REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL

NO. 84 OF 2017

BETWEEN:

BRAISON MWANYAMA TOLE.....APPELLANT

and

REPUBLIC.....RESPONDENT

JUDGMENT

1. The court has before it an Appeal against Conviction and Sentence. The Appellant BRAISON MWANYAMA TOLE was convicted on 7th September 2017 of the offence of causing grievious harm by the Senior Principal Magistrates's Court in Wundanyi Taita Taveta in ***Criminal Case No 81 of 2017*** under ***Section 234 of the Penal Code***.

2. The particulars of the offence were that on the 20th day of February 2017 at around 6.45pm at Sengenyi village Sagasa Sub Location Werugha Location within Taita Taveta jointly with others not before the court willfully and unlawfully did grievous harm to Livai Mwasambo. The Appellant was also charged with the lesser offence of causing actual bodily harm. He was convicted of the more serious offence.

3. The Appeal was admitted for Hearing before one Judge on 18th January 2018 by Hon. Jacqueline Kamau J.

4. The Petition was filed on 17th October and the Grounds of Appeal seem to follow the standard form emanating from Manyani Prison. They are:

> *1. " That Unless I the appellant invokes section 349 of the CPC in filing the same, I the appellant in this appeal would stand to suffer grave injustice.*
>
> *2. That the pundit trial magistrate erred both in law and facts by failing to consider that the charges were incurable defective.*
>
> *3. That the learned trial magistrate erred in law and facts by relying on incredible evidence from a single witness which was insufficient to sustain a conviction.*
>
> *4. That the learned trial magistrate erred in law and facts by relying on inconsistency and contradictory prosecution adduced evidence c/sec 63 (1) (c) of the evidence act.*
>
> *5. That the learned trial magistrate erred in both law and facts by failing to consider that the sentence imposed was manifestly harsh and excessive in all the circumstances c/s S.O (2) (p) of the constitution.*
>
> *6. That it is utmost important that this application be heard and determined."*

5. On 7th February 2018 the Appellant filed an amended petition and Grounds of Appeal which state:

> *1. "THAT the learned trial magistrate erred in law and in fact by relying on the sole evidence of the prosecuting witness the*

complainant who was drunk and driven by intoxication at the time of the alleged offence.

2. THAT the learned trial magistrate erred in law and fact by relying on inconsistent evidence of the investigating officer who did not carry out thorough investigations to be requisite standard.

3. THAT the learned trial magistrate erred in law and fact by convicting me without considering that there was no positive identification, hence prosecution's case was based on presumption inter alia that the trial magistrate failed to consider that the alleged identification was done in darkness hence leading to possibility of mistaken identity.

4. THAT the learned trial magistrate erred in law and fact by sentencing me to a harsh sentence without considering the mitigation circumstances.

5. THAT the learned trial magistrate erred in law and fact by convicting me without considering that no exhibit was recovered from the Appellant.

6. THAT the learned trial magistrate erred in law and fact by convicting the appellant from proceedings that are unconstitutional in breach of article 50(2) c of the Constitution.

7. THAT the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant without considering the prosecution totally failed to prove its case beyond reasonable doubt."

6. The Appellant and Respondent have filed their written submissions and the Appellant filed further submissions. Neither party wished to highlight their submissions. In hearing on first Appeal, the Appellate Court is charged with the Responsibility of considering the evidence afresh and re-evaluating such evidence.

7. In summary the Appellant argues firstly that the evidence identifying him as the perpetrator was unreliable. He claims the Complainant, in other words his victim was drunk and therefore unable to identify him satisfactorily. The argument for the State is that the evidence of the Complainant was not simply a matter of identifying but a matter or recognition. The Authority of ***M Riungu V Rep (1983) KLR 455***. Sadly, both sets of Written Submissions attempt to re-visit the trial and introduce new evidence and arguments not raised at trial. The State even goes as far as attempting to undermine the evidence of its own witness namely PW2. The record does not show that there was any application to have this witness declared an hostile witness. In the circumstances those arguments carry little weight now. The Appellant argues that there was no physical corroborating evidence for example the implement used to cause the injury.

8. The evidence that is before the Court is the oral evidence of the Complainant and the medical evidence comprising the P3 Form, the evidence of Dr. M. Machi and the photographs and treatment notes. From that evidence there can be no doubt that the complainant suffered injury. Further there can be no doubt that the injury was caused by a sharp object being used to cut through the skin of the penal shaft above and below in the scrotal area) to expose the flesh. The wound resulted in blood loss, of that there can be no doubt. The medical records show that there will be the need for corrective surgery. In the circumstances the characterisation of the wounding as grievous harm is correct.

9. Further, it is inconceivable that the Complainant inflicted that injury on himself. It must have been done by someone else.

10. The Complainant has stated on oath that the persons who inflicted the injury were the Appellant and two others. He identified him by recognising them. The contact was not fleeting but long enough for the perpetrators to remove his clothing, hold him down and cut him. They then dragged him around on his back. That is corroborated by the medical records of bruising on his back. It was co joint enterprise.

11. Under cross-examination PW1 re-asserted that the Appellant was holding him while Mwatika cut him. In his own Defence the Appellant gave sworn testimony. He claimed the denied the offence. He confirmed that the Complainant is mentally stable. He confirmed that the Complainant knows him well and it would not mistake him for someone else. He denied cutting the Complainant but he did not deny holding him down while someone else did the cutting.

12. The only evidence that undermines the identification is the evidence of PW2 Daften Mwaluma Mwambo. He says he found the Complainant on the road and they walked to the home of Saulo Mwakina. They then went to the Sengeloko dispensary, then Wesu hospital until eventually they reached Ikanga hospital in Voi. He also states that the complainant was drunk and unconscious at the time. In relation to being unconscious that evidence is clearly untrue. How does an unconscious person tell somebody what happened to them in other words speak coherently to relate events and then undertake all the travelling to the various hospitals until he was treated. In the circumstances the remainder of PW2's evidence should be treated with caution. The state considers these inconsistencies to be minor. The evidence of drunkenness is not corroborated. Neither the other witnesses who saw the complainant nor the medical evidence makes any mention of drunkenness. The evidence of PW3 demonstrates the PW1 retold his story and identified all three perpetrators consistently with the first telling. The medical evidence records NO notes that the medication should not be mixed with alcohol. Therefore the evidence of PW2 is deemed unreliable and untrue. His motives for perjuring himself are not for this judgment.

13. The Appellant also argues that he did not have a fair trial. The proceedings are before the Court and the absence of the required procedure is not readily apparent. The Appellant argues that he did not receive the witness statements. The Appellant does not appear in the proceedings to have requested witness statements. Further he did not cross examine the investigating officer on whether or not the statements ever came into existence. In the circumstances there is no evidence before the court that any statements existed. In light of the circumstances of the investigation and the failure to produce the other perpetrators, this court can make no assumption as to the standard procedures being followed.

14. The Appellant has also appealed against the sentence. He argues 30 years imprisonment is too harsh. He states that he is a young man

and has no previous convictions. The Appellant does not believe that the offence committed justifies such a high sentence.

15. Before the court will interfere with a sentence it must be satisfied that the lower court was wrong in principle. It is not sufficient that the Appellate tribunal would have applied a different sentence ***(Macharia vs R).***

16. ***Section 234 of the Penal Code*** provides for a maximum sentence of life imprisonment. The Prosecution recognises that the Appellant is a young man and he is a first offender. In fact there is no evidence before the court for either assertion. By way of analogy the state cites the case of ***Simon Kipkosgei Samoei (2017)*** where the Accused had severed the hand of the Complainant and the Court of Appeal reduced the sentence from life imprisonment to 15 years. The submissions neither refer to the matters the Court of Appeal took into consideration nor annexe a copy of the authority.

17. In the circumstances this court is not satisfied that the sentence is excessive. The Appellant and his cohorts ambushed the complainant on his way home from work. They subjected him to serious injury and humiliation. There was previously no bad blood between them. Therefore for a person to behave in such a way towards another without any provocation raises the question of whether or not society at large needs protection from the Appellant. The type of injury inflicted carries suggestions of a ritualistic punishment. Again there is no evidence before the Court of that. However, the punishment must fit the crime. In addition the Court must consider whether there are any prospects of reform and/or rehabilitation. For those reasons it is clear that a custodial sentence is appropriate and for whether damages should be ordered.

18. For those reasons the Appeal is dismissed. However the Court is satisfied that the Lower Court did not give sufficient consideration to the question of sentence. This Court will therefore review their sentence suo motto.

Order

1. Appeal dismissed

2. Probation service to prepare a report on Appellant within 28 days including victim impact assessment and Criminal Records Bureau Report.

3. List for Hearing on 11th December 2018. Summons do issue for the attendance of:-

   a. Chief of Area

   b. Probation officer on that date.

Order accordingly

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED in Voi on this the 16th day of October 2018.

In The Presence of :

Court Assistant: Josephat Mavu

Appellant : In person

Respondent: Ms Anyumba