REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 231 OF 2013

MATULO PATRICK.....1ST APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Consolidated with

CRIMINAL APPEAL NO. 232 OF 2013

MUNYASIA KASILU.....2ND APPELANT

VERSUS

REPUBLIC.....RESPONDENT

And

CRIMINAL APPEAL NO. 233 OF 2013

FRANCIS MAKUU KIVINDYO.....3RD APPELANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui

Senior Principal Magistrate's Court Criminal Case No. 604 of 2011

by Hon. B.M. Kimemia, PM on 18/9/2013)

JUDGMENT

1. Matulo Patrick, Munyasia Kasilu and **Francis Makuu Kivindyo** the appellants herein were jointly charged with the offence of **causing grievous harm** contrary to **Section 234** of the **Penal Code.** Particulars of the offence being that on the 29th day of August, 2010 at about 9.30pm at **Kathekani** village, **Kalindilo** sub-location, **Kathivo** Location in **Kitui** County unlawfully did grievous harm to

Kyalo Muthui.

2. Facts of the case were that **PW1, Kyalo Muthui,** the complainant was walking along the road at 9.30pm having left his bicycle that was damaged at **Monica Kitheka's** place. He encountered the appellants. They demanded to see the bicycle. He led them to PW2, **Monica Kitheka's** place where they found the bicycle. They took him to **Silanga** where they assaulted him. He sustained injuries. They got maize stalks and used the same to set him ablaze. They ran away. He managed to free himself. He went home and slept until the following morning. He sought treatment and **Kitui** District Hospital where he was admitted from 30/8/2010 to 15/11/2010. **Peter Wambua Muthengi,** a Clinical Officer examined him and filled a P3 form in that regard. He sustained burns on the right ear, neck, front chest, and right elbow. The legs were painful. He assessed the degree of injury sustained as grievous harm. The matter having been reported to the police the appellants were arrested and charged.

3. When put on their defence the appellants stated that they were summoned. They went to the police station where it was alleged that they had assaulted someone. They denied having assaulted the complainant.

4. The trial court analyzed evidence adduced and made a finding that the identification of the complainant's assailants was proved. She found them (the appellant and co-accused) guilty, convicted and sentenced them to **life imprisonment.**

5. Being dissatisfied with the conviction and sentence the appellants appealed on grounds that are condensed as follows:-

i. **The case was not proved to the required standard;**

ii. The prosecution evidence was weighed in isolation which occasioned miscarriage of justice;

iii. **The finding that the complainant's evidence was corroborated was a misdirection;**

iv. **The appellant's mitigation was not considered;**

v. **An alleged grudge that existed between the PW4 and the appellants was not interrogated.**

6. The appeal was canvassed by way of written submissions that I have considered.

7. This being the first appeal, I am reminded of the duty to submit evidence tendered at trial to a fresh and exhaustive evaluation so as to reach my own independent conclusion bearing in mind that I did not have the opportunity of hearing or seeing witnesses who testified. (see ***Okeno versus Republic (1972) E.A. 32).***

8. It is argued that the trial court relied on hearsay evidence as none of the witnesses was present, therefore did not witness the incident. Hearsay evidence refers to a testimony given in court by a witness other than the one who perceived it. As a general rule such evidence is inadmissible. The trial magistrate appreciated the fact that no one witnessed the act that constituted the offence. It was stated thus ;-

> "***Despite the fact that no one else witnessed the act, the evidence of other witnesses have clearly corroborated the evidence of the PW1 and I find*** *(sic)* ***prosecution's case is clear."***

9. In his evidence, PW1 stated that the appellants took him to **Silanga** where the 1st appellant tied his hands with a rope. The 3rd appellant hit him with big stick on the right hand causing it to sustain an injury. The 2nd appellant collected maize stalks threw them on him and the 1st appellant lit fire using a match stick and paraffin that they had. He sustained burns on the back as a result. Medical evidence adduced confirmed he sustained a fracture of the right elbow joint and there were visible burns on both hands on the elbow joints, the right ear lobe and the neck, posteriorly.

10. As a general rule, there is no requirement that evidence be corroborated or that a court must be warned of the danger of acting on uncorroborated evidence. This principle is well stated in **Section 143** of the **Evidence Act** which provides thus:-

> "***No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof any fact*".**

This is not a case where corroboration is required as a matter of law hence requiring the court to caution itself in accepting and eventually relying on the evidence adduced. I say this because of the fact that today a case cannot fail because of technicalities. (*vide Article 159 of the Constitution*).

11. Was there mistaken identify? PW1 met the appellants at 9.30pm. He stated that they were people he knew very well. There was also moonlight which aided him to see and he was familiar with their voices. They went with him to the home of PW2. These were people well known to the witness. The 1st appellant was her brother in law hence she could not be mistaken about his identify. On being woken up she lit a lamp that aided her to see the appellants. She stood a metre away from them. They demanded for the bicycle that the complainant left at her home. She told them it was damaged, therefore required to be repaired.

12. In the cited case o***f Republic versus Turnbull (1946) 3 ALL ER – 549 Pg 552***, it was stated;-

> "***Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes of recognition of those relatives and friends are sometimes made."***

13. In the case of ***Anjononi and Others versus Republic [1981) KLR 594*** the court stated that:-

> "… ***recognition of an assailant is more satisfactory, more assuming, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other***"

14. Evidence of the complainant was of recognition of his assailants and was corroborated by that of PW2. These were persons who knew the appellants at a personal level. They were able to identify them visually and by their voice. They communicated to them on the material night. There was moonlight and light emanating from the lamp that PW2 had. The recognition in the circumstance could not be mistaken.

15. Did the magistrate place the burden of proof on the appellants? The burden of proof in criminal cases lies with the prosecution and the proof must be beyond reasonable doubt (see ***Republic versus Derrick Waswa Kuloba [2005) eKLR).*** It was erroneous on the part of the magistrate to state that none of the accused stated where they were. That was tantamount to shifting the burden of proof to the appellants. This, however, did not weaken the prosecution's case.

16. In their defence the appellants denied having committed the offence. One of them brought in the issue of having disagreed with. PW4 who did not witness the act having committed. He received a report as an Administrator, visited the complainant in hospital and also the scene of the incident. Any alleged spite against the appellants on his part was inconsequential to the prosecution's case.

17. Was the appellants' mitigation disregarded? A person who commits the offence of grievous harm to another is liable to imprisonment for life. The court however has the discretion of imposing any other sentence as it is not a mandatory sentence. This court being an appellate court can only interfere with sentence if it is evident that the trial court acted upon some wrong principle or overlooked some material facts or if the sentence was manifestly harsh or excessive in the circumstances. (see ***Waguda versus Republic (1983) KLR 569).***

18. The appellants were first offenders. There is no suggestion that they were incapable of reforming. The complainant will be at liberty to institute a civil claim against them for compensation. In the

circumstances the sentence imposed was manifestly harsh. In the premises, I do uphold the conviction but set aside the sentence and substitute it with **five (5) years** imprisonment for each appellant.

19. It is so ordered.

DATED, SIGNED and **DELIVERED** at **KITUI** this **7TH** day of **MAY 2015.**

L.N. MUTENDE

JUDGE