REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 9 OF 2018

JULIUS MUREITHI KANUNU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Wajir Senior Resident Magistrate Criminal Case No. 472 of 2017 by Hon. A. K. Mokoross (RSM)

JUDGEMENT

1. The appellant was charged in the Magistrate's Court at Wajir with causing grievious harm contrary to section 234 of the Penal Code. The particulars of the offence were that on 7th September 2017, near Prison Canteen in Wajir East Sub-County within Wajir County unlawfully did grievious harm to George Ochieng Oyoko.

2. He denied the offence, and after a full trial, the trial court invoked section 179 (2) of the Criminal Procedure Code (Cap.75) and convicted him of the lesser offence of assault causing actual bodily harm contrary to section 251 of the Penal Code (Cap.63) and sentenced him to three (3) years imprisonment.

3. The appellant has now come to this court on appeal. He filed his initial appeal in February 2018, but before the appeal was heard, he filed an amended petition of appeal which he relied upon. He also filed written submissions.

4. The grounds of appeal in the amended petition of appeal are in summary as follows-

(1) The charge sheet was defective.

(2) The magistrate erred in convicting him while the prosecution failed to prove their case beyond reasonable doubt.

(3) His arrest was poorly instigated.

(4) The trial magistrate erred in convicting him without considering the contradictions in the prosecution witnesses' evidence.

(5) The medical evidence was dubious and uncertain.

(6) There was a vendetta between him and the complainant which was not considered in the judgment.

5. At the hearing of the appeal, the appellant relied on his written submissions which I have perused and considered. He elected not to make oral submissions.

6. A learned Principal Prosecuting Counsel Mr. Okemwa opposed the appeal and submitted that the prosecution evidence was consistent and that PW1 the complainant identified the appellant as the assailant and demonstrated the injuries suffered. According to counsel, the evidence of PW1 was supported by that of PW4 the Clinical Officer though the P3 form.

7. In addition, counsel submitted that PW2 rushed the complainant to hospital which confirmed the assault. Counsel felt that the appellant was lucky to be convicted of a lesser offence merely because the Clinical Officer described the injuries suffered as harm instead of maim. Counsel closed by stating that the sentence of three (3) years imprisonment was lawful and reasonable.

8. In response to what the Principal Prosecuting Counsel said, the appellant said that he was a visitor in Wajir and that there was a variation

between the dates of the incident, and it was not clear who had arrested him.

9. This is a first appeal. As a first appellate court, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not have the opportunity to see witnesses testify in order to determine their demeanor and give due allowance to that fact. See the case of **Okeno vs Republic [1972] EA 32**.

10. I have re-evaluated the evidence on record. The incident occurred at night, and the complainant PW1 George Ochieng Oyoko claimed in evidence in court that he knew the appellant as "Boyi".

11. It is clear to me from the evidence on record that the complainant suffered injuries, as the P3 form produced by PW4 Mohamed Mahat Mohamud a Clinical Officer at Wajir Referral Hospital demonstrated this.

12. The issue however, is how the injuries were inflicted and by who? From the evidence on record, two things stuck me. The first is the statement by PW1 the complainant that he knew the appellant as "Boyi". According to the complainant, immediately after the incident on 7th September 2017 at 8 pm PW2 Geoffrey Mureithi Kimunya a boda boda cyclist arrived at the scene after he called him. The said Geoffrey Mureithi Kimunya PW2 stated as follows-

> **"….when I got there I found him bleeding from the neck and from the left hand. I asked what had happened and he said he had been stabbed by a person he knew. I there (sic) took him home and later took him to hospital."**

13. Even in cross examination, this witness did not say that the culprit was mentioned or described by the complainant. In my view, if indeed "Boyi" injured the complainant that name or description would have been given by the complainant to PW2.

14. In addition, PW3 PC Wyckline Wanjala the investigating officer stated that when the report was made to him, no mention was made of the person who had assaulted or injured the complainant. In fact, according to this witness, the report was made on 8th October 2017 at 8 am which was slightly more than a month after the incident. In my view, had the complainant known that it was the appellant who had assaulted him, he would either have described him or given the name "Boyi" at least to the police on the first report. On these two testimonies I find that the prosecution did not prove that the appellant was the culprit.

15. The second reason why the prosecution in my view did not prove that the complainant was injured by the appellant is that the appellant was arrested because of another Criminal Case No. 473 of 2017, not because of the present case. PW3 the investigating officer did not participate in the arrest of the appellant and instead the complainant on 8th October, 2018 went to the police to make a complaint about his having been injured by the appellant, who was already in custody for another criminal case.

16. The persons or person who arrested the appellant also did not come to court to testify as to the reasons or circumstances under which they arrested the appellant. These were crucial witnesses who would have shed light on the reason for the arrest or whether it had any connection with the alleged assault against PW1 the complainant. As such prosecution failed to connect the arrest of the appellant to the incident herein.

17. In failing to call any witness to testify with regard to the reason and circumstances of the arrest of the appellant; the prosecution created a huge gap and ended up not connecting the appellant to the alleged injuries suffered by the complainant. It is also curious that the complainant took more than a month to go and report the incident to the police. In my view, the complainant had something to hide about the incident surrounding his injuries; otherwise he would have gone to the police and made a report the next day after the incident.

18. I thus find that the prosecution did not prove their case against the appellant beyond any reasonable doubt. The magistrate should not have convicted and sentenced the appellant. The conviction and sentence are not sustainable.

19. Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Garissa this 6th day of November, 2018.

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George Dulu

JUDGE