REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 176 OF 2013

PAUL KIMUTAI CHEBOI :::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

REPUBLIC :: RESPONDENT

(An appeal arising from the original conviction and sentence in the Senior Principal Magistrates Court at Iten in criminal case no 586 of 2012- Hon N. Moseti (RM)

JUDGMENT

1. The appellant ***Paul Kimutai Cheboi*** was charged before the lower court with the offence of causing grevious harm contrary to ***Section 234*** of the ***Penal Code*** particulars being that on the 14th day of November 2005, at Embobut sub location in Marakwet – East district, within Elgeyo-Marakwet County, the appellant unlawfully caused grievous harm to Nickson Kitum Cheserek.

2. The appellant denied the charges and after a full trial, he was convicted and sentenced to a term of eighteen (18) years imprisonment. Being dissatisfied with the conviction and sentence, the appellant lodged this appeal in person through the petition of appeal filed on 18th September 2013. He subsequently retained M/S Lel & Bungei company advocates to represent him in the appeal and on 22nd May 2014, his advocates filed supplementary grounds of appeal challenging the appellant's conviction and sentence on the following four grounds;-

> ***1. That the learned trial magistrate erred in law and fact in convicting the appellant on insufficient and contradicting evidence of prosecution witnesses.***
>
> ***2. That the learned trial magistrate erred in relying on medical evidence of an unqualified person.***
>
> ***3. That the learned trial magistrate erred in law and in fact in failing to consider the appellants defence.***
>
> ***4. That the trial magistrate erred in sentencing the appellant to 18 years imprisonment which was excessive in the circumstances.***

3. The appeal came up for hearing before me on 28th October 2014 and was prosecuted by way of oral submissions. In his submissions, learned counsel for the appellant ***Mr. Lel*** apparently abandoned ground number three in the Supplementary grounds of appeal and narrowed down his submissions to the other three grounds. Counsel asserted that the trial magistrate erred in convicting the appellant on the evidence of two witnesses namely PW1 and PW4 which in his view was insufficient and contradictory with regard

to the time the offence was allegedly committed. Mr. Lel also submitted that the evidence of the complainant demonstrated that he was not certain about the identity of his assailant; that the evidence of PW4 did not have any probative value considering that she was only one year old when the offence was committed and at that age, she could not have registered what was happening. Counsel further submitted that the trial magistrate erred in relying on medical evidence adduced by an unqualified person whom he described as a traditional surgeon to determine the extent of injuries sustained by the complainant.

4. On a point of law, it was contended on behalf of the appellant that there was a procedural irregularity in the proceedings before the trial court as the learned trial magistrate did not expressly indicate on the court record that the provisions of ***Section 211*** of the ***Criminal Procedure code*** had been complied with which omission allegedly denied the appellant the right to call witnesses in support of his case.

Finally**, *Mr. Lel*** submitted that the sentence imposed on the appellantwas excessive and that the trial court erred in passing the said sentence without considering the mitigating factors put forth by the appellant. He urged the court to allow the appeal.

5. The state opposed the appeal through learned prosecuting counsel **Mr. Mulati.** In his submissions in response, ***Mr. Mulati*** invited the court to find that the contradictions pointed out by ***Mr. Lel*** in the evidence of the prosecution witnesses regarding the time of commission of the offence were not material and could not have discounted the prosecution case.

Learned state counsel also submitted that the learned trial magistrate considered the cumulative effect of all the evidence adduced in the case by the prosecution to determine the guilt of the appellant and did not solely rely on the evidence of PW1 and PW4; that besides the evidence of the traditional surgeon, there was a P3 form produced under ***Section 33*** of the ***Evidence Act*** which showed the extent of injuries sustained by the victim.

6. On the claim that ***Section 211*** of the ***Criminal Procedure Code*** had not been complied with, counsel submitted that the court record clearly showed that the trial court complied with the aforesaid provision of the law even though this was not expressly indicated on the court record.

Finally, ***Mr. Mulati*** submitted that the sentence imposed on the appellant was not excessive but was in his view lenient considering that the penalty for the offence for which the appellant was convicted was life imprisonment. He urged the court to dismiss the appeal for lack of merit.

7. Briefly, the prosecution case was that on 14th November 2005 at around 5 p.m, the complainant who testified as PW1 was in his shamba together with his wife harvesting beans. This is when the appellant accompanied by his father and one Richard appeared. The appellant asked him to assist him with fire to lit a cigar whereupon, he left the shamba, proceeded to his house and started gathering fragments of burning charcoal from the fire place to comply with the appellant's request. The appellant was a person he knew before being his neighbour.

8. As the complainant was picking the burning charcoal, Richard borrowed his panga and shortly thereafter, he saw the appellant aiming a panga at his face. The panga hit him on the forehead inflicting an injury from which he started bleeding immediately. The appellant and Richard then fled. PW1's daughter who allegedly witnessed the assault started screaming attracting several people who included his wife and PW2 who went to the scene, administered first aid on the complainant before taking him to Tot Sub District Hospital for treatment where he was admitted for three months. The matter was then reported to the police.

9. After the complainant was discharged from hospital, he caused the arrest of the appellant at Chesegon market. The appellant was escorted to Tot police station where he was detained. The complainant was issued with a P3 Form which was completed by the clinical officer who had attended to him at Tot Sub District Hospital one ***Dickson Kiptum Cheserek*** who had subsequently passed away. It was produced as Exhibit 2 on his behalf by his colleague ***Leonard Cheserek*** who testified as PW6.

10. In his defence, the appellant elected to give an unsworn statement and did not call witnesses. In his unsworn statement, besides denying having committed the offence as alleged, the appellant only gave a narration of how he was arrested and escorted to Tot Police station on 3rd October 2012.

11. This being a first appeal, this court is duty bound to reconsider and re-evaluate the evidence adduced before the trial court to draw its own independent conclusions taking into account that unlike the trial court, it did not have the benefit of hearing or seeing the witnesses – See: ***Kiilu and another vs Republic (2005) KLR 175 and Kinyanjui vs Republic (2004) 2 KLR 364.***

12. I have carefully analysed the evidence on record, the submissions by counsel for the appellant and the state as well as the grounds of appeal. It is my finding that the evidence adduced by the complainant (PW1) was clear, precise and straightforward. It detailed chronologically how the appellant, his father and one Richard found him in his shamba working with his wife, how the appellant lured him into his house pretending to be in need of fire to light a cigar and how he eventually attacked him using a panga Richard had borrowed from him.

Contrary to **Mr. Lel's** submissions, it is my view that PW1's testimony demonstrated that he was certain about the identity of his assailant. He testified that it was the appellant who cut him on the forehead with a panga. He distinguished the appellant from Richard and gave a clear distinction of the roles played by Richard and the appellant in the whole incident. His evidence on the issue of identification was not shaken by the appellant on cross-examination.

13. Though it is true that there was some discrepancy between the evidence of PW1 and PW2 regarding the time the offence was committed, I agree with the submission by ***Mr. Mulati*** that the said contradiction was immaterial since the different times given by the two witnesses point to the fact that the attack occurred during the day and once it is accepted that the attack was executed during the day, it automatically follows that the complainant was able to see his assailant clearly and his identification of the appellant as his assailant cannot therefore be open to question. Besides, it is important to note that there was evidence to the effect that the appellant was a person the complainant knew well previously being his neighbour and he had interacted with him in a conversation moments before the attack.

14. With regard to the submission that the trial magistrate erred in relying on evidence of an unqualified person, namely, a traditional surgeon to determine the extent of injuries sustained by the complainant, I with respect do not find any substance in this argument.

The court record clearly shows that the trial magistrate besides considering

the evidence of PW3 also relied on the medical evidence in the P3 form produced as exhibit 2 which had been completed on 21st November, 2005 by the clinical officer who treated the complainant. The P3 form clearly confirmed that the injuries sustained by the complainant had been classified as grievous harm. The date on which the p3 form was completed is significant because it shows that the injuries sustained by the complainant had been assessed and classified as grievous harm well before the date the traditional surgeon treated the complainant. According to the trial magistrate's handwritten notes, PW3 had treated the complainant on 16th November 2013 while the p3 form was completed on 21st November 2005.

15. Another point raised by ***Mr. Lel*** in support of the appeal is that the trial magistrate erred in failing to explain to the appellant the provisions of ***Section 211*** of the ***Criminal Procedure Code*** with the effect that the appellant presented his defence without knowing that he had a right to call witnesses; that had he known of this right he would have called witnesses to support his case.

I wish to quickly dispose of this argument by noting that though the record of proceedings in the lower court clearly shows at Page 27 that the trial magistrate did not expressly indicate that he had complied with ***Section 211*** of the ***Criminal Procedure Code***, the record leaves no doubt that the appellant was well aware of his rights under ***Section 211*** by the time he was presenting his defence. This is demonstrated by

what the appellant stated at page 27 line 3. He stated as follows;

"I will prefer a sworn testimony. I do not have other witnesses to call''

This statement by the appellant is a clear indication that the learned trial magistrate must have explained to the appellant his rights under ***Section 211*** of the ***Criminal Procedure Code*** and had therefore fully complied with that provision only that he had omitted to indicate so on the court record. This omission in my view could not have caused the appellant any prejudice and cannot be a basis of vitiating his conviction.

16. In view of the foregoing, I am inclined to agree with the learned trial magistrate that the prosecution had succeeded in proving beyond any reasonable doubt that the appellant was the culprit who assaulted the complainant on the material date occasioning him grievous harm. I am thus satisfied that the appellant was properly convicted. Consequently, I do not find any merit in the appellant's appeal against conviction and it is hereby dismissed.

17. On Sentence, It was submitted on behalf of the appellant that the sentence of eighteen years imprisonment was manifestly excessive and ought to be reviewed. ***Section 234*** of the ***Penal Code*** which creates the offence for which the appellant was convicted and sentenced prescribes a maximum penalty of life imprisonment.

The court record indicates that the appellant was a first offender and

though the record shows that the learned trial magistrate considered the appellant's plea in mitigation before passing sentence, I am of the view that a sentence of eighteen years imprisonment was rather harsh and excessive for a person who had been confirmed to be a first offender especially in view of the fact that by the time the complainant testified, he had completely recovered from his injuries. But considering the gravity of the offence, the nature and severity of the injuries sustained by the complainant as a result of the appellants unjustified and unprovoked attack on him, I am in agreement with the learned trial magistrate that a stiff and deterrent sentence was warranted in this case.

18. In view of the foregoing and considering the circumstances surrounding

this case, I will allow the appellant's appeal against sentence only to the extent of reducing the sentence imposed against the appellant from eighteen years imprisonment to ten years imprisonment. Consequently, the sentence passed against the appellant by the learned trial magistrate is hereby set aside and is substituted with a sentence of ten years imprisonment with effect from the date of conviction. It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF NOVEMBER, 2014

in the presence of:-

The Appellant

Mr. Mulati for state

Mr. Lel for Appellant

Mwende Court clerk