REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 4 OF 2010

PATRICK NJOGU WACHIRA…….APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Being an appeal from the conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 78 of 2009 (Hon. J. Kiarie (SPM) on 26th May, 2010)

JUDGMENT

The appellant was charged with the offence of grievous harm contrary to **section 234** of the **Penal Code, Cap 63.** It was alleged that on 17th August, 2008 at Ithenguri village in Nyeri South District within central province, the appellant did grievous harm to James Muchoki Matai.

At the conclusion of the trial, the appellant was convicted and sentenced to serve fourteen (14) years imprisonment. He appealed against the conviction and sentence and in his petition which he filed in court 6th January, 2010, he raised the following grounds:

1. The learned magistrate erred in law and in fact in relying on the evidence that was not sufficient to sustain the conviction;

2. The learned magistrate erred in law and in fact when he did not comply with section 200 of the Criminal Procedure Code, Cap 75, Laws of Kenya;

3. The learned magistrate erred in law to have meted out the sentence of 14 years imprisonment without considering the evidence of PW1;

4. The learned magistrate erred in law by rejecting the appellant's defence without any reason;

5. The learned magistrate erred in law and in fact in relying on the evidence of PW1.

The 3rd and 5th grounds appear inconsistent but they are merely reproduced here as set out in the petition of appeal.

The evidence at the trial was that the complainant, **PW1,** was on his way home on 17th August, 2008 at 6 am from Gikuani Catholic church where he worked as a night guard when he was accosted by the appellant. The appellant attacked him with the sword he (the appellant) was armed with; he cut him on his left eye, stabbed him on the right side of the neck and cut him at the back, near his waist. The complainant cried out for help and the appellant ran away when a lady in the neighbourhood appeared,

apparently in response to the appellant's distress call.

Father Ezekiel Wambugu (PW3) of the Catholic Parish where the complainant worked came to his rescue; he took the complainant to the police and then proceeded to Mathari hospital for treatment. He remained admitted in hospital for three months and as a result of the injuries he sustained he was immobilised and could not move on his own. At the time of his evidence he could only move with the help of a wheel chair.

The complainant testified that he knew the appellant before because he was a person who resided within the area where the complainant worked. He also testified that the appellant alleged that he (the complainant) had reported him to the police and that is why he was attacking him.

The catholic priest who rescued the complainant and took him to hospital identified himself as **Ezekiel Thuita (PW3);** he recalled that on the fateful morning someone telephoned to tell him that the complainant had been beaten and was bleeding to death. He rushed to the where the complainant was and found him groaning in pain. One of his eyes had been gouged out; his back had also been stabbed. The complainant told him that the appellant had stabbed him; he went to the police with the complainant and later took him to hospital.

Laura Nyambura Kiroro (PW4) is the person that the complainant referred to as the lady in the neighbourhood who respondent to his distress call. She testified that on the material morning, she heard somebody scream and that he was less than 100 metres from her house. She rushed to the scene and found the complainant lying down, wounded, bleeding and groaning in pain. She knew the victim as guard at her catholic church. She rushed back to house to collect her phone and called the priest (PW3) and together they met at the scene.

The complainant was examined by Dr Dindi Musyoka who filled the P3 form in respect of the injuries he sustained; the P3 form was, however, produced by Dr **Cecilia Wanda Kariuki(PW2)** who testified that Dr Dindi was her colleague with whom she had worked for 2 years and that the time she testified he was on leave. She was conversant with his handwriting and signature.

The doctor's findings were that the complainant had sustained a head injury, a bleeding oblique cut over the left eye about 7cm, a sharp penetrating injury on the right side of the neck which was not deep and three cuts on the mid back. The complainant was not able to move on his own because of a spinal injury. The approximate age of the injuries at the time he was examined was 1 day and the probable type of weapon used was described as sharp. The complainant had received some treatment prior to being examined. The degree of injury was assessed as 'maim'.

The final prosecution witness was a police officer, **David Ali (PW5)** who testified that he was asked by the Officer in Charge of the Station to investigate the case. He testified that the appellant was arrested on 24th January, 2009 and when he interrogated him, he learnt that the appellant and the complainant had differences arising from the allegation by the appellant that the complainant had affairs with his wife. He confirmed having issued the P3 form that was filled and later produced in court by **Dr Cecilia Wanda Kariuki (PW2).**

When he was put on his defence the appellant opted to give a sworn testimony and denied the charge against him; in fact, it was his testimony that the complainant had on 13th April, 2009 told the police to release him because he was assaulted by other persons and not the appellant. The Officer in Charge of the station is alleged to have told him to give that information to court.

This was the evidence that was given at the trial and it has been necessary to plough through it as proffered before the trial court because this being the first appellate court, it is incumbent upon it to evaluate the entire evidence and come to its own conclusions on the findings of fact but bearing in mind that irrespective of whether its findings are consistent with those of the trial court, it is only the latter court that saw and heard the witnesses.(see **Okeno versus Republic (1972) EA 32).**

The first issue that should be disposed of at the outset is whether the court complied with **section 200 (3)** of the Criminal Procedure Code (Cap. 75) whenever it was necessary during the appellant's trial. This provision of the law normally comes into play whenever a succeeding magistrate commences the hearing of proceedings where part of the evidence has been taken by his predecessor in the matter; in such case, so the law provides, the accused person may demand that any witness who may have testified before the preceding magistrate be resummoned and reheard afresh by the succeeding magistrate; it is incumbent upon the succeeding magistrate to inform the accused of this right.

The trial record shows that the appellant's trial was conducted by three different magistrates and at every stage a new magistrate was seized of the trial, the appellant is recorded to have opted to have the case proceed from where the previous magistrate left. There is no suggestion whatsoever that the appellant ever applied to have any previous witness or witnesses recalled on any of these occasions. In these circumstances, the allegation that **section 200(3)** of the **Criminal Procedure Code** was not complied with is, in my humble view, far-fetched and without any basis.

Coming back to the offence for which the appellant was prosecuted, **Section 234 of the Penal Code** under which he was charged states as follows:-

> ***234.Grievous harm***
>
> ***Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.***

"Grievous harm" is defined in **section 4** of the **Penal Code** to mean *"any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense."*

The term “harm” has itself been defined in the same section to mean "*any bodily hurt, disease or disorder whether permanent or temporary.*"

According to the medical evidence, there is no doubt that the complainant suffered a serious bodily injury that was categorised as 'maim' which, from the P3 form admitted in evidence, means 'the destruction or permanent disabling of any external or internal organ, member or sense.'

The extent of the complainant's injuries shows that he suffered grievous harm as understood under **section 234** of the Penal Code and to this extent, the state proved its case beyond reasonable doubt.

The only question which the lower court was concerned with and which this Court, exercising its appellate jurisdiction, has to interrogate is whether the appellant was the complainant's assailant.

The complainant testified that the attack took place at 6 am in the morning and therefore there was sufficient day light for any person to identify or recognise another. He was able to see the appellant before he confronted and attacked him. The appellant is a person he knew before as one who lived in the neighbourhood; he knew his name and when **Ezekiel Thuita (PW3) and Laura Nyambura Kiroro (PW4)** came to his rescue, he specifically named the appellant as the person who had attacked him. This is the same information he gave to the police when he made his report about the attack.

It is apparent from the evidence of the complainant that he was clear from the very beginning who it was that attacked him. The conditions for positive identification or recognition were not difficult if one considers, for instance, that the complainant was confronted and attacked in broad daylight; both the appellant and the complainant struggled for sometime before the appellant overpowered him; the appellant was a person he was always familiar with. In such circumstances, the trial court was entitled to conclude that the conditions of identifying the appellant were all too favourable for the complainant to be mistaken as to the identity of his assailant; in fact, his was a case of recognition and not merely identification.

I am minded that the complainant was a single witness on recognition of the appellant and thus it is always incumbent upon the trial court to test the identification evidence of such a witness with the greatest care particularly where the circumstances for positive identification are difficult. This point is emphasised in **Wamunga versus Republic (1989) KLR424 where** the Court of Appeal, held at page 426 that:-

> ***"…it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

Long before the decision in *Wamunga Versus Republic case* the East African Court of Appeal had set the pace in this direction of the law concerning the evidence of single identification witness in **Abdala Bin Wendo & Another versus R (1953) 20 EACA 166** where it held as follows:-

> ***"Subject to certain well known exceptions it is trite that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error."***

Coming back to the present case, the trial court was satisfied with the evidence that the complainant knew the 1st appellant and the conditions in which he was recognised were favourable; my own evaluation of evidence does not lead me to any contrary opinion. There is nothing to suggest that the conditions favouring positive identification were difficult such that there was need for such other evidence to corroborate the complainant's testimony. I cannot find any fault with the learned magistrate's reliance on the complainant's sole evidence on recognition of the appellant as his assailant; the learned magistrate directed himself correctly on the facts.

As regards the appellant's defence, the trial court considered it defence but dismissed it; the defence offered by the appellant was that the complainant had on 13th April, 2009 told the police at Nyeri Provincial Police Headquarters that some other people had attacked him and that he wanted the appellant released; however, when he suggested to the complainant during cross-examination that the complainant had absolved him, the latter denied. The complainant was firm in his evidence that his assailant was the appellant whom he even knew by name.

Curiously, although the appellant testified that it was the police officers who had been told by the complainant that the appellant was innocent, he did not raise this issue with the investigations officer when he testified.

I am satisfied that the learned magistrate was right in rejecting the appellant's defence; it was in essence a mere denial which did not cast any doubt on the prosecution evidence. Accordingly, the appellant was properly convicted.

As far as the sentence is concerned, the maximum sentence provided for under the law for the offence for which the appellant was convicted is life imprisonment; he was sentenced to serve fourteen years in prison instead and the record shows that while sentencing him the learned magistrate took into account the appellant's mitigation. I do not see any basis of interfering with the sentence meted out against the appellant.

In the final analysis, I do not find any merit in the appellant's appeal; I uphold the conviction and sentence and the appeal is hereby dismissed.

Signed, dated and delivered in open court this 8th April, 2016

Ngaah Jairus

JUDGE