



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO. 67 OF 2017

BETWEEN:

JAMES KAVISHA.....APPELLANT

and

REPUBLIC.....RESPONDENT

JUDGMENT

(An Appeal from the Judgment of G. K. Kimanga delivered on 12th July 2017 in the Senior Principal Magistrates Court in Taveta)

1. The Appellant before the Court was convicted of the offence of causing Grievous Harm Contrary to **Section 234 of the Penal Code**. He was convicted under **Section 215 Criminal Procedure Code** accordingly. The Senior Resident Magistrate sentenced the Accused to a custodial sentence being 10 years imprisonment.

2. The Appellant was charged with Causing Actual Harm Contrary to **Section 234 of the Penal Code**. The particulars of the charge were that “on the 23rd day of April 2016 at around 2200 hours at Msenjoni village within Taita Taveta County he unlawfully did grievous harm to Leonard Jacob.

3. On 25th April 2016 the Appellant was arraigned before the Resident Magistrate Kitur when a plea of “not guilty” was entered. The Court also ordered that witness statements be supplied to the Accused. On 10th May 2016 the Charge was substituted with an amended charge sheet so the Appellant was charged with Causing Grievous Harm. Again he denied the charge. Before that he had pleaded guilty to the lesser offence of actual harm.

4. The Appeal was admitted for Hearing by Hon J. Kamau J on 30th November 2017. The Petition was filed on 4th September 2017. The Grounds relied upon are:

1. *That I pleaded not guilty to the charge*
2. *That PW2 Hosea Mwamburi who purportedly was the eye/key witness to this matter never appeared before the honourable court for cross-examination*
3. *The investigating officer did a shoddy job as far as the alleged matter of grievous harm is concerned, he never visited the scene of crime.*
4. *Your honour, the P3 form states clearly that the complainant went for medical on the 25th April 2016, while again on the charge sheet, the incident purportedly took place on the 23rd April 2016.*
5. *Your honour, I am the sole breadwinner of my family after my parents demise.*
6. *Supplementary grounds of appeal to follow when and if furnished with a certified true copy of the proceedings of this case.*
7. *In the view of circumstances of this case, the custodial sentence of 10 years is harsh. Severe and manifest excessive punishment.*
8. *Your honour, I beg your honourable court to reduce the conviction, give option of fine, quash the conviction or order retrial or*

whichever your honourable may deem fit.

9. That in the event of my humble appeal my find merits, I would wish to be allowed to be present during the hearing of my appeal.

5. The Appellant filed his Written Submissions on 6th February 2018. He appeals against both conviction and sentence. He has also filed amended grounds after receiving a copy of the proceedings from the Lower Court. They are:

1. That the learned trial magistrate erred in both law and fact in convicting and sentencing me while not considering that, I the appellant was not assigned an advocate by the state as required by the law since I am a layman in law.

2. That the learned trial magistrate erred in both law and fact in convicting and sentencing me while not considering that the burden of proof was not discharged beyond reasonable doubt.

3. That the learned trial magistrate erred in law and fact in not considering that I the appellant was a first offender hence deserved an alternative sentence.

4. That the learned trial magistrate erred in law and fact in not considering my defence evidence which created a reasonable doubt to the prosecution whereby the benefit ought to have been given to me.

6. The Respondent (the State) filed Written Submissions on 27th February 2018. The Appellants further Submissions were then filed on 7th March 2018.

7. Firstly the Appellant complains that he was not allocated an Advocate at public expense. Secondly he argues that the Prosecution failed to discharge the burden of proof in proving its case beyond reasonable doubt. The Resident Magistrate found otherwise but it is the function of this Appellate Court to review the evidence and evaluate it afresh notwithstanding that it has not observed the witnesses giving due allowance for that fact.

8. The Trial Magistrate heard from four Prosecution witnesses. PW1 was the Complainant. He related that on 23rd April 2016 at around 10.00pm that is 2200 hours he was asleep in his home at Msenjoni village. Someone broke in and cut him with a panga. He identified his assailant as James Kavisha the Appellant. The assailant cut him on the forehead and ran away but returned at 6 on the next morning. He said that prior to the incident the Appellant had been his neighbour for some time so he knew him. The attack was witnessed by Mamboleo who did not appear as a witness for either party although he recorded a statement and took the Complainant to hospital. The panga used was not recovered. PW1 also gave evidence that the Appellant's wife met him to ask for forgiveness.

9. The evidence of the grievous harm comes from PW2 – Dr. Patterson Mwapulu who confirmed the Complainant was aged 53 years and he had been assaulted with a weapon. He had a vertical cut about 5cm long. He was admitted and treated. Two of the Prosecution witnesses Mamboleo Hasan and Hamisi Kombo did not attend. The Investigating Officer believed there had been interference with witness by the Appellant family.

10. The Appellant gave unsworn evidence in his Defence. He claimed he was framed by Mamboleo Hosea and Hamisi Kombo. They are said to have met him on the road or taken him to the police. Neither has come forward as a witness for the Defence. Mamboleo was prepared to give a statement to the police implicating the Appellant as the assailant.

11. The medical evidence confirms that there was an injury falling within the categorisation of grievous harm. PW3 Elizabeth Nasumani corroborates that the Complainant was injured and she arranged for Mamboleo to take him to hospital. She relates what Mamboleo told her but that is hearsay and therefore inadmissible in Criminal proceedings. In his Defence the Appellant suggested he had been elsewhere at the time of the offence. The Learned Trial Magistrate considered that to be raising an alibi. However the Appellant was unable to prove his alibi to the required standard because in part no witnesses attended to corroborate his version.

12. In the circumstances the Appellant was convicted on the evidence of the Complainant. There is no dispute that they both knew each other. Therefore the evidence of identity was recognition. There was no evidence put forward to suggest that the evidence of PW1 was not credible. He did however say the Appellant broke into his home. The Appellant was not charged with robbery with violence but only the assault.

13. In the circumstances the Appeal raises no basis for this Court to interfere with the Conviction.

14. In relation to Sentence, **Section 234** of the **Penal Code** provides for a maximum sentence of life imprisonment. The Appellant was sentenced to 10 years for what the Learned Trial Magistrate found to be an unprovoked act of aggression. There is no argument put forward to demonstrate to this Court that the sentence is manifestly excessive or otherwise given on an incorrect basis.

15. For those reasons the Appeal is dismissed. Conviction to stand. Sentence to stand.

Order accordingly.

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED ON THIS the 16th day of October 2018.

In the presence of:-

Court assistant – Josephat Mavu

Appellant: in person

Respondent: Ms Anyumba