IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, MURGOR & OTIENO-ODEK JJA)

CRIMINAL APPEAL No. 139 Of 2015

BETWEEN

MUSYIMI NDAVA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Garissa (Dulu, J.) dated 1st December 2014

in

HC Cr. Appeal No. 68 of 2013)

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JUDGMENT OF THE COURT

1. By an amended charge sheet, the appellant, ***Musyimi Ndava,*** was charged with causing grievous bodily harm contrary to ***Section 234*** of the **Penal Code, Cap 63 of the Laws of Kenya**. The particulars were that on 25th July 2012 at Migwani in Migwani District within Kitui County, he unlawfully caused grievous bodily harm to ***Elizabeth Mueni Mwangangi***. He was tried and convicted by the magistrate's court and sentenced to a term of 35 years' imprisonment. His first appeal to the High Court was dismissed. Aggrieved, he has lodged the instant second appeal.

2. The prosecution case is founded on the direct evidence of the complainant, ***Elizabeth Mueni Mwangangi*****, (PW1)** who testified as follows:

> ***"On 25th July 2012 at around 9.00 pm I was in my house at Migwani all alone. The children were away in school. I heard a knock at the door. I pushed the curtain since the door is made of glass and I knew the person knocking. It was Musyimi Ndava, the accused. I opened for him and he entered the house. He was carrying a khaki bag (one used to pack maize flour) and there were some items inside.***
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> ***I welcomed him and he sat on the sofa set near the door and he placed the khaki bag on the floor. We started to talk then he removed 1 kg of rice, ¼ kg sugar, milk, elianto cooking fat and he put the items on the table. We continued to talk and the accused told me that those items were mine. He told me he longed to visit me since he loves me and decided to bring me those items. I asked him why he thought like that and he insisted on me taking the items. I refused those items and told him he was inviting poverty to my house and requested him to leave. I woke up and went to open the door for him. I opened the door and at that time the accused was looking at me from the back. I didn't know he was armed and all of sudden I heard a panga cut on the right side of the head above the ear. I turned and asked him what he was doing and he cut me on the left side of the face near the ear, and when I tried to turn and ran away he cut me on the left shoulder, then when I turned to go to the window he turned and cut me on the right shoulder and as I tried to defend myself, he cut me on the right hand, upper arm and when I raised my left hand to protect my neck he cut me on the left palm and when I looked at him he cut me near the left eye. When I was protecting myself from him cutting me on the right side of the neck using my hand, he chopped off my right hand thumb and also cut me on the right side of the neck. I was bleeding heavily and since I looked very bad the accused ran away. He was cutting me when he was all very quiet.***
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> ***When I was trying to open the window I realized my right hand thumb was gone/missing and I opened the window using my***

other fingers. I then called Makau, my neighbour to come to my rescue. But before he could arrive, I ran towards the upper door and since my fingers could not open the door I used my elbows and luckily the door opened. I fell down outside the door and lost consciousness."

3. ***PC Mutiso Nyamai***, (**PW3)** testified that he visited the complainant at Kitui District Hospital where she was admitted. He recorded a witness statement. The complainant narrated her ordeal and told him by name that it was the accused who had cut her with a panga.

4. ***Dr. Musila George***, (**PW4)** a medical doctor based at Kitui District Hospital testified that he filled a P3 Form after examining the complainant. Upon clinical examination, he established that the complainant had multiple cut wounds on the head, shoulder and upper limbs; she had a neck cut on both sides about 8cm; the temporal bone had a fracture; she had a nasal ridge cut as well as a rear cut; she had bilateral shoulder cut and wounds; and her right thumb was amputated. She also had forearm cut wound.

5. Upon evaluation of the abovementioned evidence, the trial magistrate put the appellant on his defence. He denied committing the offence. He gave sworn evidence stating that the charges against him were a vendetta; and that he left his place of work and went straight home. He denied visiting the complainant's house.

6. The trial magistrate convicted the appellant and expressed himself as follows:

"The complainant's account was clear and credible…..The accused did not materially controvert the prosecution evidence. His defence was a bare denial wherein he claimed to have left work on the material date and went straight home. The extreme injuries involved could not be self-inflicted. No evidence was tendered the complainant bore any grudge against the accused. The upshot is that the guilt of the accused is found to have been proved to the required standard."

7. Dissatisfied with the trial court's conviction, the appellant lodged a first appeal to the High Court. In dismissing the appeal, the learned judge stated:

"The appellant complained his identification was not positive. On identification, it is clear to me the appellant and the complainant knew each other before. The evidence is clear that the appellant came to the home of the complainant early in the night…..

With regard to proof of the offence, the medical evidence clearly shows that the complainant had serious injuries. The P3 Form produced in the evidence at the trial clearly demonstrates the type of injuries suffered by the complainant. They were classified as main (sic) ***which is medically defined as destruction or permanent disabling of any external or internal organ, member or sense. …. The injuries were several and severe…. In my view, the offence was proved."***

8. Further aggrieved by the dismissal of the first appeal, the appellant has lodged the instant second appeal. In his amended supplementary grounds of appeal, he raises the following grounds**:**

"(i) The judge erred by failing to realize the express provisions of Section 207 of the Criminal Procedure Code in recording of plea was not adhered to.

(ii) The judge erred in failing to find Section 200 of the Criminal Procedure Code was not adhered to thereby prejudicing the appellant.

(iii) The judge erred in failing to realize the prosecution case was full of contradictions which impugned the burden of proof and credibility of prosecution witnesses.

(iv) The judge erred in failing to inform himself as to the proper sentence to be meted on the appellant in view of the mitigation made."

9. At the hearing of this appeal, the appellant appeared in person. The State was represented by Mr. Mosses O'Mirera, Senior Assistant Director of Public Prosecution.

APPELLANT'S SUBMISSIONS

10. The appellant faults the trial court and the High Court for not finding that the procedure for plea taking was violated; that ***Section 200*** **of the Criminal Procedure Code (CPC)** was not adhered to; and the evidence on record is both inconsistent and contradictory,

11. The appellant had initially been charged with 10 counts. He pleaded not guilty to nine (9) counts and pleaded guilty to the 10th count; a plea of not guilty was entered by the trial court. It is the appellant's contention that the plea taken showed the whole procedure was equivocal; further, the plea was taken in Kiswahili and the court did not record the presence of an interpreter translating the plea into English language; that the facts were read to the appellant in Kiswahili but the response was not recorded in as much as possible in his own words; that failure to record the plea in the appellant's own words violate ***Section 207***

of the **CPC**. It was further submitted that when **PW1** testified, she did so in Kikamba language but the evidence was recorded in Kiswahili, this means that the record of proceedings is in a language he does not understand.

12. The appellant further contended that ***Section 200*** of the **CPC** was violated because the trial commenced before a different magistrate and was concluded by a different magistrate; that although the record shows that the appellant elected to have the trial to proceed from where it was left, the record is hollow as there is no record of the trial court explaining to the appellant his rights under *Section 200* **of CPC.** Citing the case of **Bob Ayub alias Edward Gabriel Mbwana alias Robert Mandinga -v- R, Criminal Appeal No. 106 of 2009** it was submitted that the provisions of ***Section 200*** of the **CPC** are mandatory and the trial magistrate ought to have recorded if ***Section 200*** of the **CPC** was complied with; failure to record if the Section was complied with rendered the entire trial process a nullity.

13. Another ground urged is that the two courts below erred in relying on contradictory prosecution evidence. It was submitted that **PW1** testified that when she tried to open the window, she realized her right hand thumb was gone/missing. Conversely, **PW3** testified that it was the left thumb that had been cut off entirely; but **PW 4** testified that it was the right thumb. The appellant submitted that the foregoing contradictions cast doubt whether it was the appellant who committed the offence. In addition, it was submitted that **PW1** testified that she called her neighbour ***Mr. Makau*** to come to her rescue; that the prosecution should have called ***Mr. Makau*** to testify to enable the trial court evaluate the veracity of the evidence of **PW1**; and that failure to call ***Mr. Makau*** implies the prosecution did not prove its case to the required standard.

14. A final ground urged is that the two courts below failed to take into account the appellant's mitigation; he was 65 years of age; had a disabled child and was remorseful as to what happened. In view of this, the sentence passed was harsh. In concluding his submissions, the appellant urged us to order a retrial because the procedure for plea was not adhered to and ***Section 200*** of the **CPC** was not complied with.

RESPONDENT'S SUBMISSION

15. The State in opposing the appeal reiterated the evidence against the appellant; that the two lower courts arrived at concurrent findings on conviction and sentence of the appellant; that in this appeal, there are only two issues for determination; identification of the appellant and if the prosecution had proved its case beyond reasonable doubt.

16. On identification, the State submitted that this was a case of recognition. The appellant was a person well known to **PW1,** the victim and complainant. In her testimony, **PW1** stated that she peeped through the window of her house when she heard a knock at her door and recognized the appellant. She sat down with the appellant inside her house and engaged in some talk. It was stressed that identification of the appellant as the person who committed the crime was by recognition.

17. On standard of proof, the respondent submitted that the prosecution proved its case beyond reasonable doubt. The appellant was charged with causing grievous bodily harm. It was submitted from the testimony of **PW1** as corroborated by the medical report and evidence of **PW4,** that it was manifest that the appellant not only assaulted **PW1**, but maimed her. PW4 testified that upon clinical examination of the complainant, he established that she had multiple cut wounds on the head, shoulder and upper limbs; a neck cut on both sides; the temporal bone had a fracture; a nasal ridge cut; bilateral shoulder cut and wound and her thumb was amputated. The State submitted that the injuries aggregated to grievous bodily harm and all the ingredients of the offence charged were proved to the requisite standard.

18. A ground of appeal urged by the appellant is inconsistency in prosecution evidence. Submitting on this ground, it was stated that the inconsistencies are not material and do not dislodge the prosecution case that the appellant was indeed the person who assaulted the complainant and caused her grievous bodily harm. The State concluded that there was overwhelming evidence against the appellant and the two courts below were lenient in impossing a 35-year term of imprisonment; and that from the injuries sustained, the appellant should have been given the maximum life sentence.

ANALYSIS

19. We have considered the supplementary grounds of appeal, submissions by both parties and the authorities cited. This is a second appeal against conviction and sentence. By dint of ***Section 361*** of the ***CPC***, a second appeal is confined to matters of law only. This Court restated as much in **Karingo - vs- R (1982) KLR 213** at p. 219;

> **"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)"**

10. A ground urged in this appeal is that the High Court erred in failing to find the trial magistrate did not follow the procedure for plea taking. In **John Kamau Githuku & Another -v- Republic CA Criminal Appeal No. 229 of 2008 [2011] eKLR**, this Court held that where it was found that the accused participated in the trial after taking of plea, it is indicative of him understanding the charges against him.

11. In the instant appeal, we have examined the record of proceedings before the trial court. The appellant participated in the proceedings and after plea he stated that he understood the charge against him and stated that the facts as read to him were not correct. We are satisfied that the appellant understood the charge that faced him and he participated in the proceedings after plea. From the record, when the charge sheet was amended, the appellant reiterated his plea of not guilty. Again when a new magistrate took over from a previous magistrate, pursuant to the provisions of **Section 200 (3)** of the **CPC,** the appellant reiterated his plea of not guilty. Persuaded by the merits of the above decision in ***John Kamau Githuku & Another vs. Republic*** (supra), we find the ground that procedure for plea taking was not followed has no merit.

12. Another ground urged is that the proceedings before the trial court took place in a language the appellant did not understand and there is no record of interpretation. The appellant also contends that **Section 200 (3)** of the **CPC** was not followed. For these reasons, the appellant has urged us to nullify the criminal trial that led to his conviction and sentence. In **George Mbugua Thiong'o -v- Republic Criminal Appeal No. 302 of 2007 [2013] eKLR,** it was held:

> **"[F]or the court to nullify proceedings on account of ….[the] language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial."**

20. In this matter, nowhere in the record did the appellant raise the issue that he did not understand what was going on during trial. The record indicates that on 10th December 2012, when a new magistrate took over the case, the succeeding magistrate inquired of the appellant whether he was pleading guilty or not guilty. The appellant reiterated that he denied the charge and the case should proceed for hearing. In his own words, the appellant stated *"I have denied the charge. The case should proceed for hearing. I still plead not guilty and I want this court to proceed from where it left off."* The succeeding magistrate recorded: "Hearing on 4th January 2013. Case proceeds under Section 200 of CPC."

21. ***Section 200*** of the CPC provides: -

> **"(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may-**
>
> **(a) Deliver a judgment that has been written and signed but not delivered by his predecessor; or**
>
> **(b) Where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.**
>
> **(2) ...**
>
> **(3) where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right."**

22. Our perusal of the record, specifically the proceedings of 10th December 2012, show the trial court complied with **Section 200** of **CPC.**

23. On standard of proof and ingredients of the offence as charged, two critical issues stand out for determination namely: whether the appellant was positively identified as the person who committed the offence and if the prosecution proved its case beyond reasonable doubt.

24. The complainant **PW1** testified that she knew the appellant well before the crime. **PW1's** testimony is one of recognition and we are satisfied that the prosecution proved beyond reasonable doubt that the appellant is the person who assaulted the complainant. In **Anjononi & others v Republic [1980] KLR 57** it was held:

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

25. A ground urged by the appellant is inconsistency in the evidence of prosecution witnesses particularly whether it was the right or left thumb of the complainant that was amputated. In our considered view, what is material is not which thumb was amputated, but actual amputation as an element of grievous harm suffered by the complainant, and caused by the appellant. The direct evidence of **PW1** against the appellant is overwhelming and there is no doubt he cut off a thumb of the complainant. The apparent inconsistency as to whether it was the left or right thumb that was cut off is immaterial. We are guided by this Court's decision in **John Nyaga Njuki & 4 others –v- R [2002] eKLR** where it was stated:

> **"But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."**

26. The appellant contends that the learned judge erred in re-evaluation of the evidence to determine if the prosecution had proved its case to

the requisite standard. It is manifest the appellant was charged with assault causing grievous bodily harm.

27. Harm and Grievous harm is defined under ***Section 4*** of the **Penal Code** as follows;

> *"**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.*
>
> ***"harm"** means any bodily hurt, disease or disorder whether permanent or temporary."*

28. In **Rex -v- Donovan [1934] 2KB 498**, **Swift, J.** delivering the judgment of the Court of Criminal Appeal, said: -

> ***"For this purpose, we think that "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the complainant. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling."***

29. Also relevant is a passage in **Archbold's Criminal Pleading, Evidence and Practice 32nd Edition, Page 95** where it is stated:

> **"Actual bodily harm includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor" (i.e. complainant)**

30. In **R -v- Chan-Fook**, **[1994] 2 ALL ER 557** Lord **Hobhouse LJ** said of the expression *"actual bodily harm,"* stating that it should be given its ordinary meaning:

> ***"We consider that the same is true of the phrase "actual bodily harm". These are three words of the English language that receive no elaboration and in the ordinary course should not receive any. The word "harm" is a synonym for injury. The word "actual" indicates that the injury (although there is no need for it to be permanent) should not be so trivial as to be wholly insignificant."***

31. In the instant appeal, **PW1** gave a graphic and sordid account of how the appellant cut her. She testified:

> ***"I didn't know he was armed and all of sudden I heard a panga cut on the right side of the head above the ear, I turned and asked him what he was doing and he cut me on the left side of the face near the ear, and when I tried to turn and ran away he cut me on the left shoulder, then when I turned to go to the window he turned and cut me on the right shoulder and as I tried to defend myself, he cut me on the right hand, upper arm and when I raised my left hand to protect my neck he cut me on the left palm and when I looked at him he cut me near the left eye. When I was protecting myself from him cutting me on the right side of the neck using my hand, he chopped off my right hand thumb and also cut me on the right side of the neck. I was bleeding heavily and since I looked very bad the accused ran away. He was cutting me when he was all very quiet."***

32. **PW4*, Dr. George Musila*** in his medical report corroborated the injuries sustained by the appellant. From the testimony of PW1 and PW4, we are satisfied the prosecution proved the ingredients of the offence as charged beyond reasonable doubt.

33. The appellant faulted the learned judge for failing to find that the prosecution should have called ***Mr. Makau***, the neighbour of PW1 to testify. This Court is alive to the fact that there is no legal requirement in law on the number of witnesses to prove a fact. ***Section 143*** **of Evidence Act (Cap 80) Laws of Kenya** provides: -

> **"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"**

34. In **Keter -v- Republic [2007] 1 EA 135** it was held *inter alia:*

> **"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."**

35. On our part, we are satisfied through the testimony of **PW1** and **PW4**, the prosecution proved its case to the requisite standard and no prejudice was occasioned to the appellant by failure of ***Mr. Makau*** to testify.

36. A final issue urged is that the judge erred in upholding the 35-year term of imprisonment meted out on the appellant. It was submitted that the two courts below did not take into account the mitigation by the appellant. We have considered this ground. Sentencing is a question of fact and it is always at the discretion of the trial court. In this matter, the appellant does not contend the sentence meted was illegal or unlawful. In **Wanjema -v-Republic (1971) EA 493** this Court stated as follows regarding interference with sentencing:

> **"[The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is**

evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."

37. In the instant appeal, there is nothing on record to show the trial court erred in the exercise of its discretion in meting out the 35-year term of imprisonment. There is also nothing on record to show the learned judge erred in upholding the sentence.

38. As stated before, sentence is a question of fact and in a second appeal our jurisdiction is confined to matters of law. In **David Munyao Mulela & Another vs Republic [2013*J*** it was held that: -

> **"The complaint on severity of sentence is misplaced firstly because it was not an unlawful sentence imposed and secondly the issue of severity of sentence cannot be before us as it is a matter of fact."**

39. In the case of **M K M -v- Republic [2018] eKLR** this Court faced with a similar "appeal" rendered itself thus: -

> **"Indeed, we need to state quite categorically that the practice now seeming to gain traction and notoriety, of second appeals against severity of sentence only being presented as mitigation statements or the like, has no foundation in law, is contrary to statute and should stop. It is also worth recalling, that when all a person presents on a second appeal is a mitigation, there really is no appeal because an appeal under our Rules is based on a memorandum of appeal."**

40. Persuaded by the merit of the dicta of this Court as stated in **M K M -v-Republic [2018] eKLR,** the appellant's submission on the sentence meted to him has no merit.

41. In the final analysis, we find that the evidence against the appellant is overwhelming. This appeal has no merit and is hereby dismissed. We uphold the conviction of the appellant for the offence of causing grievous bodily harm contrary to ***Section 234*** of the **Penal Code** as charged. We affirm and uphold the 35-year term of imprisonment meted on the appellant.

Dated and delivered at Nairobi this 24th day of May 2019

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR