REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 37 OF 2015

(CORAM: J.A. MAKAU – J.)

CHARLES MBOK NDUTA …................................. APPELLANT

VERSUS

REPUBLIC ….. RESPONDENT

(Being an appeal against both the conviction and the sentence DATED 22.7.2015 in Criminal Case No. 843 of 2013 in SIAYA Law Court before Hon. Hazel Wandere – P.M.)

JUDGMENT

1. The Appellant **CHARLES MBOK NDUTA** was charged with an offence of **Grievous Harm Contrary to Section 234 of The Penal Code.** The particulars of the offence are that on the 8th day of November, 2013 at Umasi village in North Alego Location within Siaya County Unlawfully did grievous harm to **MILLICENT AKOTH OTIENO**.

2. After full trial the appellant was convicted and sentenced to serve seven (7) years imprisonment.

3. Aggrieved by the sentence, the Appellant preferred this appeal through a petition of Appeal filed on 19th March 2010 setting out four (4) main grounds of Appeal being as follows:-

> ***(a) The learned trial Magistrate erred in law and in facts by failing to observe that this case was never investigated to the required standards as the law stipulates in any criminal offence.***
>
> ***(b) The trial court failed to notice that this was a mere domestic issue that could have been resolved by village elders.***
>
> ***(c) The culprit engaged over the fight was never arrested by the police but instead insisted on a very old and poor innocent person.***
>
> ***(d) The exhibits presented before court was never screened or tested to establish the truth over this matter.***

4. The Appellant appeared in person while the State was represented by M/s. M. Odumba learned State Counsel.

5.At the hearing the Appellant urged that the case involved himself and his wife, that he had a dispute

with someone else when his wife came to separate them and as she held his hand he pulled his hand and the panga he had accidentally cut her, that they have five (5) grown up children and they had no previous problems, that he is 78 years old as he was born in 1938, that the sentence is excessive and he prayed for non-custodial sentence.

6. M/s. M. Odumba opposed the appeal and submitted both the conviction and sentence were proper and lawful. She submitted the Appellant had ***mensrea*** to commit the offence of grievous harm, that the prosecution proved their case beyond reasonable doubt, that the ingredients of the offence of grievous harm were satisfied, that the appellant's defence was a mere denial and in arguing his appeal he gave a different story as to what had happened and urged the court to dismiss the appeal.

7. Facts of the prosecution case are well set out in the proceedings which forms part of the record of appeal and I need not reproduce the same but will briefly state the prosecution case and the defence.

8. The facts of the prosecution case are that, PW1 Millicent Akoth Otieno was in 2002 inherited by the Appellant Charles Mbok Nduta after her husband died. That on the night of 8th November 2013, the complainant who wanted to visit her children at Nairobi started packing her clothes while the Appellant was asleep. The Appellant came from the bed, locked the complainant inside the house telling the complainant he wont allow her to go to Nairobi. He told her to say her last prayers as he was going to ensure she wont see anyone else and her children will never see her grave. The complainant approached the Appellant to the bedroom to find out what was the matter. The Appellant pulled a panga underneath his mattress, removed a knife from his pocket telling the complainant to kneel down and pray for the last time while holding the panga in his right hand and a knife in his left hand. He cut the complainants' left arm as she raised her hand and complainant hit the tin lamp to prevent the Appellant from seeing her. The Appellant then cut the complainant's right arm as she screamed loudly. Appellant told complainant to stop screaming as no one could rescue her as it was raining heavily. The complainant got door keys moved to the door slowly as the Appellant was looking for the tin lamp and she managed to open the door as Appellant was asking the complainant where she was. The Appellant did not hear the complainant open the door and leave as the rains were pounding the roof very hard. The complainant sought refuge at the home of her nephew one C. Owuori Owino at a distance of about 15 metres from her house. Oduori saw the complainant and the Appellant who was armed with panga and knife. Oduori called other family members who took the complainant in and enquired from the Appellant what had happened and he told them the complainant was talking to other people outside. Oduori escorted the complainant to Ndere Police A.P. Post then Siaya Police Station and later to Siaya County Referral Hospital, where the complainant was treated and discharged, that the following day the Appellant removed his belongings and returned back to his home. PW1 returned to Siaya Police Station and was issued with P3 form. She took it to Siaya County Hospital and it was completed showing that she suffered as grievous harm. The Appellant was subsequently arrested, panga recovered and he was thereafter arraigned in court, charged with this offence.

9. As the first appellate court, I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis and will draw my own conclusions. I am alive to the fact we neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I are guided on the duties of a first appellate court by the Court of Appeal decision of **Kiilu & Another V. R (2005) 1 KLR 174** where the court held thus:-

> ***"an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."***
>
> ***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

10. I have carefully examined the evidence of identification adduced by the complainant PW1. According

to PW1 she was inherited by the Appellant in 2002 following the death of her husband and after the clan decided that he inherits her. That on 8.11.2013 at night she cooked food which she ate with the Appellant. PW1 knew the Appellant very well. Appellant went to sleep in the same house with the complainant. He got up and went out and returned. There was tin lamp on which was on. That both the Appellant and complainant had discussion out of which a misunderstanding arose. Appellant told the complainant he was going to finish her, got a panga and a knife. He cut her twice on both arms at which time the complainant was able to recognize the Appellant as she saw him and also recognized him by his voice. PW2 as he was rescuing the complaint, she told him she was attacked and injured by "**Mbok**" the Appellant. PW2 as he was taking the complainant back to her house he saw the Appellant at their compound fence armed with as panga and a knife. They went to the complainant's house and found it full of blood on the floor. PW1 also told PW3 that the Appellant was the one who had assaulted the her. PW3 saw the Appellant armed with a panga.

11. Regarding identification am guided by the case of **Paul Etole and Another V. Republic CRA 24 of 2000 (UR) Pg. 2 and 3** where the Court of Appeal stated:-

> ***"The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution, before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."***

12. The evidence of PW2, PW3 and PW4 deals with the issue of the first report and the importance of that report when it comes to considering the ability of the complainants to identify or recognize the assailant or the person who committed an offence. In the case of **Republic V Shabani Bin Donaldi Criminal Appeal No. 76 of 1940 VII EACA page 60**, it was held:-

> ***"That it is desirable in almost every case in which an immediate report has been made to the police by someone who is subsequently called as a witness that being hearsay or the like should always be given at the trial."***

13. PW2 was the first person who received the first Report from the complainant in this case. He testified that the complainant was calling him to go and help her. He saw her entering his compound, crying and covered with blood and she told him "**Mbok**" wanted to kill her. PW2 also spotted the Appellant at PW2's compound. PW3 saw PW2 and the complainant whose body was covered with blood. PW1 told PW3 that the appellant had assaulted her. PW5, an investigating officer testified that the complainant gave him the name of her assailant as her inheritor Charles Mbok Nduta.

14. I have carefully considered the evidence of PW1, PW2, PW3, and PW5 and I am satisfied that PW1 recognized the Appellant as her assailant as they had been together before he went to sleep, that he came from the bedroom and had conversation with the complainant threatening her life, that PW1 in her first Report to PW2, PW3 and PW5 she gave the name of the Appellant as her assailant. The evidence of PW2, and PW3 placed the Appellant at the scene of the crime. PW1 testified that the Appellant at the time of the assault was armed with a panga and a knife. PW2 and PW3 at the material night saw the Appellant armed with a panga which PW1, PW2 and PW3 identified the assault weapon, thus corroborating the evidence of PW1. I therefore find and hold that the recognition of the Appellant was free from any mistake or error. The complainant and PW2 and PW3 also identified the appellant through voice recognition.

15. Section 234 of the Penal Code provides:-

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

16. The complainant testified that the Appellant inflicted serious injuries to both of her arms using a sharp panga. PW2 and PW3 noted that the complainant had injuries to both of her arms and was bleeding profusely. PW4, the Clinical Officer testified that on 9.11.2013 he examined the complainant who alleged she had been assaulted and noted she had bruises at her chest, cut wounds on both hands, left arm with shoulder dislocation caused by a sharp object. He filled the P3 form and classified the injuries as grievous harm as per P3 form exhibit 3. From the evidence of PW1, PW2 PW3 and PW4 it is evidently clear that the complainant sustained serious injuries which PW4 classified as grievous harm. I am therefore satisfied that the prosecution proved that the injuries sustained by the complainant were caused by the Appellant and amounted to grievous harm within the meaning under **Section 4 of the Penal Code** which provides:-

> ***"grievous harm" means 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;"***

17. The Appellant denied the offence, stating that he could not cut his wife at his age. He stated that at the night of assault his wife came home bleeding from a bar, that she was harsh with him, that the following day he went to the bar where she was drinking to make enquiries from where he did not get the information on how she got injured. The trial court considered the Appellant's defence and rejected the same. I have considered the Appellant's evidence, the evidence of PW1, PW2, and PW3 which placed the appellant at the scene of the crime. He was found in possession of the assault weapon the panga. He did not challenge the evidence of PW1, through his defence nor cross-examination nor did he put it to PW1 that she was assaulted elsewhere as alleged in his defence. The Appellant did not cross-examine PW2 and PW3 on their evidence that placed him at the scene of crime. I have no doubt in my mind that the defence of the appellant is a mere denial and an afterthought as he did not raise the issue of any grudge between himself and PW1 nor PW2 and PW3 and from their evidence I find no reasons why PW1, PW2 and PW3 would frame or gang up to lie against the Appellant. His defence was rightly rejected by the trial court and I find no merits in the same.

18. The Appellant contends that the sentence meted against him is harsh and excessive in view of his age. He urged that he is 78 years old and the complainant is his wife. I have considered that the Appellant is an inheritor to the complainant in accordance with Luo customary law, after her husband died in the year 2002, and therefore before the incident, the two were living peacefully, however from the prosecution's evidence the attack of the complainant was not provoked, it is unjustified and intentional as the Appellant intended to cause grievous harm or kill the complainant from what he told the complainant. The attack was vicious and brutal in its nature as observed by the trial Court. It is not what is expected of a 78 year old man attacking his wife of inheritance. The Appellant has not given any explanation as to why he caused grievous harm to his wife of inheritance. The Social Inquiry Report which the trial court relied upon and which court found to be unfavourable to the appellant, was not availed to the Appellant to make a response though it was not favourable to him. In the case of **Nicholas Muli Nguli V Republic Criminal Appeal No. 66 of 2008 (Nairobi) t**he Court of Appeal dealt with Appellant's main ground of appeal that the High Court did not give him an opportunity to challenge the allegations against him in the probation report that was produced by the probation officer and held as follows:-

> ***"The sentence passed without the appellant being given an opportunity to challenge the allegations in the probation report could not have been lawful …...... If the High Court had given the Appellant that opportunity it would have settled for a light sentence."***

19. I have very carefully considered the mitigation in favour of the Appellant inrespect of very serious injuries sustained by the complainant and the sentence meted against the Appellant. I find the sentence to

be lawful and within the provision of **Section 234 of the Penal Code**, however, though the Probation Report was not availed to the Appellant to respond on it, I do not find that the Appellant was prejudiced nor was he occasioned any injustice by such failure that could result in interference with the sentence meted against the Appellant. I am alive to the fact that the appellant is now 78 years old and he was in custody for one (1) year and three (3) months before sentence and has now served 1 year, since conviction. I am of the view that the sentence meted is not harsh and excessive in view of the offence and should not be reduced after considering the mitigating factors in favour of the Appellant, I have to state that the Appellant's action amounted to violence against the complainant who he had inherited since she was a woman. This amounted to violence against women. It is in my view a gender based violence which this court cannot condone or tolerate and let perpetrators of violence against women and girls go unpunished. The Appellant was lucky that he was leniently treated and given a light sentence. He is lucky that the state did not appeal for enhancement of the sentence meted against him. I find that there is no good reason why I should interfere with such lenient sentence as by doing so, this court would be sending the wrong message to the perpetrators of violence against women and girls and create a state of impunity in this country. I feel a deterrent sentence would ensure that would be perpetrators of violence against women and girls are deterred from committing act of violence against women and girls.

20. The upshot is that the conviction was safe and the same is upheld. The sentence of 7 years was lenient and not harsh nor excessive. The sentence of seven (7) years is confirmed.

DATED AT SIAYA THIS 8TH DAY OF JULY, 2015.

J. A. MAKAU

JUDGE

Delivered in Open Court in the Presence of:

Appellants in person – present.

M/s. M. Odumba for State.

C.C. 1. Kevin Odhiambo.

2. Mohammed Akideh.

J. A. MAKAU

JUDGE