REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CRIMINAL APPEAL CASE NO. 41 OF 2017.

PETER WESUSA WAMALWA

alias PROTUS BUKHALA CHILINDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original sentence and conviction arising from Criminal Case No. 1009 of 2016 in the Senior Resident Magistrate's Court at Sirisia – L. N. Kiniale)

JUDGMENT

1. This is an appeal from the Senior Residents' Magistrate Court at Sirisia. The Appellant **Protus Wekesa Wamalwa** was charged with the offence of grievous harm contrary to **Section 234** of the **Penal Code**. The particulars of the charge were that on the 7th day of October, 2016 at about 2100 hours at Chongeywo Village, Chongeywo Location in Cheptais Sub-County within Bungoma County, he unlawfully did grievous harm to MARTIN WANJALA KHISA. At the end of the trial he was convicted and sentenced to serve 3 years in Prison.

2. Being dissatisfied with the outcome of the case the Appellant lodged an appeal on 7th April, 2017 against both conviction and sentence. In his appeal he raised five grounds in which he argued that the conviction went against the circumstances of the case and was based on hearsay and inconsistent evidence. He also complained that the learned trial magistrate did not consider his defence and mitigation and was unfair.

3. He elected to give oral submissions during the hearing of the appeal in which he did not address any of the grounds that he raised. Instead he merely continued to deny the office. He urged the court to reduce his sentence because his family is suffering in his absence.

4. Learned State Counsel Mrs. Njeru opposed the appeal on behalf of the state. She submitted that the evidence adduced in the trial court was not hearsay since the complainant himself testified as to what he had seen. That the complainant's evidence was corroborated by that of PW2 and the medical report.

5. On the sentence the learned State Counsel opined that the trial magistrate was lenient in the circumstances, since that offence for which the Appellant was convicted carries a sentence of up to life imprisonment. She urged the court to dismiss the appeal and uphold the conviction and sentence.

6. This being the court of first appeal, I have analyzed and reassessed the evidence adduced before the trial court afresh, to draw my own conclusions and reach my own findings. In so doing, I am alive to the

fact that I did not have the opportunity to observe the witnesses as they testified and I have made the necessary allowance therefor. See **Okeno vs. Republic [1972] E.A. 32.**

7. The learned trial magistrate framed two issues for determination being, whether the Appellant was assaulted on 7th October, 2016 and if so, who the assailant was. I will retain the same two issues for determination.

8. On the first issue the complainant's testimony was that on 7th October, 2016 at about 9.00 p.m. he was walking home to Chongeywo when a man pounced upon him and felled him with blows to the head and face. Whilst on the ground the man sat on him and continued to punch him with blows to the head and face using his bare hands and elbows.

9. PW2 testified that on 7th October, 2016 at 9.00 p.m. he was at home at Chongeywo Primary School when the complainant who was the school watchman came and reported to him that he had been assaulted. He noted that the complainant was bleeding on the left side of the chin and his right arm was injured. PW2 escorted the complainant back to the scene where they recovered one of the complainant's shoe and a ten shilling coin. He also escorted him to the village elder where they lodged a report.

10. PW3 Moses Makasi Maubi received the report of the assault the following morning from the complainant whom he visited at home. He found the complainant complaining of injury to his right shoulder and legs. The witness escorted him to the police to make a report and to the hospital at Kopsiro where he was treated and X-rayed.

11. More important was the evidence of Pw4 the Clinical Officer from Kopsiro Hospital who attended to the complainant on 8th October, 2016. He noted injuries to both upper limbs and to the right shoulder and bruises to the left and right knees. The injuries were about 12 hours old and had been caused by a blunt object.

12. PW4 assessed the degree of injury occasioned to the complainant as grievous harm because of the dislocation in the right shoulder as shown in the X-ray film. He noted that the Appellant would require surgery to repair the shoulder. The officer filled and signed the P3 form and produced it in evidence. The Appellant did not dispute any of this evidence in his defence during the trial or in his submission on appeal.

13. From the foregoing evidence, I find that the complainant was indeed assaulted on 7th October, 2016 as he stated. The question that then begs an answer is who assaulted the complainant and caused him grievous harm as set out above.

14. The complainant told the court that the time of the attack was 9 p.m. Before he was set upon, he heard a voice that he recognized as belonging to one Protus making noise ahead of him as he approached. Protus is the Appellant in the instant case. He said that he was able to recognize the voice because Protus is his brother-in-law and they grew up together. He announced to Protus that it was he the brother-in-law, who was approaching.

15. Without much ado, the Appellant set upon the complainant with blows to the face and head when he reached him. The Appellant called to his wife to bring him a machete to finish the job he had started. Instead, the Appellant's wife came out and tried to intervene by imploring him not to injure the complainant. The complainant managed to extricate himself and flee.

16. PW2 was the first person to whom the complainant reported the assault a few minutes later and he testified thus:

> *"Martin Wanjala our School Watchman at Chongeywo S.A Primary came and informed me that he had been assaulted by Protus"*

The Appellant contended that this witness hailed from far away in Malakisi and could not be trusted. I note however that the witness testified that he lived in the school compound where the complainant worked as a watchman and knew the complainant and the Appellant very well.

17. PW3 also testified that the report that he received from the complainant the next morning was that the Appellant had assaulted and injured him. According to PW3, the Appellant later came to tell him that he had indeed assaulted the complainant. This is however neither here nor there since it was not recorded as a confession in the requisite fashion. The testimony of the medical witness was also that the complainant was presented for treatment on 8th October, 2017 with a history of having been assaulted by a person known to him.

18. The Appellant's response to the foregoing was that he was framed and did not understand any of it as he was not involved in the matter at all. He gave his testimony without oath and without calling any witness but the court is alive to the fact that this being a criminal trial, the Appellant was under no burden to prove his innocence or at all. I must note that the trial court has refrained from using language that seems to suggest that the Appellant was required to prove his innocence as appears on the record herein.

19. The complainant testified that he was assaulted by the Appellant who was a person well known to him and whose voice he recognized as that of his brother in law. In the case of **Choge vs. R [1985] KLR 1,** this Court held that evidence of voice identification is receivable and admissible and it can, depending on the circumstances, carry as much weight as visual identification.

20. In receiving such evidence, however, care and caution should be exercised to ensure that the witness was familiar with the Appellant's voice and recognized it. The conditions at the time the recognition was made should be such that there was no mistake in testifying to that which was said and who had said it. See - **Karani vs. Republic [1985] KLR 290.**

21. I have duly warned myself of the dangers of basing a conviction on the evidence of a single identification witness in line with the holding in the case of **Roria vs. Republic [1967] EA 573** in which the Court of Appeal for East Africa held that: -

> **"A conviction resting entirely on identity invariably causes a degree of uneasiness…..That danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification." emphasis mine.**

From the foregoing, it is clear that this court can still convict on evidence of a single identifying witness if the evidence is sufficient and the court warns itself appropriately of that danger.

22. In the instant case and in view of the fact that the complainant and the Appellant were well known to each other, I find that there was a sufficient period of contact between the Appellant and the complainant at the scene to warrant a conclusion that the Appellant was identified by recognition. I also observe that PW1's report to the persons he came into contact with soon after the assault was consistent. PW2, PW3 and PW4 all testified that the complainant told that them it was the Appellant who had assaulted him.

23. On the severity of the punishment, the trial court called for mitigation from the Appellant and a Probation report before passing sentence. The court acknowledged that the Appellant and the complainant were relatives but that the Probation report did not favor a non-custodial sentence, hence the three year sentence.

24. Section 234 of the **Penal Code** provides that:

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

The punishment upon conviction, for causing grievous harm is therefore up to life imprisonment. The Appellant was sentenced to 3 years imprisonment which was fair in the circumstances. The High court will only interfere with the discretion of the trial court in sentencing if it is established that the trial court arrived at the sentence erroneously, or the sentence was excessive or illegal. None of the foregoing applies to this case.

25. Upon reassessing and analyzing the entire evidence, I find that the prosecution did prove its case against the Appellant beyond reasonable doubt and that the conviction was safe and the sentence lawful and merited in the circumstance. I therefore find the appeal is without merit and is consequently dismissed.

DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF OCTOBER 2018.

……..

L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 21ST DAY OF NOVEMBER 2018.

……..

S. N. RIECHI

HIGH COURT JUDGE