



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC CRIMINAL APPLICATION No. 53 OF 2020

B E T W E E N:

PETER ASIEMA.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

(An Application for review of the sentence handed down by Hon. E. Malesi SRM in KAKAMEGA CMCC No. 1339 OF 2016 delivered on 25May 2017)

R U L I N G

1. The Application before the Court was filed on 14th October 2020. The Applicant seeks the followings orders:

- “1. THAT, may the honourable court be pleased to grant Orders for reviewing my sentence of (10) years downward to a more lenient sentence.
2. That may the honourable judge allow me to lodge this application seeking for resentencing to a more lesser sentence but not limited to probation or C.S.O
3. That may the honourable court be pleased to make any appropriate order that may meet the ends of justice.

2. The Application is supported by the Applicant’s Affidavit. In it he states:

- “1. THAT I was charged tried and convicted for the offence of maim contrary to section 234 of the penal code and sentenced to serve ten years imprisonment by honourable E. MALESI (SRM) IN JUDGMENT DATED 25TH May 2017 in CR. Case no. 1339 of 2016 CM’s Court Kakamega
2. THAT having aggrieved I appealed at the high court of Kenya at Kakamega vide HCCRA NO. 62 of 2017 which was dismissed accordingly through a judgment dated 16th July 2018.
3. THAT I now lodge this application seeking for resentencing to a more lesser sentence but not limited to probation or C.S.O.
4. THAT am mentally and psychologically tortured due to my young family which is currently depressed since my children lack education, health, parental care of both parents as their mother ran away leaving the children to no direction after my appeal has been dismissed hence defenseless and stigmatized children
5. THAT I was the only sole bread winner of the family
6. THAT I am able to raise reasonable fine that this honourable court will deem it fit to grant me in substitute of imprisonment
7. THAT all that I have deponed herein in support of my application herewith attached is true to the best of my knowledge trust and belief.

3. The Applicant was charged with the offence of causing grievous harm under **Section 234 of the Penal Code**. The Particulars of the Offence as set out in the were: “CHARGE: GRIEVOUS HARM CONTRARY TO SECTION 234 OF THE PENAL CODE” and “PETER ASIEMA: On the 1st day of April 2016 at Maziwa road, sichira s/location, Kakamega central district within Kakamega County unlawfully

did maim to BERNARD OTIENO". In the course of the Trial the Learned Trial Magistrate heard the oral evidence of the Complainant, his wife who was an eye witness and the medical officer who treated him and completed the P3 Form.

4. The Complainant and his eye-witness gave oral testimony that the Applicant, upon being asked to repay a debt turned on the complainant and burnt him with a device used to weld metal using an open flame powered by gas. It is well known that the purpose of such a device is to apply a flame at extremely high temperatures to the surface to which it is applied. The P3 records the injuries as "*Alleges to have been burned with a gas welding machine by a known person to him on the 1st/04/16 along Maziwa Road. He sustained burns on the face, neck, chest, abdomen and the head and buttocks.*". The description of the attack is that it was not a swift single act but a sustained attack. The injury sustained was described as "*maim*". From those details, it is clear that, there will be lasting effects from which the Complainant will suffer.

5. The Learned Trial Magistrate heard oral evidence and made his finding, that the Applicant had indeed caused grievous harm to the Complainant. The Applicant was convicted as charged. The Applicant was thereafter sentenced to a term of 10 years imprisonment. The Judgment of the Lower Court was delivered on 25th May 2017. On around 7th June 2017, the Applicant lodged his appeal. In his Appeal, he impugned the Judgment of the Lower Court. By the Judgment of Hon Lady Justice R. Sitati, the Appeal was dismissed on 16th July 2018.

6. In his Judgment and consequent sentencing, the Learned Trial Magistrate expressed himself very clearly, he said, "*The accused turned mad as he had indicated and inflicted burns on pw1. I cannot fathom how one can do that. A deterrent sentence would be appropriate. Accused shall serve 10 years imprisonment.*".

7. Ground 9 of the Appeal was that "The 10 years sentence meted out on the appellant is manifestly harsh in the circumstances.". The only circumstance the Appellant put forward was that he was a first offender and he asked for forgiveness. The Judgment of the Appeal Court held that the learned trial magistrate properly exercised his judicial discretion in sentencing the appellant". This was taken against the background that under **Section 234** of the **Penal Code**, a person convicted may be liable to life imprisonment.

8. The Judgment in the Appeal was delivered on 16th July 2018. On 16th October 2018 the Applicant filed an Application in **Misc App No 76 of 2019**. The Application was filed under a certificate of urgency. In that application, the applicant asserted that he was about to lose his family. The application, expressed as a Petition asked the Court to grant an alternative sentence including probation or community service. In his Ruling delivered on 30th September 2020, Hon Mr Njagi dismissed the petition as having no merit. The Learned Judge did order a re-sentencing report which contradicted the facts put forward by the Applicant. Rather than his family being left destitute, the Report records that the inmate has a strong social support and that he owns a piece of land one acre in size where his wife and children live. It is notable that the probation officer interviewed the family of the Applicant but not the family of the Complainant. On 14th October 2020 the Applicant filed his current application.

9. In short, the Applicant does not wish to complete the sentence imposed on him. He wishes to be freed and would prefer it if the Court imposed a less severe sentence or probation or a community service order. In order to decide whether any of those are appropriate, the Court has to consider the seriousness of the offence. In this case, it was a severe sustained unprovoked attack. The Applicant used whatever came to hand to attack the Complainant. The Complainant was left with lasting injuries. In the circumstances, a community service order is not appropriate, if only for the protection of the community.

10. The Applicant had in incarcerated for only one year and two months when he made his first application. In relation to the current one he has been imprisoned for only 2 years and 5 months of his sentence. The Applicant appears to have undergone some training including a Diploma in Bible Studies. In considering whether an alternative sentence is appropriate, the Court must consider the character of the offending behaviour. In this case, there are numerous aggravating factors. Firstly, the Applicant and Complainant were friends. The offence was committed in the workplace, the offence was committed in a public place. The attack was unprovoked and severe. It is clear from the tone of this Application and the previous one, that the Applicant, even now has no compassion for his victim and his victim's family.

11. The Applicant has not produced one iota of evidence to demonstrate any rehabilitation. There is nothing to demonstrate that he will not, again attack the next person who "*makes him crazy*". He has not accepted his wrongdoing. As at today's date he has only served 4 years and one month. In the circumstances, any re-sentencing exercise would be premature.

12. Application dismissed.

Order accordingly,

Farah S. M. Amin

JUDGE

**DELIVERED ELECTRONICALLY, SIGNED AND DATED AT KAKAMEGA THIS THE 24TH DAY OF JUNE 2021.
DELIVERED ON-LINE USING MS TEAMS PLATFORM**

In the presence of:

Court Assistant:

Applicant: In person from Kakamege Main GK Prison

Respondent: Mr Mutua