



REPUBLIC OF KENYA

IN THE HIGH COURT

AT HOMA BAY

CRIMINAL APPEAL NO. 26 OF 2015

BETWEEN

COLLINS OCHIENG OMONDI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. B.R. Kipyegon, RMin Senior Resident

Magistrates Court at Ndhiwa in Criminal Case No. 131 of 2015 dated 12th May 2015)

JUDGMENT

1. The appellant, **COLLINS OCHIENG OMONDI** was charged and convicted of the offence of causing grievous harm contrary to **section 234** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge were that on 11th October 2013 at Koguta Location of Ndhiwa District, Homa Bay County he unlawfully did grievous harm to **ROBERT ONONO ONYANGO**. He was convicted and sentenced to 10 years imprisonment.

2. The facts emerging at the trial were that on 11th October 2013 at about 11.00pm, the complainant (PW 1) was on his way to work as a security guard. The appellant suddenly emerged from a bush and attacked him with a panga and cut him on the left wrist and left ear causing him to become unconscious. The complainant was rushed to Ndhiwa District Hospital for treatment. PW 1 testified that before the attack, he had a torch which he flashed and saw the appellant whom he knew since childhood. He later reported the incident at Ndhiwa Police Station where the report was received by PC Joseph Katumo (PW 3) who confirmed that the report was made on 12th October 2012 at about 10.00 am. PW 1 named the appellant as the assailant and caused him to be arrested. PW 3 issued a P3 form to be filled at Ndhiwa District Hospital.

3. PW 2, a clinical officer at Ndhiwa District Hospital, examined PW 1 and confirmed that he had sustained an injury on the right hand which was swollen at the elbow joint and was stitched. He also noted that the left ear had a 6cm cut which was also stitched. He was of the opinion that the injury had been caused by a sharp object. He classified the injury as grievous harm.

4. APC Patrick Nairenge (PW 4) testified that on 14th April 2014, PW 1 came to Pala Koguta DO's Office and reported that someone known to him had attacked him. PW 1 led PW 4 and other officers to

the appellant's home in Wandati Village where he was arrested under warrant and brought to Ndhiwa Police Station.

5. The appellant in his sworn testimony denied the offence. His testimony was argumentative but in cross-examination, he stated that on 11th October 2013 at 11.00pm he was at home with his children. He admitted that PW 1 was his relative and that they were neighbours and he knew him very well hence he was perplexed that the charge was brought against him and they had no grudge.

6. The appellant appeals against the conviction on the basis set out in the grounds of appeal dated 16th June 2015. The appellant contends that the learned magistrate erred in convicting him yet there was no independent witness to support the conviction. In his written submissions, the appellant stated that the conditions for identification were not favourable. He also argued that the sentence was excessive. Mr Oluoch, counsel for the respondent, opposed the appeal and submitted that the appellant was recognized and that in this case corroboration of PW 1's testimony was not necessary.

7. It is not in doubt that the appellant was assaulted and suffered serious injuries that were confirmed by PW 2. The main issue is whether the appellant is the one who inflicted the injuries. This is a case dependent of the testimony of one witness identifying the perpetrator in difficult circumstances. Such evidence must be watertight before a court can return a conviction (see *Abdalla Bin Wendo & Another v R* [1953] 20 EACA 166, *Wamunga v Republic* [1989] KLR 42 and *Maitanyi v Republic* [1986] KLR 198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see *R v Turnbull* [1967] 3 ALL ER 549). This case was not a case of identification of a stranger but rather one of recognition as PW 1 knew the appellant hence his identification was more assuring. Even in such cases the court ought to exercise caution as mistakes can still be made in such circumstances (see *Anjononi & Others v Republic* [1980] KLR 59).

8. As I stated this was not a case of identification of stranger. PW 1 was attacked at very close range and he shone the light on the appellants face when he recognized him. At the material time PW 1 testified that he had a two dry battery torch which he was using as he was going to work as a night guard. Although he became unconscious after the attack, he was able to recall the appellant, report him to the police and direct the police to the appellant's home where he was arrested. I am therefore satisfied that it is the appellant who committed the felonious act. The conviction is therefore affirmed.

9. As to whether the sentence was excessive, I am alive to the general principle that the appellate court should only intervene in the sentence where the subordinate court disregarded a material fact, or considered irrelevant factor or that the sentence was manifestly harsh or excessive as to constitute an error of principle (see *Ogolla s/o Owuora v R* [1954] EA 270 and *Macharia v R* [2003] 2 EA 559).

10. The evidence is that the assault was deliberate and the resultant injuries serious. On the other hand the appellant was a first offender and having taken into account sentences imposed in similar circumstances and the need to ensure consistency in sentencing (see *Steven Omondi v Republic* HB HCCRA No. 93 of 2014 [2014]eKLR, *John Kasya & Another v Republic* MKS HCCRA No. 169 & 182 of 2008 [2014]eKLR, *Violet Mulayi v Republic* KKG HCCRA No. 115 of 2005[2007]eKLR), I therefore set aside the sentence and substitute it with a sentence of 6 years imprisonment.

11. Accordingly the conviction is affirmed. The sentence is reduced to 6 years imprisonment.

DATED and DELIVERED at HOMA BAY this 3rd day of March 2016.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.