REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 211 OF 2011

ALEX KINYUA MURAKARU.....……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(Appeal against conviction and sentence in criminal case number 16 of 2016, R. vs Alex Kinyua Murakaru at Nyeri, delivered Hon. H. M. Okwami, DM 11 Prof. on 17.10.2011).

JUDGEMENT

The appellant herein **Alex Kinyua Murakaru** was convicted of the offence of assault causing actual bodily harm contrary to Section **251** of the Penal Code[1] and sentenced to two years imprisonment.

This being a first appeal, this court is required to re-analyse and re-evaluate the evidence adduced before the trial court and come up its own conclusion while at the same time bearing in mind that I did not have the advantage of seeing the witnesses testify.

The prosecution called a total of **5** witnesses whose evidence is summarized below.

PW1 Susan Nyawira Warutere, the complainant testified that on 15.12.10 at around 19.30 the appellant beat her using blows and kicks. He is known to her as a neighbour. She raised the alarm and PW2 came and found her on the ground. The appellant ran away. PW2 took her to hospital. She proceeded to the Police Station and was issued with P3 form.

PW2 Charity Maina testified that she heard someone yell, that it was the voice of the complainant, she rushed out only to find her on the ground. She also found the appellant, but he ran away after seeing many people come. She testified that the appellant was bleeding from the head and mouth.

PW3 Stephen Maina Wandeto testified that he found the Appellant beating his mother and he ran away. He also stated that the complainant was bleeding from the mouth and hand and was in pain.

PW4 PC 83152 Charles Masita Muchai Police officer attached to Karatina Police Station received the complaint at the station, recorded the statements, issued a P3 form to the complainant and together with his colleague arrested the appellant. He investigated the case.

PW 5 Maina Ndirangu a clinical officer at Karatina District Hospital examined the complainant. He classified the injuries as harm, completed the **P3** form and signed it.

After evaluating the above evidence, the trial magistrate concluded that the appellant had a case to answer. The appellant elected to give sworn evidence which essentially was a denial and insisted no investigations were done and that all the witness were relatives of thre complainant.

After considering both the prosecution evidence and the said defence, the learned Magistrate convicted the appellant and sentenced him to **2 years imprisonment**.

Aggrieved by the said finding, the appellant appealed to this court against both conviction and sentence. The appellant in the original petition of appeal advanced **5** grounds while in the supplementary petition of appeal advanced **2** grounds of appeal and sought for the conviction to be set aside and for an order of re-trial.

The original petition of appeal was filed through an advocate but on 9.11.2015, the appellant filed a notice of intention to act in person and on 24.11.2014 he filed supplementary grounds of appeal referred to above and during the hearing, he informed the court he was ready to proceed with the appeal without his advocate.

In my view all the grounds of appeal can be summarized into two, namely **(a)** whether the evidence was sufficient to sustain the conviction and **(b)** whether there are sufficient grounds to warrant a re-trial.

At the hearing of the appeal, the appellant stated that the case proceeded while he was unwell, that the evidence was contradictory, key witness were not called, that the witnesses who testified were children of the complainant, that the charge sheet did not state the date of arrest, that the magistrate did not record all that he said, that he was arrested after two weeks and insisted he wanted was a re-trial.

Counsel for the State **Mr. Njue** submitted that page 10 of the record shows that the accused indicated he was unwell, but no prejudice was occasioned since the appellant cross-examined the witnesses, namely, **PW4** and **PW5**. Counsel submitted that **PW4** was the investigating officer and his testimony is essentially what he gathered while **PW5** was the clinical officer who produced the **P3** form, hence their evidence was such that it cannot be said to have prejudiced the appellant, and that the appellant nevertheless cross-examined the said witnesses.

On the issue of the independence of the witnesses, counsel submitted that after the alarm, the nearest people were the relatives who responded to the alarm and no inference or bad motive can be inferred nor is there anything to show that the evidence was not truthful. The said witnesses were cross-examined and they stood their ground. Counsel submitted that there is no rule of law barring relatives from testifying and that what counts is the credibility and truthfulness of the witnesses. Counsel also pointed out that there were no material contradictions.

As to the issue of being arrested after two weeks, the counsel submitted that there was no indication of where the appellant was after the alleged offence nor did he cross-examine witnesses on the issue. Counsel urged the court to dismiss the appeal.

*Section **251** of the Penal code provides as follows:-*

Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

The essential ingredients of the offence assault causing actual bodily harm were spelt out in the case of *Ndaa vs Republic*[2] as follows; *i. Assaulting the complainant or victim, (ii). Occasioning actual bodily*

harm.

In *Rex vs Donovan*[3], **Swift J** delivering the judgement 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."

Also relevant is a passage in *Archbold's Criminal Pleading, Evidence and Practice*[4] where it is stated as follows:-

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

In *R vs Chan-Fook*,[5] **Lord Hobhouse LJ** said of the expression *"actual bodily harm*," in contenting 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."

Potter LJ in *R vs Morris*[6] stated as follows:-

"What constitutes "actual bodily harm" for purposes of this Section .....is succinctly and accurately set out in *Archibold*[7] at para 19-197:-

"Bodily harm has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the victim: such hurt or injury need not be permanent, but must be more than merely transient or trifling...

Thus, actual bodily injury is any physical injury to a person (which is not permanent), or psychiatric injury that is not merely emotions, fear or panic. to make out the offence, the prosecution must show that there has been an assault, and that the assault has resulted in actual bodily harm. There must be an intention to assault (*mens rea*) and the assault must have taken place (*actus resus*).

I have carefully evaluated the evidence adduced by the prosecution witnesses. First, the appellant was known to the complainant, hence identification is not in issue. Secondly, the appellant states that the witnesses were all related to the complainant. Whereas there is no rule of law barring relatives from testifying, even taking the evidence of the complainant alone, to me it was sufficient to establish the offence. The appellant insists a key witness, namely, the complainants husband was not called as a witness, thus imputing an adverse inference that his evidence would not have been favourable to the prosecution had he been called. It's not clear what forms the basis of the appellants conclusions because the alleged witness was not an eye witness, nor is he among the ones who rushed to rescue the complainant after she screamed. There is no evidence that the said person heard the complainant screaming.

Section **143** of the Evidence Act[8]provides as follows:-

“No particular number of witnesses shall in absence of any provision of the law to the contrary be

required for proof of any fact"

In *Julius Kalewa Mutunga vs Republic*[9] the Court of Appeal held as follows:-

"…As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive"

There is nothing to show that the prosecution had any oblique motive in calling the witnesses who testified against the appellant. More so, the fact that they were related to the complainant is not a ground to exclude their evidence. The appellant has not disputed that the witnesses were the first to arrive at the scene nor has he denied that he was at the scene. He has not said he was framed for the offence. I find no basis to doubt their evidence.

The Court of Appeal reiterated the above position in the case *Alex Lichodo vs Republic*.[10] Perhaps the leading authority on this issue is the case of *Bukenya & Others vs Uganda*[11]where the East African Court of Appeal held that:-

i. the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

iii. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

In *Paul Mwangi Gathongo Vs Republic*[12]this court observed as follows:-

"But in the same vein the court was categorical to state that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. My re-evaluation and analysis of the evidence submitted in the lower court concludes that this is not a proper case for the court to make an adverse inference because as concluded below, the evidence tendered was sufficient to prove the facts in issue.

*I hasten to support my above conclusion by reiterating that it should be made clear that the rule in Jones vs Dunkel***[13]** *which outlines the circumstances under which an adverse inference may be drawn where a witness is not called is grounded on common sense. The prosecution has discretion to assess the importance that the testimony of a witness would play, or would likely have played in relation to the issue concerned. Nonetheless, I should outline what I apprehend to be the basic jurisprudence that has developed in relation to the rule and that has governed the way I approach the issue at hand.*

The unexplained failure by a party to give evidence or call a witness or tender certain documents may, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party's case. The failure to call a witness or tender documents can allow evidence that might have been contradicted by such witness or document to be more readily accepted. Further, where an inference is open from the facts proved, the absence of the witness or documents may be taken into account as a circumstance in favour of the drawing of the inference. But the absence of a witness or document cannot

*be used to make up any deficiency in the evidence. Thus it cannot be used to support an inference that is not otherwise sustained by the evidence. The rule cannot fill gaps in the evidence or convert conjecture and suspicion to inference.***[14]***"*

In the above cited case, this court proceeded to state as follows:-

*"Whether the failure to call a witness or tender a document gives rise to an inference depends upon a number of circumstances. In Fabre vs Arenales***[15]** *Mahoney J (Priestly and Sheller JJA agreeing) said that the significance to be attributed to the fact that a witness did not give evidence depends in the end upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so. There are circumstances in which it has been recognized that such an inference is not available or, if available, is of little significance. The foregoing position was cited with approval by Miler JA in Hewett vs Medical Board of Western Australia***[16]** *and also the same position has authoritatively been stated by Heydon J D in Cross on Evidence.***[17]**

*The rule only applies where a party is required to explain or contradict something. What a party is required to explain or contradict depends on the issues in the case as thrown in the pleadings or by the course of the evidence in the case. No inference can be drawn unless evidence is given of facts requiring an answer. This position was upheld in the following cases, namely; Schellenberg vs Tunnel Holdings,***[18]** *Ronchi vs Portland Smelter Services Ltd***[19]** *and Hesse Blind Roller Company Pty Ltd vs Hamitovski***[20]** *and its also reiterated in Cross on Evidence.***[21]**

*When no challenge is made to the evidence of witnesses who are called, the principle in Jones vs Dunkel cannot be applied to make an inference in respect of other witnesses who could have been called to give the same evidence.***[22]** *A look at the record shows that PW1"s evidence is largely unchallenged, The witness who was not called was to give the same evidence or corroborate PW1's testimony whose evidence has not been said to have gaps which needed further clarification. As explained in Cross on Evidence,***[23]** *the rule does not require a party to give merely cumulative evidence.*

*In order for the principle to apply, the evidence of the missing witness must be such as would have elucidated a matter.***[24]***The appropriate inference to draw is a question of fact to be answered by reference to all the circumstances of the case."*

I therefore find no basis to draw an adverse inference on the alleged failure by the prosecution to call the said person as a witness.

The appellant sates that the case proceeded on a day he was sick. True on 30.6.2011, the appellant is recorded informing the court:-

Accused: *"Not ready to proceed. I am not feeling well."*

Court: *"Matter to proceed since prosecutor informs me the investigating officer is due to transfer and accused not in a critical condition."*

The court proceeded to hear the investigating officer and the clinical officer. The question for determination is whether or not by proceeding under such circumstances, that amounted to an irregularity which prejudiced the appellant and denied him fair trial. The central purpose of the criminal justice system is to decide the factual question relating to the guilt or innocence of an accused person.

In other words, by proceeding with the trial when the accused said he was sick, did that amount to an irregularity or a defect and if so, did it result in failure of justice. I find useful guidance in the decision in the case of the High Court of South Africa, Natal Province Division in *Shabeer Naicker vs The State*[25]where the learned Judge citing relevant authorities had this to say:-

i. The general rule in regard to irregularities is that the Court will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial Court would inevitably have convicted if there had been no irregularity.

ii. In an exceptional case, where the irregularity consists of such a gross departure from established rules of procedure that the accused has not been properly tried, this is per se failure of justice, and it is unnecessary to apply the test of enquiring whether a reasonable trial Court would inevitably have convicted if there had been no irregularity.

iii. Ultimately, the decision will depend on the nature and degree of the irregularity.

Applying the above rules to the present case, it would appear to me that the test proposed by the common law is adequate in relation to both constitutional and non-constitutional errors. Where the irregularity is so fundamental that it can be said that in effect there was no trial at all, the conviction should be set aside. Where one is dealing with an irregularity of a less severe nature then, depending on the impact of the irregularity on the verdict, the conviction should either stand or be substituted with an acquittal on the merits.

Once it has been established that there has been an irregularity the next issue to be determined is the type of that irregularity with a view to establishing whether the same is so fundamental that it *per se* amounts to failure of justice. In the event of the inquiry eliciting an affirmative response, the appellate court would then set aside the conviction without reference to the merits of the case. As it was held in the above cited South African case, an irregularity which *per se* amounts to a failure of justice falls under an exceptional category and the inquiry is whether:-

"the nature of the irregularity is so fundamental and serious that the proper administration of justice and the dictates of public policy require it to be regarded as fatal to the proceedings in which it occurred."

The appellant is recorded as having cross-examined the said witnesses. In my view, the appellant actively participated in the proceedings and there is nothing to show that he was prejudiced in any manner. The nature of the ailment was not disclosed nor did the appellant inform the court that he was so sick that he could not follow the proceeding and as the record shows, the appellant actively cross-examined the two witnesses. Applying the rules cited above to the present case, I am not persuaded that by proceeding on day that the appellant said he was unwell amounted to an irregularity of such a nature as to warrant this court to arrive at a conclusion that the trial was unfair.

The appellant insisted that this court orders a retrial. The principles governing the making of an order for a retrial were stated in the in the cases of *Fatehali Manji vs Republic*[26] and *Aloys vs Uganda*[27] and these have been cited with approval in numerous cases to the extent that they have acquired the singular distinction of law. They are:-

i. That, in general, a retrial will be ordered when the original trial was illegal or defective.

ii. That a retrial will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial.

iii. That, it does not follow automatically that a retrial will be ordered where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame.

iv. That each case must depend on its own particular facts and circumstances.

v. And that, an order for re-trial should only be made where the interests of justice require it and it should not be ordered where it is likely to cause an injustice to the accused person.

Guided by the above considerations, I find that there are no grounds at all for this court to order retrial.

The appellant also states that the learned magistrate never recorded all what he stated. The mode of recording evidence is provided for under Part V of the Criminal Procedure Code.[28] In my view, the basic considerations while recording evidence are:-

*i. Care should be taken to see that only relevant and admissible evidence under the provisions of the Evidence Act***[29]** *is recorded.*

ii. The court has a duty to elucidate the facts and record he evidence in a clear and intelligible manner.

*iii. The manner of recording evidence is prescribed under Section 197 of the Evidence Act.***[30]**

The appellant never informed this court what is it that was omitted in the record. As stated above, the duty of the trial court is to comply with the law governing recording of evidence and in particular record only relevant and admissible evidence. There is nothing to show that Section 197 and Section 198 of the Criminal Procedure Code[31] on the manner of recording evidence before magistrate and on interpretation of evidence to the accused person were not complied with. Accordingly, I find no merit in this argument.

I have considered the defence offered by the appellant. It is a mere denial and does not rebut the evidence tendered by the prosecution. I find that the evidence tendered by the prosecution sufficiently proved the offence and conclude that the conviction was well founded on evidence and I find no reason to fault the findings of the learned magistrate.

The upshot is that i find no merits in the grounds of appeal advanced by the appellant.

Regarding the sentence, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously.[32] In **Shadrack Kipchoge Kogovs Republic**,[33] the court of appeal stated:-

"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"

Section 251 of the Penal Code[34] provides that a person who is guilty of the offence of assault

occasioning actual bodily harm is guilty of a misdemeanour and **is liable to imprisonment for five years.** The appellant was sentenced to **two** years.

The Supreme Court of India in **State of M.P. vs Bablu Natt**[35]stated that '*the principle governing imposition of punishment would depend upon the facts and circumstances of each case.* In **Alister Anthony Pareira vs State of Maharashtra,**[36]the court held that:-

"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances"

Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.[37]

I have considered the nature of the offence, the principles of sentencing listed above and I find no reason to interfere with the sentence imposed by the learned Magistrate.

The upshot is that I up hold both conviction and sentence and dismiss this appeal. The appellant is ordered to serve the sentence of **two years imprisonment** imposed by the lower court less any period he may have served prior to being admitted to bail pending appeal. Alternatively, the appellant may be set free upon payment of a fine of **Ksh. 30,000/=.**

Dated at Nyeri this **12th** day of **February** 2016

John M. Mativo

Judge

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[1] Cap 63, Laws of Kenya

[2] {1984} KLR

[3] {1934} 2KB 498

[4] 32nd Edition, Page 959

[5] {1994} 2 ALL ER 557 paragraph D

[6] {1998} Cr App R 336 at 393

[7] {1997 ed}

[8]Cap 80, Laws of Kenya

[9] Criminal Appeal No. 31 of 2005

[10] Criminal Appeal No. 11 of 2015-Visram A, Karanja W, and Mwilu P. JJJA.

[11] {1972}E.A.549

[12]HC CR App No 206 A of 2010- Nyeri

[13] {1859} HCA 8; {1859}101 CLR 298, 308, 312

[14] See Schellenberg vs Hesse Tunnel Holdings Pty Ltd {P2000} HCA 18

[15] {1992} 27 NSWLR 437, 449-450

[16] {2004} WASCA 170

[17] 7th Edition, Page 1215

[18] Cubillo (No. 2) 355

[19] {2005} VSCA 83

[20] {2006} VSCA 121 28

[21] Supra at page 1215

[22] See Cross on Evidence, Supra.

[23] Supra

[24]See Payne vs Parker, 202 Cubillo)No. 2) 360

[25] Case No. AR 204/07

[26] {1966} E.A 343

[27] {1972} EA 469

[28] Cap 75, Laws of Kenya.

[29] Cap 80, Laws of Kenya

[30] Ibid

[31] Supra

[32]See Makhandia J (as he then was in Simon NdunguMuragevs Republic, Criminal appeal no. 275 of 2007, Nyeri.

[33]Criminal Appeal No. 253 of 2003(Eldoret), Omolo, O'kubasu&Onyango JJA)

[34] Supra

[35] {2009}2S.C.C 272 Para 13

[36] {2012}2 S.C.C 648 Para 69

[37] See Somanvs Kerala {2013} 11 SC.C 382 Para 13, Supreme Court of India