2007) 1 EA 135** the Court stated thus:

> ***"The prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."***

14. In the case of **Kihara vs. Republic (1986) KLR 473** the Court of Appeal stated that:

> ***"The prosecution is not compelled to call as many witnesses as there could be as what matters is not the number of witnesses but the best sound evidence that can be given in court. It would have been pointless to call witnesses who did not know what had happened between the Appellant and deceased."***

15. In her testimony the Complainant stated that the Appellant was within their neighbourhood having visited **Jeremiah Munyalo** but he did not find him. He then requested her (Complainant) to take him to **Hellen's** place to take his medicine.

16. Further she stated that after she was injured she managed to go to the plot nearby where she screamed in an endeavour to get assistance but no one came out. Consequently she moved to the 2nd plot and lay down. It is there that she saw a motorcycle passing and she called the cyclist. The person entered the plot and people came out. She identified **Mrs. Kilonzo** her teacher amongst them who was called after she (Complainant) gave the people her cellphone number and that of her mother. The motorcycle operator left them saying he was going to the police while her teacher **Mrs. Kilonzo** called the taxi that took her to hospital. **Maundu** was an individual who was being served food by PW3 when PW1's phone rang. PW2 (PW4) **Mary** the mother of the Complainant stated that on receiving a phone call she got the information about what had befallen the Complainant. She was with her son **Mbiti** and after they reached the scene she identified one **Mwanza** of Kitui County Council and the Complainant's teacher as people who were present. **Mr. Kamau** was mentioned by the Complainant as the person who was with **Mrs. Kilonzi** her deputy head teacher. PW3 stated that the next day she heard their mother crying and she told their uncle **David Wambua** that the Complainant's hands had been cut. PW6 **No. 36949 P C Maurice Ogada** on cross examination gave the names of **Wambua** and **Emmanuel** as people who reported the incident. In his evidence in chief PW6 stated that he re-arrested the suspect who was with the village elder, a "bodaboda" man and the suspect's parents.

17. The Appellant questioned what kind of evidence these persons would have tendered had they been called to testify. These individuals did not witness the act of maiming the Complainant. They were mentioned as having featured in the course of the unfolding events. It is not in doubt that as a result of the injury the Complainant sustained her mother who testified was informed and she reached the scene of the incident. That she was taken to hospital, the matter was reported to the police and subsequently the Appellant was arrested. The charge could still be established without their evidence.

18. The power bestowed upon the Court to summon witnesses is discretionary. The Court can only exercise that power if their evidence is essential to assist it reach a just decision. Where their evidence is not essential as in the instant case, failure to call them was not fatal to the Prosecution's case.

19. The learned Magistrate is faulted for acting and convicting on a charge that was defective having not disclosed the elements or ingredients of the charge. The charge was grievous harm. The particulars of the offence were indicated thus:

> ***"On the 21st day of Otober, 2013 at about 7.15 p.m. at Site Estate, Township Sub-Location, Township Location in Kitui County, unlawfully did grievous harm to Martha Mwende Mbulungo."***

Section 234 of the **Penal Code** provides thus:

> ***"Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."***

A charge sheet can only be defective if it does not state the essential ingredients of the offence **(See Yosefa vs. Uganda (1969) EA 236; Sigilani vs. Republic (2004) 2 KLR 480).** The ingredients of the offence were stated. Evidence was tendered to establish what amounted to grievous harm which enabled the Appellant to fully participate in the trial having prepared for his defence. In the premises the charge was not defective.

20. It is argued that there were no eye witnesses. That a witness may be honest but mistaken a fact that the Court should have considered and acquitted the Accused. **Section 143** of the **Evidence Act** provides thus:

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

21. In other words the Appellant was arguing that the evidence of the Complainant should have been corroborated. The aforestated provision of the law clearly shows that there is no requirement for evidence to be corroborated, what the Court is expected to do is to be cautious and expressly state so.

22. PW4 **Mary Joseph Mbulungo,** the mother of the Complainant saw the Accused at their place of residence at **3.00 p.m.** on the material date at their neighbour's house. He talked to her seeking to know where he would find her neighbour **Jeremiah.** Thereafter, he saw him talking to the Complainant prior to leaving. In the evening the Complainant escorted **Agnes,** PW3, who was supposed to go back to school. While on the way a person kept calling the cellphone of the Complainant who divulged that it was the Appellant.

23. However at the point of being injured the Complainant was alone. She testified that she met him after **7.00 p.m.** at a construction site near Kitui District Hospital. They talked and she told him that she was tired hence sat down prior to being hit. On being cut on the head the 2nd time she turned and saw her assailant it was the Appellant who was holding a panga. She attempted to run but fell into a trench. He caught up with her and assaulted her further by cutting her upper limbs. He only left on seeing that the Complainant was overwhelmed.

24. The Appellant was stated to have been a member of the same church the Complainant used to attend and her boyfriend therefore she could not have been mistaken as to his identity.

25. It is submitted that there were inconsistencies and contradictions in the evidence adduced. It was stated in the case of **Twehangane Alfred vs. Uganda Criminal Appeal No. 139 of 2001 (2003) UG CA** that not every contradiction warrants rejection of evidence of a witness. The Court stated thus:

> ***"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."***

26. It is stated that the record shows that PW5 stated that it was the girl who told him about her assailant while PW6 stated that it was PW5 who told him which in his view was a contradiction. That there was a contradiction regarding the colour stripes of the T-shirt that the Appellant wore. The Complainant stated that the Appellant was wearing a white and black stripes T-shirt. While PW6 recovered a red T-shirt that was wet having been washed. The Appellant also questioned the time of the alleged offence. He argued that it was stated it was **7.15 p.m.** and **7.30 p.m.** respectively. These were minor contradictions that the learned trial Magistrate was right in disregarding.

27. The Appellant came up with the alibi defense which he argues that was rejected, the Magistrate having not taken into account relevant matters. The Appellant having come up with the defense of alibi he had no duty of proving that alibi **(See Ssentale vs. Uganda (1968) EA 36).** The duty was upon the Prosecution to disapprove the alibi and prove beyond reasonable doubt that the Appellant was guilty **(See Wangombe vs. Republic)1976 – 80) 1 KLR 1683).**

28. It is the Court that is faulted for rejecting the defense without cogent reasons. In dismissing the defence the Court stated that the Appellant may have gone to Lower Yatta on the material date but at **3.00 p.m.** and **7.00 p.m.** he was within Kitui. His evidence was that he visited his grandparents in Lower Yatta and returned home in the evening. DW2 **Florence Kyalo** his mother stated that he returned home at **8.45 p.m.** having visited his grandparents at Lower Yatta. DW **Agnes Muio** stated that she was at the home of the Accused when he arrived at **8.45 p.m.** Evidence adduced by the defence proves the fact that the Appellant was away from home from morning and he returned at **8.45 p.m.** His parents believed he was away in Lower Yatta. However, the Prosecution did prove that between **2.00 p.m.** and **3.00 p.m.** he was at the house of the Complainant's neighbour and after he failed to find him at home he talked to PW4 and the Complainant. PW1 was the girlfriend of the Appellant, she could not have been mistaken as to his appearance and verbal communication therefore the Prosecution discharged its duty of disapproving the alibi defense put up by the Appellant.

29. The learned Magistrate found the Appellant culpable of the offence of grievous harm which was an alternative charge.

30. The Appellant was accused of causing grievous harm to the Complainant which is defined by **Section 4** of the **Penal Code** thus:

> ***""grievous harm" means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense;"***

31. The Complainant was examined by PW3 **Doctor Patrick Mutuku.** She had injuries thus:

- Degloving injury of the right fronto – temporal parietal area.
- A cut on the left breast measuring **7cm x 1cm.**
- Right elbow joint multiple fractures with severe cut wounds.
- Left elbow severe wounds.
- Cuts on the left shoulder, both hands, non viable and below elbow and amputation had to be done.

32. She was admitted in hospital where grafting and treatment of the wounds was done. The degree of injury was assessed as grievous harm. These were life threatening severe injuries.

33. It was stated that the Appellant was not happy with the Complainant who had declined to have an intimate sexual relationship with him. His action was therefore unlawful and he acted deliberately.

34. Regarding the Appeal on sentence. For this Court to interfere with the sentence, it must be demonstrated that the learned trial Magistrate disregarded material facts, or considered irrelevant facts and the sentence imposed was manifestly harsh such that the principles regarding sentencing were not taken into consideration. **(See Ogolla s/o Owoura vs. Republic (1954) EA 270).**

35. The law provides for the sentence of upto life imprisonment. However the Appellant was a first offender, a young adult, who however was not remorseful he simply shook his head when granted the opportunity to mitigate. In the circumstances I confirm the conviction, set aside the sentence imposed and substitute it with a sentence of **15 years imprisonment** to run from the date of conviction.

36. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **20th** day of **September,** 20**18.**

L. N. MUTENDE

JUDGE