REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. E008 OF 2020

MOHAMED ALI HIRE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the Judgement of Principal Magistrate Hon. A. Makoross in Criminal Case No. 190 of 2019)

JUDGEMENT

1. This is an appeal arising from the Judgement in Wajir Criminal Case No. 190 of 2019 on grounds that:

- **The prosecution witnesses failed to prove the case beyond all reasonable doubt.**
- **The offence was framed due to an existing grudge.**
- **There was no eye witness to the alleged offence.**
- **Evidence was contradictory and inconsistent &**
- **There was no doctor's report.**

2. The appellant was charged with the offence of causing grievous harm upon one Salat Luhus Mohamed on the 5th of March 2019 at Dadajabula Location in Habaswein Sub-County of Wajir County.

3. Upon hearing the case the trial magistrate found the appellant guilty as charged, convicted him and sentenced him to 10 years imprisonment.

4. The appellant submitted oral evidence and though the State had filed written submissions it was submitted orally as well for the benefit of the appellant.

5. The appellant submitted that he was framed; there was no eye witness; further the victim owed him money and the evidence was based on suspicion. He questioned why the alleged eye witness failed to arrest him. He raised an alibi of having been out of town where the incident occurred.

6. The prosecution opposed the appeal and supported the judgement. It is the prosecution's case that the victim gave an account of the incident and PW2 placed the appellant at the scene of crime. The incident was at 11 am and visibility was clear the assailant was identified.

7. The duty of this court as the first appellate court is to reconsider, examine, and analyze the evidence afresh in order to arrive at an independent opinion. See the case of **Okeno vs Republic [1972] E.A.**

8. From the evidence before court the complainant, PW1 received stab wound injuries to his abdomen and was taken to Garissa General Hospital where he was hospitalized for 10 days. According to PW9 who filled the P3 form on the 11th of May 2019 the diagnosis at Garissa Hospital from the case summary indicated that the victim had sustained penetrating stab wound. He assessed the injury as grievous harm. The incision seen was 10 cm x 0.5 cm.

9. The question before court is who inflicted the said injuries. PW1 stated that he was sleeping when the appellant inflicted the injury and was woken up by the pain, when he saw the appellant standing over him. He also stated that the Appellant also stabbed one other person at the same time.

PW2 heard the victim cry out. He went to where he was and saw the appellant with a knife, he rushed to the victim at which point the appellant ran off.

10. Both the eye witness and the complainant pointed an accusing finger at the appellant. Though the complainant stated that he had no grudge with the appellant, on his part the appellant alluded to a grudge between them. Whatever the case there was no justification for the action.

11. It was vicious and done when the complainant was a sleep. There must have been a grudge that drove the assailant to commit the act.

12. The P3 gave details of the injuries. Same was not challenged. Further there was sufficient evidence placing the appellant at the scene and armed with a knife. The court finds therefore, that the case against him was proved beyond all reasonable doubt.

13. Sentencing is discretionary. And an appellate court ought not to interfere unless the sentence meted out is too harsh and unreasonable.

In **Bernard Kimani Gacheru vs Republic Cr. Appeal No. 188 of 2000** the Court of Appeal stated:

> **"It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests on the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive on the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist. (Emphasize added)."**

14. In the Sentencing Guidelines of the Judiciary it has been proposed in paragraph 3.1 as follows;

> **"The sentence meted out must be proportionate to the offending behavior. The punishment must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence of the offending behavior is weighed in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender."**

15. The complainant was in hospital for 10 days. The incision was 10cm x 0.5 cm. The treatment administered was described as wound closure with medication.

16. The court has formed the view that the 10 years meted out to the appellant was manifestly excessive. The court also considers that the appellant stayed in custody for a period of about 2 months before his conviction.

17. Based on the above the appeal succeeds to the extent that the sentence will be reduced from 10 years to 5 years from the date of conviction taking into account the 2 months the Appellant was in custody,

DATED, DELIVERED AND SIGNED AT GARISSA THIS 30TH DAY OF SEPTEMBER, 2021.

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ALI-ARONI

JUDGE