REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL APPEAL NO. E005 OF 2021

(Being an Appeal from the Conviction and Sentence in Bomet Principal Magistrate Court Criminal Number 3053 of 2019 –by Hon. K. Kibelion, PM)

HILLARY KIPKORIR BII ……..…..APPELLANT

VERSUS

REPUBLIC…….... RESPONDENT

JUDGMENT

1. The Appellant (then Accused) was charged with the offence of causing grievous harm contrary to section 234 of the Penal Code. The particulars were that on the 5th day of September, 2019 at around 9.30am at Kisimboi village Kapkesosio location in Chepalungu Sub County within Bomet County wilfully and unlawfully did grievous harm to F.K.

2. The Appellant denied the charge and the case proceeded to full trial in which the prosecution called 5 witnesses.

The Prosecution/Respondent's Case

3. PW1 testified that the accused person was her son. That on the material day, she was at home feeding her cows when she saw the accused person going to the farm where he was followed by two children, BC and FK. Shortly she heard the children screaming. She called the accused person by his name but he did not respond. That she quickly ran towards the children and found the victim with blood on his throat. That the accused person rushed to where his father was and later escaped by running away. That the victim was taken to Olbutyo Hospital by members of the public. She testified that the child was later taken to Tenwek Hospital where he remained for 10 days. She further testified that they reported the matter to Bomet Police Station and they were issued with a P3 Form.

4. PW2 was the sister to the accused person and the victim. She testified that on the material day, she was at home when she heard her mother screaming that the child F had been cut. That F told her the child who was the victim told her that he had been cut by the accused person. It was her further testimony that she took the victim to hospital.

5. PW3 was the sub chief. He testified that on the material day, he received a report of the incident from his fellow sub chief. That he thereafter received a call from a resident of his sub location who told him that the boy who had allegedly cut his brother was hiding in his home. PW3 testified that he sent nyumba kumi officers to go and arrest the accused person. That he went there and found the accused person talking with the officers and thereafter escorted him to Kapkesosio Police Post. PW3 testified that he did not see the victim.

6. PW4 was the Clinical Officer who filled he P3 form for the victim aged 5 on 3rd October 2019. He was escorted by a Police

Officer and had a history of having been assaulted by known person on 5/9/2019. PW4 observed suffered injuries to the neck. There was a scar on ulterior neck where tracheostomy had been done where the tube had been inserted as the trachea had been cut. The vein on the ulterior neck had been cut. A colostal tube was inserted to aid in feeding. The injuries were 28 days' old and were caused by sharp object. PW4 stated that he relied on the discharge summary, treatment notes, and the medical report from Tenwek Hospital where the victim had been admitted. He assessed the degree of injury as grievous harm and filled the P3 (Exhibit 1).

7. PW5 testified that he was the Investigating Officer attached to Kapkesosio Police Station performing general duties. That on the material day a case of grievous harm was reported to the station. That together with his in charge, they visited the scene and found that the accused person had cut his brother on the throat. It was his testimony that the victim had been taken to Olbutyo Dispensary and later transferred to Tenwek Hospital. Where he visited him at the ICU. That the accused person was later arrested by the Assistant Chief.

8. It was PW5's testimony that he took the accused person for mental assessment where it was established that he was fit to stand trial. It was his further testimony that they did not recover anything at the scene but they established that the accused person had a knife.

The Defence/Appellant's

9. The Appellant testified as DW1. His defence was that on the material day, he was unwell and went to the graveyard. He stated that he would go and herd people's cows even though he was unwell. He testified that he was arrested at his aunt's (Caroline's) home.

10. At the close of the trial, the trial court found the appellant guilty and sentenced him to life imprisonment.

11. Being aggrieved by the decision of the lower court, the Appellant filed an Amended Petition of Appeal dated 13th July 2021 on the following grounds: -

I. THAT the learned trial magistrate erred in law and in fact in convicting and sentencing the Appellant to life imprisonment for the offence of causing grievous harm contrary to Section 234 of the Penal Code.

II. THAT the learned trial magistrate erred in law and fact by failing to appreciate that the offence was not proved beyond reasonable doubt.

III. THAT the learned trial magistrate erred in law and in fact in failing to evaluate the evidence tendered judiciously.

IV. THAT the learned trial magistrate erred on all points of fact and law in finding the Appellant guilty without the complainant identifying him as the assailant.

V. THAT the learned trial magistrate erred in law and in fact in failing to appreciate that the evidence relied on was hearsay evidence.

VI. THAT the learned trial magistrate erred in law and in fact by failing to notice the contradictions in PW1, PW2, PW3 and PW4 testimonies.

VII. THAT the learned trial magistrate basing his judgment on the evidence on record should have used his discretion in favour of the Appellant.

VIII. THAT the Judgment is harsh, excessive and unsafe in the entire circumstances.

IX. THAT the learned trial magistrate erred in law and in fact by failing to appreciate the accused did not understand the nature of the charges he was facing and did not participate in cross examination of the prosecution witnesses.

12. This court's duty is to evaluate and scrutinize evidence on record and draw its own independent conclusions. The Court of

Appeal in the case of **Mark Ouiruri Mose vs.R (2013) eKLR,** in explaining this duty held that:

"This court has a duty to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter".

13. The Appeal was heard by way of written submissions. The appellant's submissions are dated 18th October 2021 and were filed on 28th October 2021. The Respondent's submissions are dated 21st October, 2021 and were filed on 22nd October, 2021.

The Appellant's Submissions

14. The Appellant relied on the case of **Pius Mutua Mbuvi vs Republic (2021) eKLR,** which listed the ingredients for proving the offence of grievous harm. The Appellant admitted that the victim suffered grievous harm but that he played no part in the commission of the offence of grievous harm on the complainant. It was his further submission that there were three people who were at the scene of the crime i.e. the Appellant and two children (the complainant and BC). That the complainant and BC were not called to testify and that no reason was given as to why they did not testify. The Appellant submitted that the prosecution failed to call to the stand the father of the victim, whom PW1 identified as the first person that the accused rushed to after cutting the victim. That the prosecution had also failed to call the strange person who called the area chief and told him that the Appellant was hiding in his house. It was the Appellant's submission that in the absence of key witnesses, the prosecution's case manifested a lot of gaps. He relied on the cases of **GMI Vs Republic (2013) eKLR, Republic Vs Cliff Macharia Njeri (2017) eKLR, Republic Vs Stanley Muthike Tiire (2018) eKLR** and Sections 125 (1) and 128 of the Evidence Act to support his submission.

15. The Appellant further submitted that the weapon used in the commission of the offence was not produced in court. That PW4 being the Investigating Officer guessed that the Appellant used a knife but was quick to state that he did not find the said knife

16. It was the Appellant's submission that there were material contradictions in the testimonies of PW1, PW2 and PW3. It was his further submission that PW5 did not tell the court what he found at the scene as he stated that he recorded all statements excluding that of the complainant as he could not speak

17. The Appellant further submitted that he participated in the proceedings without understanding what he was up against. That the record clearly showed that he participated very passively and further that he had no legal representation and as such suffered prejudice. He submitted that it was the duty of the court to be satisfied that the accused person understood the entire proceedings. That failure to put questions to the prosecution's witnesses and raise mitigation should have been a red flag to the trial court that the Appellant was perhaps in limbo in the proceedings. That his right to a fair trial had been infringed upon. He relied on the case of **Albanus Mwasia Mutua Vs Republic (2006) eKLR** to support his submission.

18. On sentencing the Appellant submitted that the sentence passed was harsh, excessive and unjustified bearing in mind his mental health concerns. He urged the court to consider the cases of **Zedekiah Omari Vs Republic (2021) eKLR** and **Harun Mandela Naibei Vs Republic (2014) eKLR**

19. Finally, the Appellant further contended that the prosecution did not prove the case against him and should therefore be acquitted.

The Respondent's Submission

20. The Respondent submitted that PW4 who was the clinician assessed the degree of injury as that of grievous harm. That on the identity of the perpetrator, PW1 who was the mother of the appellant testified that she saw him together with the victim and other children going to the farm and after some time heard the children screaming. It was the Respondent's submission that PW1 clearly saw the appellant slit the throat of the victim. That this was clear evidence pointing to the appellant to the exclusion of anyone else as the perpetrator. That this evidence was not shaken during cross examination.

21. The Respondent submitted that the accused person was mentally fit to stand trial as the mental assessment report indicated so. The Respondent submitted that the appellant did not raise the defence of mental incapacity indicating that he committed the offence while suffering from mental illness. It was the Respondent's submission that the trial court noted that the appellant appeared calm and his speech was coherent, his orientation, judgment and memory were good.

22. On sentence, the Respondent submitted that the sentence of life imprisonment was legally sound. That from the proceedings, the appellant was a first offender and that generally a first offender should not be given the maximum sentence available but should be given a lesser sentence. The Respondent further submitted that while meting out the sentence, the trial magistrate applied his discretion and that the reason for handing down a deterrent sentence was due to the age of the victim, the nature of the injuries suffered and the trauma occasioned to the victim who suffered permanent injuries as a result of the actions of the appellant. The Respondent submitted that the accused person was the elder brother of the victim and instead of providing filial love and protection, maimed the victim in such a brutal way and as such deserved a harsh sentence. That the trial magistrate therefore properly exercised his discretion in imposing the deterrent sentence.

23. I have considered the trial court proceedings, the Amended Petition of Appeal dated 13th July,2021, the Appellant's written submission filed on 13th October 2021 and the Respondent's Written Submissions dated 21st October,2021. I discern three issues for determination as follows: -

i. Whether the Prosecution proved its case beyond reasonable doubt

ii. Whether the defence raised places any doubt on the Prosecution's case

iii. Whether the sentence passed was harsh and excessive.

Whether the Prosecution proved its case beyond reasonable doubt.

24. The Appellant was charged with the offence of Grievous Harm contrary to Section 234 of the Penal Code. In criminal proceedings, the evidence presented in support of a charge is critical. For the prosecution, the evidence whether direct or circumstantial, must prove beyond reasonable doubt that the person charged was involved in the commission of the offence.

25. From the proceedings, it was clear that the evidence that the prosecution tendered was circumstantial. There was no direct evidence as the victim did not testify. There was also no eye witness to the commission of the offence. The evidence in this case must therefore be analysed in line with the principles set out by the Court of Appeal in the case of **Sawe Vs Republic [2003] eKLR** that: -

"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."

26. The prosecution based its case on circumstantial evidence arising from the movement of the Appellant at the scene of crime, which was his home. His mother (PW1) saw him walk towards the farm carrying a panga. She thought he was going to cut nappier grass. His younger siblings BC and FK aged 5, followed him. Shortly, she heard screams from the direction that the Appellant had taken being followed by the younger children BC and the victim FK. On responding to the screams, she found FK bleeding at the neck. She saw the Appellant running away towards where the father was.

27. I find the evidence of PW1 believable for the reason that she is the mother of both the Accused and the Victim. She had no reason to implicate her son in such a heinous crime.

28. PW2's evidence was hearsay to the extent that she said that the victim told her that he had been cut by the Appellant. However, she testified that she was at home and heard their mother (PW1) screaming that the child had been cut and that she (PW2) was the one who took the victim to hospital. Her testimony therefore goes a long way in corroborating PW1's evidence on the fact that her younger brother was cut at their home that day. Her evidence that she escorted the injured brother to hospital also corroborates PW1's evidence.

29. The victim was rushed to Tenwek hospital where he was treated. Julius Magut a clinical officer (PW4) testified that he filled the P3 Form on 3/10/19. That the patient (victim) had been admitted at Tenwek Hospital for 3 weeks. The victim's vein in the anterior neck had been cut and that a feeding tube had to be inserted. He assessed the degree of injury as grievous harm. PW3, PW4 and

PW5 were the Sub Chief, Clinical Officer and the Investigating Officer respectively and their involvement came after the Accused person had been arrested and the victim rushed to hospital.

30. The evidence of PW4 clearly corroborates that of PW1 leaving no doubt in the mind of the court that the victim, though not produced as a witness, suffered grievous harm.

31. The Appellant relied on the case of **Pius Mutua Mbuvi Vs Republic (2021) eKLR** which gave the ingredients that the prosecution had to satisfy in proving the charge of grievous harm. They are: -

a) That the victim sustained grievous harm

b) The accused caused or participated in causing the grievous harm

c) The harm was caused unlawfully.

32. I have already accepted the evidence of PW4 set out *in extenso* above. His evidence together with the P3 Form (Exhibit 1) clearly proves that the victim was cut and injured. The medical evidence provided by PW4 corroborated the oral evidence of PW1 and PW2 that the victim had been cut on the neck. It went further to provide expert opinion on the degree of injury. It was therefore not in dispute that the victim sustained grievous harm. In fact, the Appellant admitted to the injuries in his submissions in this appeal.

33. The identification of the Appellant as the person who injured the victim has been contested by the Appellant in this Appeal. Indeed, the identifying evidence was purely circumstantial. In the case of **Neema Mwandoro Nduzya V R [2008] eKLR**, the Court of Appeal held that:

"It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in R v Taylor Weaver and Donovan (19280 21 Cr. App. R. 20). But circumstantial evidence should be very closely examined before basis of a conviction on it.

34. In this case therefore I have critically evaluated the identifying evidence of PW1. The best person to identify the perpetrator would have been the victim but he was not presented as a witness PW1 was the only person close to the scene and the fact that she did not witness the commission of the offence does not make her evidence immaterial or of less probative value.

35. In Mwangi **and Another Vs Republic (2004) 2 KLR 32,** the Court of Appeal held that:

"In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the Accused is guilty of the charge"

36. PW1 linked the accused person to the commission of the offence. It is my finding that the link was so strong as it put the accused person and the victim at the scene and the only plausible conclusion based on the evidence on record is that the accused person committed the offence against the victim. An offence is by its very nature illegal and unlawful, therefore the harm occasioned to the victim was unlawful.

37. The Appellant submitted that the prosecution failed to call witnesses who would have given direct evidence. I agree with the Appellants submission that direct evidence is important.

38. In this case however, the medical evidence showed that the victim's trachea had been cut. The investigation officer told the court that he did not take the statement of the victim because he could not talk. He was only 5 years old and, in my view, he may not have been literate to write out his statement. The Appellant having so injured and incapacitated the victim cannot therefore turn around and demand that he should have been presented in court to testify.

In any event the law grants the prosecution discretion as to the kind and number of witnesses it requires in proving a particular charge. Section 143 of the Evidence Act provides that:

"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"

39. In the case of **Keter –V- Republic [2007]1 E.A. 135** the Court of Appeal held:

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

Additionally, in the case of DENNIS KIBAARA VS REPUBLIC (2019) eKLR, Limo J held that:

"The Appellant in his defence questioned why only family members were called as witnesses and why the others did not record statements. The trial court address this issue by holding that Section 143 of the Evidence Act provides that no particular number of witnesses shall in the absence of any provisions of the law to the contrary be required for proof of any fact. It also cited the decision in JULIUS KALEWA MUTUNGU -VS- REPUBLIC (CRIMINAL APPEAL NO. 31 OF 2005) where the court held that as a general principle, the prosecution is granted a discretion whether or not to call specific witness and courts would not interfere with that discretion unless it is shown that the prosecution had an ulterior motive in which event it will be presumed that the witness not called would have given adverse evidence".

40. It is my finding therefore that the prosecution had the discretion to call witnesses it chose in aid of its case. It was not required to call a supertuity of witness.

41. Regarding the issue of the production of the weapon that was used in the commission of the offence, I am persuaded by the decision of Mutende J in the case of **Zedekiah Omari vs Republic (2021) eKLR,** where it was held that:

"To prove the offence of grievous harm, it is not a requirement for the weapon used to be produced in evidence, what is crucial is to prove ingredients of the offence".

42. I am equally persuaded by the case of PATRICK CHOMBA NJOKA VS REPUBLIC (2017) eKLR, where Gitari J held that:

"My view is that failure to produce the weapon used does not vitiate a conviction. It would be to set a bad precedent as criminals would use a weapon and ensure that it is never recovered so that they can escape a conviction. It would also mean if the weapon used to commit a crime is not recovered and produced as an exhibit even where there is other evidence a person would not be charged. I am not persuaded to adopt the reasoning in the authority".

43. I find from the circumstantial evidence I have analysed above that the Appellant was correctly linked to the offence. His mother (PW1) saw him walk towards the nappier grass followed by his young siblings. Soon there were screams and the victim (one of the siblings) had been cut. He ran towards one father. He was the only on with the weapon and he had the opportunity to commit the offence. In addition, he ran away. If he was not the attacker, why did he not attend to the injured sibling"

44. I find that the circumstantial evidence point to him and no one else as the perpetrator of the offence. There was nothing in the circumstantial evidence presented by the prosecution that would infer guilt on any other person other than the accused person. The prosecution has proved its case based on circumstantial evidence to the required legal standard of beyond reasonable doubt.

The Appellant's Defence

45. Upon being placed on his defence, the Accused (DW1) testified that he worked at a quarry and that he understood the kind of charges he faced. It was his testimony that on the material day, he was unwell and went to the graveyard. That when he was unwell, he would go and herd people's cows. The accused person testified that he was arrested at the home of his aunt named Caroline.

46. It is my finding that there was nothing in the accused person's defence that would place doubt on the prosecution's case.

47. I however observe that the heinous action of cutting his kid brother's throat could be indictive of some ill mental condition. The Record however shows that the learned Magistrate ordered a mental assessment of the Appellant and made the following observation at page 5 of his Judgment: -

"For clarity and having interacted with the accused on very many occasions during the trial, the accused appeared calm and collected. He was at all times whenever he chose to speak quite coherent save for at times urged this court to have the case referred back for resolution at family level. This is a case which would otherwise easily provoke the court to invoke the provision of Section 162 of the Criminal Procedure Code making provision of procedure in case of the lunacy or other incapacity of an accused person".

48. I have no reason to doubt the trial court's assessment of the accused person.

49. The Mental Assessment Report file on 1st November 2019 stated that he was stable and fit to stand trial. Besides if there had been any history of mental disorder, his family members in particular the mother (PW1) and the sister (PW2) would have mentioned the same in the course of the trial. His motive for attacking the brother therefore remains a mystery to this court.

Whether the sentence passed was harsh and excessive.

50. *The* Appellant did not submit on sentence in the written submissions. However, when the Appeal came up for mention to confirm submissions, he told the court that his family had forgiven him and prayed for leniency.

51. In the case of WANJEMA VS REPUBLIC. 1971 E.A 493, the Court held: -

"A sentence must in the end, however, depend upon the facts of its own particular case. In the circumstances with which we are concerned a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand.

An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case".

52. The accused person was convicted for the offence of causing grievous harm and was sentenced to life imprisonment. In mitigation, the accused person asked for his parents to attend court when he was being sentenced.

53. In the present case the offence carries a maximum life sentence where there are aggravating circumstances. No doubt the offence which I have already found proven was aggravated. I have however, taken into consideration the fact that the Appellant and the victim were siblings. His contention that the family had forgiven him rings true as it is the mother (PW1) who instructed counsel to prosecute his appeal. I will therefore temper justice with mercy and reduce his sentence. In doing so, I have taken into account the purposes of sentencing which include rehabilitation.

54. In the end, I confirm the conviction. I however, set aside the sentence of life imprisonment and substitute therefor a sentence of 15 years' imprisonment from the date of first conviction and sentence. This lenient sentence will enable the Appellant, upon release to reconcile with this family and heal the wounds inflicted by his heinous act.

55. Orders accordingly.

Judgment delivered, dated and signed at Bomet this 31st day of January, 2022.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the virtual presence of the Appellant acting in person, Mr. Mureithi for the Respondent, and Kiprotich (Court Assistant).