**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL APPEAL NO. 49 OF 2018**

**ELIJAH OGETA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the original conviction and sentence in Criminal case No. 231 of 2018 of the Principal Magistrate's Court at Oyugis by Hon. J.S. Wesonga– Senior Resident Magistrate)**

**JUDGMENT**

1. Elijah Ogeta**,** 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 2nd August, 2018 at Kanyaluo location in North Rachuonyo Sub County of Homa Bay County, unlawfully did grievous harm to Walter Obado Oketch.

3. He was sentenced to serve seven years imprisonment. He has appealed against the sentence. He however raised issue with the conviction in his written submissions.

4. The appellant was in person. He raised the following grounds of appeal:

a) That he was a first offender.

b) That he was taking care of six orphans.

c) That he is 69 years old and diabetic.

5. The state opposed the appeal through Mr. Ochengo, 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. It is not open for any appellant to introduce new issues during submissions. He can only do so by filing supplementary grounds of appeal with the leave of the court. In this case no leave was sought. I will however evaluate the entire evidence this notwithstanding.

8. What was the evidence against the appellant? Walter Oketch Obado (PW1) testified that he was seated

while looking after his cows. At the time the appellant approached him, he was on his phone, scrolling. The appellant was armed with a machete and a hoe handle. He accused his of being a nuisance and then viciously attacked him with the weapons he had.

9. Dan Maende Sammy (PW2) said as he was going to his employer he found the complainant's cattle grazing in front of his mother's house. He called the complainant on phone but there was no response. He drove the cattle back to the complainant's land. This is when he met with the appellant who was armed with a machete. When the latter saw him, he ran towards his home. From where the appellant came, he saw a bloodied body. He went and found that it was the complainant who informed him that he had been attacked by the appellant.

10. In his defence the appellant contended that the complainant went to his (appellant's) home while armed with a machete, slashers and a stick. He complained that his cows had destroyed his crops. He (complainant) vowed to kill him. When he told him he did not intend, he left.

11. This defence was dismissed by the learned trial magistrate. It could not stand against the prosecution evidence that overwhelmingly displaced it.

12. 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. 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 Shershewsity (1912) C.CA 28 T.LR 364.**

14. 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 26TH DAY OF JULY, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**