REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO E004 OF 2021

PAUL OCHIENG MARTIN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon F. M. Rashid (SRM) delivered at

Winam in Principal Magistrate's Court in Criminal Case

No 285 of 2019 on 18th April 2019)

JUDGMENT

INTRODUCTION

1. The Appellant herein was convicted by Hon F.M. Rashid, Senior Resident Magistrate for the offence of grievous harm contrary to Section 234 of the Penal Code and she sentenced him to serve life imprisonment.

2. The particulars of the offence were that on the 24th day of February 2019 at Nyalunya village, Nyabuya Sub location, Kolwa Central Location in Kisumu East District within Kisumu County, unlawfully did grievous harm to Pamela Akinyi Ochieng (hereinafter referred to as "the Complainant").

3. Being dissatisfied with the said Judgement, on 4th February 2021, he preferred this appeal. His undated Petition of Appeal was filed on 4th February, 2021. He relied on three (3) Grounds of Appeal.

4. His undated Written Submissions were filed on 29th June 2021 while those of the State were dated 13th July 2021 and filed on 28th July 2021.

5. Both parties relied on their Written Submissions. This Judgment herein therefore is based on the said Written Submissions.

LEGAL ANALYSIS

6. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. However, no evidence was adduced in court in this case because the Appellant pleaded guilty to the charge. It was therefore not necessary to analyse whether or not the Prosecution proved its case to the required standard.

7. The Appellant submitted that he was a first offender and had come in conflict with the law for the first time. He relied on the case of **Francis Karioko Muruatetu & Another vs Republic [2017] e KLR** which declared the mandatory nature of sentences unconstitutional. He urged this court to consider that he had asked for forgiveness and the fact that he was in custody while his case was being held.

8. On the other hand, the State opposed his Appeal on the ground that he pleaded guilty to the offence. It asserted that the charge and the particulars of the offence were read to the Appellant in English, and the Appellant understood the proceedings and responded in English. It was its contention that the plea of guilty was equivocal and that it met all the elements that were set out in **Adan vs Republic [1973] EA 445**. It submitted further that in the event the court was to set aside the conviction, it would be seeking for a retrial.

9. It is, however, important to point out that the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) was not applicable

in the circumstances of the case herein as on 6th July 2021, the Supreme Court issued guidelines stating that the said case was only applicable in matters where persons had been charged and convicted of the offence of murder.

10. The question as to whether or not the Learned Trial Magistrate ought to have warned the Appellant of the seriousness of the offence after pleading guilty as has been held in the case of **Simon Gitau Kinene v Republic [2016] eKLR** did not appear material as he did not appear to question the procedure and manner in which his plea was taken and recorded.

11. This court understood the Appellant's case to have been limited to the length of his sentence. There was nothing in his Petition of Appeal or his Written Submissions to suggest that he had questioned the manner in which his plea of guilty was recorded. As there was no evidence that was adduced, his Ground of Appeal No (1) that the prosecution evidence was full of contradictions was irrelevant and may have found its way in the Petition of Appeal inadvertently.

12. Having looked at the Appellant's Grounds of Appeal and the respective Written Submissions, it appeared to this court that the issue that had been placed before it for determination was whether or not in the circumstances of this case the conviction and sentence meted upon the Appellant by the Trial Court was lawful and or warranted. The only avenue that was open to him was to appeal against the regularity or otherwise of the proceedings or on his conviction.

13. The Complainant was the Appellant's mother. According to the Pre-Sentence Report dated 18th April 2019, the Appellant had confronted her on several other occasions and eventually attacked her on the material date. The said Report also indicated that he was unsuitable for release on a non-custodial sentence due to his association with wrong peers and habitual use of bhang which had caused him to be violent especially to the Complainant.

14. Section 234 of the Penal Code Cap 63 (Laws of Kenya) under which the Appellant herein was charged stipulates that:-

> **"Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life** (emphasis court)**."**
>
> **15. The term "liable to imprisonment for life" does not mean that a person once convicted must be sentenced to life imprisonment. Life imprisonment is the maximum sentence and a judicial officer can sentence such person from the minimum to the maximum applicable lawful sentences.**

16. Indeed, in the case of Sajile Salemulu & Anor *vs* Republic [1964] EA 3, the court therein held as follows:-

> ***"In assessing the appropriate sentence, the chief determining factor is the offence itself. Where there is no prescribed minimum or maximum penalty, the court has absolute discretion as to what sentence it considers appropriate. Where there is a prescribed maximum and minimum, the court's discretion to what is the appropriate sentence is limited to the range between the two extremes. The prescribed minimum penalty is the appropriate one where there are no aggravating features. And even where there are aggravating features, the prescribed minimum penalty may still be adequate…"***

17. Although none of his Grounds of Appeal were successful as they were badly presented, this court came to the firm conclusion that taking the circumstances of the case and having noted that the Appellant was a person who took narcotic substances and therefore not in a sober state of mind, it was the considered view of this court that the sentence of life imprisonment was too harsh and/or excessive warranting interference by this court. It found a sentence of four (4) years to have been reasonable.

DISPOSITION

18. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 4th February 2021 was allowed. The effect of this decision is that the conviction of the Learned Trial Magistrate be and is hereby upheld as it was safe but the sentence be and is hereby reduced from life imprisonment as it was too harsh to four (4) years imprisonment.

19. The period the Appellant remained in custody while his case was concluded shall be taken into account while computing his sentence as contemplated in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

20. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF OCTOBER 2021

J. KAMAU

JUDGE