



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS CRIMINAL DIVISION**

**CRIMINAL REVISION NO. 229 OF 2019**

**REPUBLIC.....APPLICANT**

**VERSUS**

**COLLINS KINOJA JUSTIN.....RESPONDENT**

**RULING**

1. On 20<sup>th</sup> August 2019, the Office of the Director of Public Prosecution (DPP) and (herein “the Applicant”), wrote to the Presiding Judge of the Criminal Division of the High Court, Nairobi, pursuant to the provisions of; sections 362 and 364 of the Criminal Procedure Code, (Cap 75), Laws of Kenya, (herein “the code”)
2. The Applicant is seeking that, the sentence meted out, in the Chief Magistrate’s Court at Milimani vide; Criminal Case No. 1986 of 2018, Republic vs Collins Kinoga Justin be revised. It is averred that, there is illegality in the sentence, in that, the Respondent was sentenced to pay a fine of; Kshs 100,000, in default to; serve two (2) years in jail for the offence of; grievous harm contrary to; section 234 of the Penal Code (Cap 63), Laws of Kenya.
3. The Applicant avers that, the subject offence is a felony which attracts a penalty of; life imprisonment, upon conviction. That in the given circumstances the sentence meted out is very lenient. Hence the need of the court to examine the record and satisfy itself as to the legality and propriety of that sentence.
4. The Respondent opposed the application by filing a replying affidavit dated; 25<sup>th</sup> March 2021, in which he avers that, the Learned Trial Magistrate correctly administered the law as required under; section 7(1) of the code. That, the Applicant is being vindictive given that, he has since lost his job with the Kenya Police Service, on account of the case and is unemployed. As such, he is unable to fend for his family.
5. He further states that, he highly regrets the events that took place on; of 7<sup>th</sup> October 2018, that resulted in the subject criminal case. That, the judgment entered is the correct one at law, and therefore, the application be should be dismissed.
6. The background facts of the case are that; the Respondent was charged with the offence of; grievous harm contrary to; section 234 of the Penal code. The particulars of the charge are that, on 7<sup>th</sup> October 2018, at Landmawe off Bunyala road, in Industrial Area, the Respondent did grievous harm to; Peter Kiptoo.
7. The charge was read to the Respondent who pleaded not guilty to the same and consequently, the prosecution called a total of; six witnesses while, the Respondent gave sworn evidence and called two witnesses. At the conclusion of the case, the trial court found that, the prosecution had proved its case beyond reasonable doubt and convicted the Respondent accordingly. Upon considering the Respondent’s records and mitigation, the Respondent was sentenced to pay a fine of; Ksh 100,000, in default to serve two years in jail.
8. The application was disposed of vide filing of submissions. The Applicant filed submissions dated; 15<sup>th</sup> April 2021, and reiterated the fact that, the sentence meted out was too lenient and illegal as, the charge which the Respondent was charged with, attracts a sentence of; life imprisonment, which leads to irresistible conclusion that, there was an obvious and apparent error in principle.
9. That, the trial court did not take into consideration the aggravating circumstances in which the offence occurred, in that, the victim sustained a deep cut on his left cheek and he was admitted in the Intensive Care Unit, as the medical report prepared and produced in evidence by; PW4

10. The Applicant invited the court to; be guided by the Sentencing Policy Guidelines and exercise its discretion judiciously taking into consideration the victim's sentiments as presented in the lower court.

11. The Respondent filed submissions dated; 16<sup>th</sup> June 2021, and submitted that, section 234 of the Penal Code, does not quantify what grievous harm is. However, once a qualified medical doctor determines how severe the harm is, it is upon the learned Trial Magistrate to exercise discretion and mete out sentence, deserved.

12. That, in the instant case, Learned Trial Magistrate invoked the provisions of; section 203 and 215 of the Code to sentence the Respondent. The Respondent invited the court to note that, under sections; 362 and 364 of the Code, the key words are; legality and propriety, and urged the court to arrive at the conclusion, that the subject sentence and conviction herein were legal and proper at law. He cited the case of; Republic Versus Joseph Nduvi Mbuvi, (2019), eKLR.

13. Finally, the Respondent submitted that, the Applicant should not use this revision application under the guises of an appeal and relied on the case of; Public Prosecutor Versus Muhari Bin Mohd and Another (1996).

14. That, the Applicant should not use revision and disguise it as an appeal and relies on the Malaysian case of; Public Prosecutor Versus Muhari Bin Mohd and Another (1996).

15. I have considered the arguments advanced by both parties and I find that, the only issue to determine is whether, the provisions of section 362 and 364 have been properly invoked. In that regard, the subject provisions provide as follows: -

*“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”.*

16. Similarly, the provisions of; section 364 of the Code, states: -

*“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—*

*(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;*

*(b) in the case of any other order other than an order of acquittal, alter or reverse the order.*

*(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of; being heard either personally or by an advocate in his own defence:*

*Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.*

*(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.*

*(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.*

*(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed”.*

17. However, as stated in, Ogolla s/o Owuor vs. Republic, [1954] EACA 270, it is settled law that, sentencing is the discretion of the trial court and that, the appellant will only interfere with that discretion if, it is satisfied that, the court acted upon some wrong principle or overlooked some material factors.

18. The Respondent herein was charged with the offence of; causing grievous harm. The provisions of; section 234 of the Penal code that creates that offence states that; “any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life”.

19. The question that arises is whether, the life sentence stipulated in the subject provision is mandatory. In this regard the courts have held that, it is not a mandatory sentence. In the case of, Opaya vs Uganda (1967) E.A. 752, it was held as follows: -

*“...where these words “...liable to imprisonment for life are used in any particular provision providing for a punishment the proper interpretation is that the court has discretion in*

*providing to pass sentence which may be appropriate in the circumstances of that particular case.”*

20. In the instant matter, the trial court sentenced the Respondent to pay a fine of; Kshs 100, 000, in default serve two (2) years' imprisonment. The sentence imposed was erroneous in the first place in that, the maximum default period for the fine of Kshs 100, 000 is a custodial period of one (1) year. Therefore, the two (2) years period given is unlawful and I hereby set it aside.

21. Be that as it were, it is evident that, the sentence of a fine, is not prima facie provided for under the subject section. Further, a question arises as to whether the sentence imposed herein reflects the objective of sentencing. It is noteworthy that, the Sentencing Policy Guidelines of the Judiciary, sets down factors that a court takes into account while meting out a sentence as follows; -

- a) *Proportionality of the sentence to the offending behavior;*
- b) *Uniformity of sentence; similar offences should attract similar penalty/sanction;*
- c) *Deterrence; to discourage or eliminate a vice in the community/society;*
- d) *Retribution; appropriate sentence to act as a punishment for wrong done to help the victim see that justice has been served;*
- e) *Transparency; consideration taken as to what sanction the law provides.*

22. To determine whether, these factors were considered, one has to first and foremost consider the offence herein. It is an offence of grievous harm. Section 4 of the Penal Code (cap 63) of the laws of Kenya, states that;

*“Harm means any bodily hurt, disease or disorder whether permanent or temporary”*

23. In the same vein, grievous harm is defined as follows: -

*“Grievous harm” means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense”*

24. However, the word; “maim” is not defined under the Code but in in the P3 Form as here below: -

*“Maim means destruction or permanent disabling of any external or internal organ, membrane or sense.”*

25. In the instant matter, the P3 form signed by Dr Maundu indicates that, the victim of crime suffered; a large scar on the left cheek. That though it had healed leaving large laceration, he had to undergo surgical deconstruction. The Doctor classified the injuries as grievous harm.

26. The evidence of the victim himself was that, the Respondent stabbed him with a knife. He was treated at; Langata Hospital and transferred to Nairobi West Hospital and admitted in ICU. In my considered opinion, these injuries were very serious.

27. The further questions that arise are: Is the sentence of; Kshs 100, 000, meted herein sufficient and/or adequate? Would any reasonable prudent person find that subject sentence commensurate to the offence?

Did the sentence take into account all the relevant factors and/or meet the objectives thereof?

28. I find that, as much as the appellate court will not necessarily and generally interfere with the trial court's discretion in sentencing, it will do so where the sentence is either; manifestly low or excessive and/or illegal, as held in *Griffin -vs- Republic (1981) KLR 121* . In my considered opinion, the sentence herein was extremely lenient.

29. In fact, immediately it was pronounced, the victim vide a letter dated 5<sup>th</sup> July, 2019, wrote to the Court requesting for proceeding to petition the Director of Public Prosecution to appeal for enhancement. Thus, it does not meet the objective of deterrence and/or pass proportionality test. In the circumstances I hereby set it aside, for being too lenient and illegal, in relation to the default period.

30. In considering the sentence to impose, I have considered the Probation officer's report on record, the Respondent's mitigation, that he is a first offender, and the fact that, he has ever since been interdicted from the National Police Force. Similarly, the period of about four (4) years he has been on trial is considered and finally, that, the victim has further recourse in a civil suit.

31. Therefore, pursuant to the exercise of the powers conferred on this court by sections; 354, 357 and 358, of the Criminal Procedure Code, (cap 75) laws of Kenya, I enhance the sentence herein and sentence the Respondent to serve; two (2) years imprisonment. The sentence shall run from the date of this order. It suffices to note that, the Respondent is out on bond, the sentence will be calculated from the date he is physically, incarcerated. The right of appeal within 14 days is explained.

32. It is so ordered

**DATED, DELIVERED AND SIGNED ON THIS 6<sup>TH</sup> DAY OF AUGUST 2021**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Ms Akunja for the Applicant

Mr. Omollo for the Respondent

Edwin Ombuna. Court Assistant