



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 37 OF 2016, 38 of 2016 and 39 of 2016 (CONSOLIDATED)**

*(From original conviction and sentence in criminal case No. 573 of 2014 of the Magistrate's court at Kyuso – E. M. Mutunga – R.M)*

**1. DANIEL MUTUA KIMWELE ..... 1<sup>ST</sup> APPELLANT**

**2. JOHN KYALO KIMWELE ..... 2<sup>ND</sup> APPELLANT**

**3. MUSYIMI KIMWELE..... 3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

This three appeals No. 37 of 2016, 38 of 2016, and 39 of 2016 were consolidated and heard together as they arose from the same trial. The appellant in appeal No. 37 of 2016 is Daniel Mutua Kimwele, the Appellant in Appeal No. 38 of 2016 is John Kyalo Kimwele, while the appellant in appeal No. 39 of 2016 is Musyimi Kimwele.

The three appellants were charged in the magistrate's court at Kyuso with grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that on 24<sup>th</sup> December 2014 at Kimangao - Kyuso road jointly and unlawfully assaulted E K K thereby occasioning her grievous harm.

They all denied the charges. After a full trial they were convicted of the offence and sentenced to serve 10 years imprisonment each. Dissatisfied with the decision of the trial court, the appellants came to this court with separate appeals which were consolidated and heard together. Their grounds of appeal are similar and in short they are as follows:-

1. That the evidence of the prosecution witnesses was not corroborative.
2. That some witnesses including PW2 gave hearsay evidence.
3. That the witnesses contradicted each other.
4. That the magistrate erred in rejecting their alibi defence.
5. That the sentence was harsh and excessive.

The appellants filed combined written submissions in the appeal which they relied upon. I have perused

and considered the said written submissions. In the said submissions, they emphasized the inconsistencies in the prosecution evidence and maintained that the complainant PW1 was injured in a road traffic accident involving her motor cycle and the motor cycle in which the three appellants were riding that night at around 7.00 Pm.

Learned Prosecuting Counsel Mr. Okemwa submitted that on perusing the written submissions, he sought for clarification from his colleague a Mr. Mwangi stationed at Kyuso, as well as the Officer Commanding Station (OCS) of Kyuso Police Station. Counsel stated that the OCS Kyuso Police Station subsequently disclosed that an accident on the incident was reported to the police station. Counsel submitted that the complainant PW1 twisted the incident to blame the appellants and as such the State was not opposing the appeal.

In summary the prosecution evidence is that on the 24<sup>th</sup> of December 2014 at about 7.00 Pm, the complainant PW1 E K K a teacher from Kyuso, was riding her motor cycle carrying a passenger PW2 J B K a Primary Standard Seven class pupil. They were from church at Kimangao heading to Kyuso, when they met a motor cycle coming from the opposite direction which was moving in a zigzag manner. She parked her motor bike for the other motor bike to pass, but the other motor bike carrying 3 people went into a ditch.

PW1 then proceeded to the ditch to assist those people but instead of being grateful, they beat her unconscious and was injured and lost a tooth. She was later taken to the hospital and treated, and a P3 form issued. The three appellants were there after arrested and charged with the offence.

In their defences, the appellants tendered sworn testimonies. Daniel Mutua Kimwele who was the 1<sup>st</sup> accused, said that he was on the motor bike on that day and at Kamutemwa river, he saw light and suddenly there was a head on collision and he fell in a ditch. He then found that the rider of the motor bike which had flashed light on them was in a ditch with a motor bike resting on her. They assisted her and shortly a crowd gathered. The next day he was arrested.

John Kyalo Kimwele who was the 2<sup>nd</sup> accused said that he was on the same motor bike with Daniel Mutua Kimwele. That they had an accident and a lady who had fallen into a ditch was assisted. That lady was unconscious. He went home but was woken up and taken to the police station where he was later charged.

Musyimi Kimwele, who was a 3<sup>rd</sup> accused stated on oath that he was the motor bike rider with his two brothers and they had come from playing a match. As they approached a river, he tried to evade an accident from approaching motor bike. He did not know what injuries the female rider of the other motor bike had suffered. He however noted that the female rider of the other motor bike was unconscious. In cross examination, he said that he was arrested later.

Daniel Mutua Kimwele called one witness Kimwele Mengi DW4, who stated that he heard noise and went to the scene and when the Assistant Chief arrived, and a vehicle took the injured lady to hospital. Though all the appellants stated that they would call witnesses, and were granted adjournments, no additional witness was called to testify for the defence.

This being a first appeal, I am duty bound to re-evaluate 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 to determine their demeanor and give due allowance to that fact. See the case of ***Okeno -vs- Republic (1972) EA 32.***

I have re-evaluated the evidence on record. I have considered the submissions of the appellants as well as the prosecuting counsel I observe that the prosecuting counsel Mr. Okemwa has conceded to the appeal. The appellants have raised several grounds of appeal.

The appellants have said that their alibi defences were not considered by the trial court. My

understanding is that an alibi defence is a defence to the effect that the appellants were not at the scene of the

incident when the offence is alleged to have occurred. From the record herein I do not see any of the appellants as having raised a defence that he was not at the scene when the incident occurred. They all said that they were at the scene. They all said that a lady motor bike rider was injured and became unconscious and had to be taken to hospital. Their version of what happened is different from the version of the prosecution witnesses. However, they were all at the scene. There was thus no alibi defence from any of the appellants which needed to be considered by the trial court.

The appellants claim that there were contradictions in the evidence of the prosecution witnesses. Having perused the evidence on record, I find no contradictions in the evidence of the prosecution witnesses.

PW1 the complainant and PW2 were the only prosecution witnesses at the scene when the incident occurred. They did not contradict each other. They merely gave different versions of the same story with varying degrees of details, which is expected and natural. The other witnesses who came to the scene also gave their versions of what they saw and what they did when they came to the scene.

Contradictions or contradiction is not the same thing as a difference in details. In the Concise Oxford English Dictionary, Twelfth Edition contradiction is defined as follows:-

***“1. a combination of statements, ideas, or features which are opposed to one another. 2. The statement of a position opposite to one already made.”***

It follows that a contradiction is a statement that is opposite or appears to be opposite to another. A difference in detail is never a contradiction.

This case hinges on whether what the prosecution witnesses were saying was true, or whether what the defence was saying was true. The prosecution case or evidence was that the complainant's PW1 motorbike stopped and was parked to let the other motor bike on which the appellants were riding pass. But that motor bike entered a ditch. That the complainant proceeded to the ditch to assist the riders of the other motor bike, but they assaulted and injured her.

The defence story was that the appellants saw an oncoming motor bike which overturned in a ditch and the rider fell with her motor bike resting on her, and she was thus injured and became unconscious.

Having considered the evidence on record, I find that the version of the prosecution witnesses was credible and the learned magistrate was correct in believing the same. No witness said that he saw the motor bike of the complainant on the ground. The evidence on record was that it was parked on the roadside even when people came shortly after hearing screams. The evidence on record was also that the complainant was lying unconscious where the appellants were, which gave credence to her story that she moved from her parked motor bike to the ditch where the appellants fell with the motor bike. The appellants also said that there was a head on collision between the two motor bikes. However there was no evidence that the two motor bikes were together when people came. The appellants also did not state how and when they removed the complainant's motorbike and parked it safely away. In my view therefore the appellants were merely giving a story that favoured them in the circumstances. They were not saying the truth.

The Prosecuting Counsel has conceded to the appeal because an accident was reported to the police station. That issue was not raised at the trial court. Secondly, no OB report was produced in court even at the appellate stage. More significantly, there was nothing wrong with reporting a traffic accident. From the evidence on both sides, there was indeed a traffic accident. The prosecution evidence was that the appellants were involved in a traffic accident when they fell in a ditch while riding a motor cycle, when the complainant had already parked her motor cycle to let them pass because they were riding in a zigzag way. The appellant's story on the other hand was that there was a head on collisions between the two motor bikes. In both situations the fact remained that there was a road traffic accident. Therefore the

fact that a road traffic accident was recorded in the OB was no defence to the charge of assault causing grievous which the appellants faced. In my view, the injuries suffered by the complainant were consistent with the prosecution version.

Though the Prosecuting Counsel has conceded to the appeal, I do not agree with him. I am respectfully of the view that the version of the prosecution witnesses as to what happened at the scene was credible and deserved to be believed. There is no doubt that the complainant suffered serious injuries. The treatment notes and the entries in the P3 form clearly show that the injuries were serious. She lost one tooth and five other teeth became loose. She had tenderness all over the chest and had a cut lip. She was unconscious until the time she was taken to hospital. I find that the prosecution proved its case beyond reasonable doubt. I will uphold the conviction.

With regard to the sentence, the maximum sentence for the offence of grievous harm is life imprisonment. The appellants were all sentenced to serve 10 years imprisonment. They were first offenders and asked for leniency in their mitigations. Sentencing is the discretion of the trial

court. In the circumstances of this case, I find no aggravating factors which would justify a sentence of 10 years imprisonment, though the offence was certainly a serious offence. I will reduce the sentence to 4 years imprisonment.

Consequently I dismiss the appeal on conviction. I uphold the conviction of the trial court. I however set aside the sentence against each appellant and order that each of the three appellants will serve a sentence of four years imprisonment from the date in which they were sentenced by the trial court.

**Dated and delivered at Garissa this 4<sup>th</sup> day of October 2016.**

**GEORGE DULU**

**JUDGE**