



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. 18 OF 2018

GEOFFREY ODHIAMBO OTIENO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal case No. 110 of 2017 of the Principal Magistrate's Court at Ndhiwa by Hon. Mary A.Ochieng- Principal Magistrate)

JUDGMENT

1. Geoffrey Odhiambo Otieno, the appellant, was convicted of the offence of grievous harm contrary to section 234 of the Penal code.
2. The particulars of the offence were that on 13th September, 2015 at Anginya village, Ndhiwa Sub County of Homa Bay County, jointly with another, unlawfully did grievous harm to Maurice Otieno Oruru.
3. He was sentenced to serve six years imprisonment. He has appealed against both conviction and the sentence.
4. The appellant was in person. He raised the following grounds of appeal:
 - a) That the learned trial magistrate erred in law and in fact by convicting him on evidence rife with contradictions.
 - b) That the court did not factor in the period he was serving a sentence in Ndhiwa Criminal case number 145 of 2016.
 - c) That the sentence meted was very harsh.
5. The state opposed the appeal through Mr. Oluoch, the learned counsel.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. Maurice Otieno Oruru (PW1) is the complainant in this case. He testified that while going home from the church, the appellant and another stopped him and then viciously cut him with a machete. His evidence was supported by that of John Otange Joseph (PW2) the area assistant chief. He said he witnessed the incident for he was at the scene where he had gone to quell down the animosity by two groups of youths.
8. John Okeyo Olala (PW3) witnessed the incident and was categorical that the appellant was one of the culprits.
9. I have gone through the record and did not come across the contradictions alleged by the appellant.
10. It is important to note that the period the appellant was in custody cannot be termed as a sentence. He had been granted bond but was not able to meet the terms. It is only in exceptional cases where custody period may be factored in the sentence.
11. It is trite law of practice that an appellate court can only interfere with the sentence meted out by the trial court upon satisfaction of some circumstances as was spelled out in Those circumstances were well illustrated in the case of **Nilsson vs. Republic [1970] E.A. 599,601** as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewcity (1912) C.CA 28 T.L.R 364.

12. After the learned trial magistrate had convicted the appellant, he sentenced him to six years imprisonment. Section 234 of the Penal Code provides as follows:

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

13. I have evaluated the evidence on record and concluded that in the circumstances of the offence, the sentence by the learned trial magistrate cannot be said to be harsh or excessive. I have no reason to interfere with it. The appeal is accordingly dismissed.

DELIVERED and SIGNED at Homa Bay this 24th day of June, 2021

KIARIE WAWERU KIARIE

JUDGE