IN THE COURT OF APPEAL

AT KISUMU

(CORAM: WAKI, NAMBUYE & OKWENGU, JJA

CRIMINAL APPEAL NO. 65 OF 2015

JOSEPH MAHENDE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Migori (D.S. Majanja, J.) Dated 21st November, 2014

in

Migori HC.CR.A. No. 67 of 2014*)*

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JUDGEMENT OF THE COURT

The appeal arises from the judgment of the High Court of Kenya at Migori (**D.S Majanja, J.)** dated 21st November 2014.

The background to the appeal is that the appellant was charged with the offence of causing grievous harm contrary to Section 234 of the Penal Code (CAP 63) Laws of Kenya. The particulars of the offence were that on 28th August 2012 at Tarang'anya in Kuria West within Migori County, the appellant unlawfully inflicted grievous harm to **Peter Marwa** by fracturing his skull. The appellant denied the offence prompting a trial in which the prosecution tendered evidence through six (6) witnesses to prove the offence, while the appellant gave unsworn testimony and his wife also testified in support of his defence.

The brief facts of the prosecution case were that on 28th August 2012 at around 10 am, the complainant **Peter Marwa, (**PW1) was engaged in charcoal burning when the appellant, who is his uncle, attacked and hit him with a stick on the back and on the head. He went home and told his father what had happened. His father took him to Kuria District hospital where he was treated. He was thereafter referred to Tenwek hospital for further management of his injuries.

Appolinal Nyanganga Magege, (PW2) the father to PW1 testified that he was at home on the material day when he heard people quarrelling outside. He went outside to check what was going on. That is when he saw his son PW1 and appellant standing about 200m away. He saw the appellant hit his son on the head and the back using a stick and then went away. **Ibrahim Mohinda Mahende**, PW 3 on the other hand stated that he was on his way from church when he witnessed the incident but just walked away. He knew both PW1 and the appellant as persons from the locality.

Mr. Moses Ginono (PW5), a Clinical Officer at Kuria Hospital testified that on 29th August 2012, he examined the complainant and observed a bruise and oedema on the left side of the head. He sent him for a CT scan. On 28th January 2013, the complainant came back complaining of headaches and general weakness. PW5 treated him and again advised him to do a CT scan. On 28th April 2013, the complainant went back to the hospital with a CT scan which showed that there was a mass in the brain. (a swelling inside the brain). The CT Scan gave three probable causes of such a swelling i.e Lymphoma (Cancer), brain abscess (wound in the brain) or Glioma (Water/Fluid in the brain). PW5 formed an opinion that the injuries noted above had been caused by a blunt object and assessed the degree of injury as grievous harm. He advised the complainant to seek specialized treatment.

Constable **Churchill Omondi,** (PW4), the investigating officer stated that while on duty at Kehancha Police Station, he received a report of assault on PW1. He visited the scene, interrogated witnesses, and gave instructions pursuant to which the appellant was arrested, handed over to police and subsequently charged with the offence he faced at the trial.

When put to his defence, the appellant stated that he was not at home on the date he is alleged to have assaulted the complainant. His wife also testified and stated that it was the rivalry between the appellant and the complainant's father PW2, which had led to the fabrication of the charges against the appellant.

At the conclusion of the trial, the trial Magistrate assessed and analized the record and made findings thereon, that from the evidence on the record as tendered by the prosecution, there was overwhelming evidence adduced through PW1, 2 and 3 who knew the appellant very well, that had placed the appellant at the scene of the assault; that the incident took place in day time; that both the witnesses and appellant were known to each other prior to the incident. On that account, the trial Magistrate rejected the appellant's *alibi* defence.

It was further the trial Magistrate's finding that PW5, the clinical officer who examined PW1 opined that the injury was caused by a blunt object which in the trial magistrate's view, was consistent with the *fimbo* PW2 and 3 had seen the appellant use to inflict the injury on the complainant; that the complainant did not go for the CT Scan immediately he was advised to do so by PW5. Instead, he attended many other hospitals and even underwent an operation so that by the time he went back to PW5 for assessment of the injury, his condition had deteriorated such that he could not talk coherently or stand on his own. In light of the above, the trial magistrate made observations as follows:

> ***"In my view, he had really serious injury from the first time he went for treatment. This is the reason that the medical officer ordered a CT Scan. It is not lost on me that he would not have had any of his present challenges had he not been assaulted by the accused person. The assault on him caused him to suffer harm that permanently injured his health. I am convinced that the gravious harm was occasioned by the accused person's assault on him."***

On the totality of the above assessment, and reasoning the trial court found the prosecution case proved to the required threshhold of proof beyond reasonable doubt, found the appellant guilty of the offence charged, convicted him accordingly and sentenced him to thirty (30) years imprisonment.

The appellant appealed to the High Court against both conviction and sentence raising 6 grounds of appeal. The High Court re-assessed and re-evaluated the record and affirmed the finding of the trial court that on the evidence on the record there was sufficient demonstration that the complainant knew the appellant; that PW2 and 3 witnessed the assault on PW1 and also recognized the appellant as the person who assaulted the complainant as they knew him very well. That the incident took place during day time; and all the witnesses confirmed that the complainant was hit with *a fimbo*.

Turning to the medical evidence, the 1st appellate Judge made observations thereon that while the report of the incident was made to police on 28th August, 2012, the complainant went to hospital on 29th August, 2012; that assessment of injury was done eight (8) months after the incident; that the CT scan was done on 18th March, 2013 which revealed presence of a mass in the complainant's brain; that the CT scan gave three causes for the swelling in the complainant's brain namely, cancer; a brain abscess and water fluid in the brain; that upon evaluation of the medical evidence in totality, PW5 arrived at the conclusion that it was the assault that had led to the brain abscess. On that account the 1st appellate Judge took no issue with the trial Magistrate's conclusion that evidence of aggravated assault had been made out and on that account affirmed the appellant's conviction but interfered with the sentence of thirty (30) years, set it aside and substituted it with one of twenty (20) years imprisonment.

Undeterred, the appellant is now before this Court on a second appeal raising eight (8) home grown grounds of appeal which may be summarized into the following: that the learned Judge erred in law when he:

(a) ***failed to properly analyze and re-evaluate the evidence thus arriving at a wrong conclusion.***

(b) ***failed to find that the evidence produced by the prosecution did not meet the threshold of proof beyond reasonable doubt.***

(c) ***failed to appreciate that the appellant's rights under Article 50 Of the Constitution were violated.***

The appeal was canvassed by way of written submissions adopted fully by the appellant who appeared in person and who did not make any oral submissions. **Mr. L.K Sirtuy,** the learned Public Prosecution Counsel (PPC) fully adopted and briefly highlighted the written submissions that were filed on behalf of the State**.**

In support of the appeal, the appellant submitted that the Superior Court erred in failing to find that some essential witnesses were not summoned to Court in violation of **Section 150** of the CPC, **Sections 107(1), 108, 109** and **128** of the Evidence Act; that **Article 50** of the Constitution and **Sections 70** and **77(1**) and **(2)** of the Evidence Act were also violated as the Clinical Officer who tendered medical reports in evidence was not the maker of those documents.

Secondly, it was submitted, no proper basis was laid by the court before allowing the Clinical Officer to produce those documents. The appellant was never served with medical documents prior to their production in evidence. His rights to a fair hearing were therefore violated. In addition, the technical and medical terms used in the report were not clear. He was therefore greatly disadvantaged in his defence. He therefore urged us to allow the appeal.

The appeal is opposed. **Mr. Sirtuy** submitted on behalf of the State that the High Court discharged its mandate judiciously as there is demonstration on the record that the Judge re-evaluated and reanalyzed the evidence as was required of him by the law. The two Courts below therefore properly exercised their mandate judiciously, when the trial court correctly on the evidence before it found the appellant guilty, convicted and sentenced him to thirty (30) years imprisonment which was lawful considering that the maximum penalty for the offence appellant faced at the trial was life imprisonment, and subsequently that the 1st appellate court also discharged its mandate properly by re-evaluating the record, found basis for affirming the conviction, but interfering with the sentence by reducing the same to twenty (20)

years imprisonment which was also lawful. On that account, the learned Public Prosecution Counsel urged us to dismiss the appeal in its entirety.

This is a second appeal and the position in law is that by dint of the provisions of ***Section 361*** of the ***Criminal Procedure Code,*** only points of law fall for our consideration. See also ***Chemangong -vs- R. [1984] KLR 611***. In ***Karingo -vs- R. (1982) KLR 213 at p. 219*** this Court said:-

> ***"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)".***

We have considered the record in light of the above mandate, and the rival submissions of the respective parties. Only four issues fall for our determination namely whether:

> (i) *"**the medical evidence was properly produced;***
>
> (ii) ***the appellant was supplied with all documents produced by the prosecution prior to hearing;***
>
> (ii) ***the High Court properly analyzed and re-evaluated the evidence, and lastly***
>
> (iii) ***the evidence tendered by the prosecution met the required threshhold of proof beyond reasonable doubt."***

The appellant faced the offence of causing grievous harm. The prosecution therefore had an obligation to prove the ingredients for sustaining a charge of causing grievous harm as set out in **section 234** of the Penal Code namely:

> *i. That the complainant was assaulted without any legal justification;*
>
> *ii. That the complainant sustained grievous bodily harm;*
>
> *iii. It was the appellant who unlawfully assaulted the complainant and occasioned him the injury.*

The first appellate court upon reevaluation and reanalyzing the record, found that those elements were present from the evidence tendered by witnesses especially the eye witnesses namely PW1, 2 and 3, and stated as follows:

> ***"Finally, I am satisfied the injuries suffered by the appellant were as a result of an assault by the appellant. The assault led to severe head trauma which caused PW 1 to undergo treatment at various hospitals. There is no evidence that the appellant suffered from a previous ailment. The appellant did not put any questions to PW 2 and PW 3 to suggest that PW 1 suffered from an ailment before the assault. The charge sheet stated that the complainant sustained a skull fracture. However, the evidence of PW 5 does not disclose that he sustained a fracture. I do not think the failure to prove a fracture of the skull was fatal to the charge as it was an error curable under section 382 of the Criminal Procedure Code.....***
>
> ***The injuries sustained by the complainant were classified by PW 5 as grievous harm and the appellant was properly convicted."***

In urging us to fault the Judge of the first appellate court on the conclusions reached above, the appellant took issue with the manner medical documents were tendered in evidence. According to him, the mode adopted vitiated the prosecution case and the 1st appellate court should not have sustained the appellant's conviction.

Section 33 (d) of the Evidence Act Chapter 80 laws of Kenya provides *inter alia* as follows:

> ***"Statement, written or oral of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases-***
>
> ***.....***
>
> (d) ***when the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen."***

The above provision clearly gives leeway for the production of documents (expert evidence) if the maker cannot be found or whose attendance cannot be procured without an amount of delay or expense which in the circumstance appears unreasonable, subject to compliance with the prerequisite in **section 77** of the Evidence Act.

Section 77(1) of the **Evidence Act** provides *inter alia* as follows:-

> ***"In Criminal proceedings any document purporting to be a report under the hand of a government analyst, medical practitioner..... or anything submitted to him for examination or analysis may be used in evidence."***

Subsection 2 of **section 77** on the other hand states as follows:

> ***"the Court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it."***

Both of the above provisions makes a presumption that the document sought to be introduced under the said provisions are genuine and the signature thereof is authentic. This is the mode of production employed by the trial court and affirmed by the first appellate court when admitting medical evidence in the absence of their makers.

Our interpretation of **section 33 (d)** of the Evidence Act as read with **section 77(1)** & **(2)** of the Evidence Act, is that evidence touching on expert opinion should be tendered by experts themselves as provided for under **Section 48** of the **Evidence Act. However,** in instances where the evidence of such experts cannot be procured without unreasonable delay or expense, other experts working in similar fields of expertise and who are familiar with the handwritings of the unavailable expert can be called upon to tender such evidence as provided for under **Section 33 (d)** of the **Evidence Act and which** evidence by dint of **Section 77 (1) & (2)** of the **Evidence Act**, is admissible and presumed as genuine and authentic.

In ***Joseph Bakei Kaswili -vs- Republic [2017] eKLR,*** the Court confronted with a situation where a victim had been attended to by 3 different medical practitioners but only one appeared at the trial, held *inter alia* as follows:-

> ***"Section 33 of the Evidence Act Cap 80 Laws of Kenya deals with admission in evidence of statements made by persons whose attendance to court cannot be procured without an amount of undue delay or expense which in the circumstances of the case appears to the court to be unreasonable. Section 77 of the Act on the other hand makes provision for the admission in evidence of medical evidence."***

In ***Angela -vs- Republic [2001] eKLR*** the Court added the following:

> ***"A medical doctor or pathologist is a professionally trained and qualified person. When carrying out a postmortem examination, he is undoubtedly performing and discharging a professional duty. When completing and signing postmortem examination report, he is doing so in the discharge of a professional duty. We think, under these circumstances, that subject to other requirements being met, a postmortem examination report is a document made in the discharge of a professional duty and would be covered by Section 33(b) of the Evidence Act. But before Section 33(b) can apply, the first part of the section must come into operation. The first part lays out conditions precedent without which, any of paragraphs (a) to (h) may not be applied. Once again for the sake of convenience and clarity, we set out below the requirements of the first part of the Section. They are:***
>
> ***"Statements, written or oral on admissible facts made by a person who is dead, or cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases....."***

It is clear from the record that the treatment notes from Kuria Hospital, X-ray report from Kisii hospital, medical diagnostic and images reports as well as the report from Tenwek hospital were marked for identification through PW 1, the complainant and subsequently produced in evidence together with the P3 by PW5. The treatment notes marked by PW1 related to the injuries PW5 had observed on PW1 on the first day when he saw him namely, a Bruise and Oedema on the left side of the head. The content of the CT scan report is what PW5 discerned from the CT Scan report. The record is clear that the appellant never objected to have those documents, firstly marked through PW1 and subsequently produced through PW5. PW1 was never cross-examined at all on those documents. The appellant never applied to have the makers of those documents called to testify. He was therefore satisfied with having them produced through PW5. When cross-examined, PW5 stated as follows:-

> ***"It is true that a swelling in the brain could be the result of something other than an assault. A heavy stick would cause such injury if it was used on the head. It had to be used with force. All the reports contribute to ascertaining what is happening with the complainant."***

No further requests were made by the appellant, meaning he was satisfied with the mode of production of those documents. The complaint is therefore belated. We accordingly reject the same considering that the crucial issue in controversy at the trial and the first appellate court was the nature of injuries complainant sustained as a result of the assault inflicted upon him by the appellant which were clearly specified in the P3 form.

As to whether the appellant was supplied with the documents prior to the hearing of the case, **Article 50(2)** of the Constitution provides safeguards for an accused's right to fair trial. Amongst the tenets of fair trial is the right of an accused person to be informed of the charge faced with sufficient detail (Article 50 (2) (b), the Right to have adequate time and facilities to prepare for his Defence (Article 50(2) (c)) and the right to be informed in advance of the evidence the Prosecution intends to rely on at the trial and also to have reasonable access to that evidence (Article 50 (2) (j).

In **Thomas Patrick Gilbert Cholmondeley v Republic (2008) eKLR**, the Court stated *inter alia* as follows,

> ***"…. there is a duty on the part of prosecuting authorities to disclose to an accused person the evidence which they intend to bring before the court in support of their charge. That duty also includes disclosing to an accused person evidence which the***

prosecution has in their possession but which they do not intend to use during the trial. Such evidence may, if adduced, weaken the prosecution's case and strengthen that of the defence; whatever may be its nature, the prosecution is still obliged to disclose it to the defence. The duty continues during the pre-trial period and during the trial itself, so that if any new information is obtained during the trial, it must be disclosed."

In **George Taitimu v Chief Magistrates Court Kibera & 2 Others (2014) eKLR**, the High Court aptly stated as follows;

"[T]he words of Article 50(2) (j) that guarantee the right "to be informed in advance" cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2) (c) guarantees the accused the right, "to have adequate facilities to prepare a defence.

[27] This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence …. The obligation to disclose was a continuing one and was to be updated when additional information was received."

We have considered the above in light of appellant's complaint as highlighted above, and find that the appellant never raised that issue at the earliest opportunity either at the trial or on first appeal. There is therefore no basis upon which we can base our finding that the appellant's rights were infringed with regard to that complaint. It is therefore rejected.

With regard to failure to accord the appellant State funded legal representation, *the Court in the case of* ***David Macharia Njoroge V R, (2011) eKLR*** *analyzed the applicability of Article 50 of the Constitution inter alia as follows:*

"State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense. Substantial injustice is not defined under the Constitution."

In the case of ***Karisa Chengo & 2 others V R****, CR Nos. 44, 45 & 76 OF 2014, it was stated inter alia as follows:*

"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation.

.....

However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the States' obligation to provide legal representation arise."

Considering the appellant's above complaint in light of the above pronouncements, it is our finding that the complaint has been raised belatedly as nowhere in the record do we find any entry where the appellant requested for such legal aid. Secondly, it is also our observation that the appellant was arrested in 2012. Both his trial in the subordinate court and his appeal to the High Court were heard and concluded in 2014, long before the enactment of the Legal Aid Act 2016. In the circumstances, we find that the appellant's right to legal aid at the States' expense were never infringed as alleged by him. That complaint is also rejected.

As regards the first appellate court's discharge of its mandate, it is now trite law that it is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw out its own conclusions in deciding whether the judgment of the trial court should be upheld or otherwise- see **Okeno v. Republic [1972] EA 32.** Further in the case of **David Njuguna Wairimu v. Republic [2010] eKLR** the Court reiterated this duty and pronounced itself as hereunder:-

"***The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.***

From the record as already highlighted above it is evident that the 1st appellate Judge carefully weighed the entire evidence before affirming the trial court's rejection of the appellant's *alibi defence*.

Turning to the last issue as to whether evidence tendered on record by the prosecution disclosed the offence of causing grievous bodily harm to the required threshhold of proof beyond reasonable doubt, the concurrent findings on the evidence tendered on the record was that the complainant was hit by a *fimbo*. He later on developed complications noticed eight (8) months later. Medical evidence tendered revealed that the cause of that medical condition could have been any of the following namely cancer, a brain abscess and fluid in the brain. It was however, not condusive as to whether the one stroke on the appellant's head by the appellant using a *fimbo* could have triggered that medical condition which was the basis for the two courts below sustaining and affirming the charge of grievous harm. We find this issue and the findings made thereon was not properly and effectively interrogated by the two courts below. It therefore creates a doubt in our minds as to whether the appellant is responsible for the subsequent grievous and medical complication. In light of the above, we find it prudent to resolve

the above doubt in the appellant's favour. In light of this finding, we find it prudent to set aside the conviction for the offence of grievous harm and substitute it with a conviction for the offence of assault causing actual bodily harm contrary to **section 251** of the Penal Code as originally preferred against the appellant.

As for sentence, we find the appellant was sentenced on 5th May, 2014, a period of five (5) years and about two (2) months to the hearing of his appeal which we find is sufficient punishment for the substituted offence of assault causing bodily harm. We therefore find it prudent in the circumstances to reduce, the sentence to the period served. Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered at **Kisumu this 7th day of October, 2019.**

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

HANNAH M. OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.