



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 55 OF 2019

SMW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the whole judgement of Hon E Agade

(RM) delivered on 10th November, 2017 in Kangundo Criminal Case 417 of 2016)

ARISING FROM

REPUBLIC.....PROSECUTOR

VERSUS

SMW.....ACCUSED

JUDGEMENT

1. The appellant was charged with the offence of grievous harm contrary to section 231 of the **Penal Code**, the allegations being that the appellant on the 19th Day of June, 2016 in Matungulu Sub-county within Machakos County unlawfully did grievous harm to **MM**.

2. According to PW1, **RMM**, she had left her matrimonial home due to violence when the appellant, her husband threatened to kill her. Three weeks thereafter, on 19th June, 2016 at about 2030 hours, the appellant followed her to her parents' home and found her with her second born four year old child in the kitchen. According to her, the appellant found her bending while putting firewood on the fire and held her by the neck while choking her. He then took a knife and stabbed her severally in the left ear. He also hit her on the head with a piece of wood. When PW1 started bleeding, the appellant ran away taking with him both the knife and the wood he used in attacking her. As a result, she lost consciousness and when she came to, she found herself in a GK vehicle in the company of strangers. She was then taken to Kangundo Hospital before being transferred to Kenyatta National Hospital where she was admitted for a week. It was her evidence that for three days she was unable to speak. She identified her treatment documents as well as the clothing she was wearing on that day.

3. According to PW1, after the incident, the appellant went into hiding and it took a while before he was arrested though she was not aware of either the date or place of his arrest. It was her evidence that the reason why the appellant attacked her was because she had declined to return to his home. It was her evidence that though her parents had demanded that the appellant goes with his parents the appellant instead went with someone else and her parents declined. In cross-examination, PW1 stated that they had four children and one child died in her womb due to assault by the appellant and though she did not report the incident, she informed her parents of the same. According to her the matter was resolved after both parents discussed the matter.

4. PW2, **PN**, was the mother of PW1. According to her, on 19th June, 2016 at about 2030 hours while she was in the shop, her husband, **M**, informed her that he had found PW1 at home with her children and he asked her to go and assist PW1. PW2 closed the shop and went home. When she arrived, she found PW1 standing by the cupboard unconscious, her head bowed while her children were seated studying. She then went into the kitchen and when she returned she found when PW1 had been assisted to sit by her father. It was her evidence that blood was oozing from PW1's nose and ear and blood was all over the place. They then proceeded to Matuu Police Station where they were referred to Kangundo Hospital from where they proceeded to Kenyatta National Hospital where PW1 was admitted for six days. She testified that PW1 was only able to speak after three days.

5. Though PW2 was not aware of what happened, she was informed by PW1's four year old son that his father had come and had held PW1 by the neck and started beating her then threw her on the stones and wood. PW2 identified the clothes which PW1 wore on that day as well as her medical documents.

6. In cross-examination, PW2 stated that though the couple used to live well they had problems and when she told the appellant to bring his mother, the appellant told her that his mother would not come though his mother only went once. She stated that there was a time PW1 stated that the appellant beat her and she had a still birth and PW2 mentioned the matter to the appellant's mother though they did not report the matter to the police.

7. PW3, **Dominic Mbindyo**, a clinical officer based at Kangundo Level 4 Hospital, testified that he attended to PW1 on 30th June, 2016. It was his evidence PW1 had been treated at Kangundo and was referred to Kenyatta National Hospital where she had been admitted on 20th June, 2016 and was discharged on 23rd June, 2016. PW1 had a history of assault by a person known to her who hit her with a piece of wood and she sustained body injuries. At the time she reported at the Hospital she was complaining of headache and was bleeding from the nose, ears and had depressed scalp fracture. She also had a temporal parietal subdural haematoma and blood clot in the brain. She was noted to be drowsy. In PW3's opinion the weapon used was blunt. After PW1 was discharged on 23rd June, 2016, she was sent for follow up at the Mental Health Clinic. PW3 assessed the degree of injury as grievous harm. He produced PW1's treatments and P3 form.

8. PW4, **Cpl James Miyano**, was on 28th June, 2016 at the Crime Office at Tala Police Station when PW1 in the company of her mother reported a case of assault by the appellant, PW1's husband which occurred on 16th June, 2016. According to him, PW1 was in a lot of pain and looked weak and could not record her statement that day. She was therefore told to return after getting better with her witnesses. PW1 later returned and her statement was recorded and was furnished with a P3 form.

9. According to PW4, he looked for the appellant but did not find him till he was arrested on 8th February, 2017 in respect of another matter upon PW1 hearing that the appellant had been arrested.

10. Upon being placed on his defence, the appellant testified that he did not beat PW1. According to him, PW1 left his home and went to live with her parents after PW1 quarrelled with a neighbour's wife who threatened her. According to him, he used to visit PW1 and used to take food to her and the children. It was his evidence that he was informed of this case when he was arrested in another case. He denied the allegations that he had previously beaten PW1 when she was pregnant. According to him what caused PW1 to miscarry was the fact that she walked for long hours after leaving home. According to him, after PW1 left he married another wife and that was the reason he was framed up.

11. In his amended grounds of appeal, the appellant abandoned the grounds challenging his conviction and restricted his appeal to sentence.

12. The appellant vide his submissions sought to move the court under Section 362 and 364 of the Criminal Procedure Code to review his sentence downwards. He submitted that he was remorseful, had fatherly duties and resourceful hence urged the court to exercise its discretion. Vide further submissions, he indicated to court that he sought to amend his memorandum of appeal and sought mitigation and leniency on the additional ground that he was baptized while in prison.

13. Learned counsel for the state submitted that the offence that he appellant committed was a domestic violence related one and ought to be deterred. She urged the court not to interfere with the lenient sentence of 10 years and in the alternative sought that the same be enhanced. It was her submission that the court upholds the conviction and sentence of the trial court.

Determination

14. This appeal is only against the sentence. The appellant in his submissions has repeated the mitigating factors and seeks that the court considers the same and allows his appeal. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in **S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12** where it was held that:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”.”

15. Similarly, in **Mokela vs. The State (135/11) [2011] ZASCA 166**, the Supreme Court of South Africa held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”

16. The predecessor of the Court of Appeal in the case of **Ogolla s/o Owuor vs Republic, [1954] EACA 270**, pronounced itself on this issue as follows: -

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material

factors”.

17. To this, I would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case”. (**R - v- Shershowsky (1912) CCA 28TLR 263**). In **Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated thus: -

“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also **Sayeka -vs- R. (1989 KLR 306)**”

18. Section 231 of the *Penal Code* provides as hereunder:

Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person –

(a) unlawfully wounds or does any grievous harm to any person by any means whatever; or

(b) unlawfully attempts in any manner to strike any person with any kind of projectile or with a spear, sword, knife or other dangerous or offensive weapon; or

(c) unlawfully causes any explosive substance to explode; or

(d) sends or delivers any explosive substance or other dangerous or noxious thing to any person; or

(e) causes any such substance or thing to be taken or received by any person; or

(f) puts any corrosive fluid or any destructive or explosive substance in any place; or

(g) unlawfully casts or throws any such fluid or substance at or upon any person, or otherwise applies any such fluid or substance to the person of any person,

is guilty of a felony and is liable to imprisonment for life.

19. I associate myself with views of J. Ngugi, J in **Benson Ochieng & Another vs. Republic [2018] eKLR** that:

“Re-phrasing the *Sentencing Guidelines*, there are four sets of factors a Court looks at in determining the appropriate custodial sentence after determining the correct entry point (which, as stated above, I have determined to be fifteen years imprisonment). These are the following:

a. Circumstances Surrounding the Commission of the Offence: The factors here include:

i. Was the Offender armed? The more dangerous the weapon, the higher the culpability and hence the higher the sentence.

ii. Was the offender armed with a gun?

iii. Was the gun an assault weapon such as AK47?

iv. Did the offender use excessive, flagrant or gratuitous force?

v. Was the offender part of an organized gang?

vi. Were there multiple victims?

vii. Did the offender repeatedly assault or attack the same victim?

b. Circumstances Surrounding the Offender: The factors here include the following:

i. The criminal history of the offender: being a first offender is a mitigating factor;

ii. The remorse of the Applicant as expressed at the time of conviction;

iii. The remorse of the Applicant presently;

iv. Demonstrable evidence that the Applicant has reformed while in prison;

v. Demonstrable capacity for rehabilitation;

vi. Potential for re-integration with the community;

vii. The personal situation of the Offender including the Applicant's family situation; health; disability; or mental illness or impaired function of the mind.

c. Circumstances Surrounding the Victim: The factors to be considered here include:

i. The impact of the offence on the victims (if known or knowable);

ii. Whether the victim got injured, and if so the extent of the injury;

iii. Whether there were serious psychological effects on the victim;

iv. The views of the victim(s) regarding the appropriate sentence;

v. Whether the victim was a member of a vulnerable group such as children; women; Persons with disabilities; or the elderly;

vi. Whether the victim was targeted because of the special public service they offer or their position in the public service; and

vii. Whether there been commitment on the part of the offender (Applicant) to repair the harm as evidenced through reconciliation, restitution or genuine attempts to reach out to the victims of the crime."

20. According to Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015:

"[71] To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(a) *age of the offender;*

(b) *being a first offender;*

(c) *whether the offender pleaded guilty;*

(d) *character and record of the offender;*

(e) *commission of the offence in response to gender-based violence;*

(f) *remorsefulness of the offender;*

(g) *the possibility of reform and social re-adaptation of the offender;*

(h) *any other factor that the Court considers relevant.*

21. In this case the crime was gender based committed against the appellant's wife. According to PW1, as a result of the brutality meted against her by the appellant, she finally decided to seek refuge in her parents' home. However, if PW1 thought that she would be safe under the wings of her parents, she was in for a rude shock. The appellant pursued her right up to her parents' home into her mother's kitchen and continued brutalising her leaving her unconscious. Therefore, this was not a crime that was committed on the spur of the moment but one in which the appellant harboured deep anger and hatred for PW1; anger which would not abate even after PW1 left his house. It did not concern the appellant that his own children were present at the time of the assault and were likely to be psychologically traumatised by his own actions.

22. As appreciated by the Supreme Court in *Muruatetu Case* (supra):

"Comparative foreign case law has also shown that the possibility of review of life sentences and the fixing of minimum terms to serve a life sentence before parole or review, is intrinsically linked with the objectives of sentencing. In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR*, where the High Court held that the objectives include: "deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim." The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

- 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.**
- 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.**
- 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.**
- 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.**
- 5. Community protection: To protect the community by incapacitating the offender.**
- 6. Denunciation: To communicate the community’s condemnation of the criminal conduct.”**

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict.”

23. In my view in the circumstances of this case, the appellant does not deserve mercy from this court. Not only should the appellant be made accountable for his own reckless actions, but there is need to protect the society and particularly PW1 and the children from the brutality of the appellant by keeping the appellant away from her till such a time that he proves that he has sufficiently reformed. In order to show this court’s disapproval and denunciation of the appellant’s conduct, and to send a stern message to those with similar intentions, the sentence imposed must be commensurate with the offence committed.

24. Having considered the material on record as well as the submissions made, I am not satisfied that this is a proper case for this court to interfere with the sentence. In my view the sentence imposed was very lenient and the appellant ought to count himself lucky that he got away with such a light sentence in the circumstances. He ought to keep cooling his feet where he is not a danger to the health and safety of PW1.

25. In the premises, this appeal fails and is dismissed. However, pursuant to section 333(2) of the **Criminal Procedure Code**, the sentence will run from 8th February, 2017.

26. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 10th day of March, 2020.

G V ODUNGA

JUDGE

In the presence of:

The Appellant in person

Miss Mogoi for the Respondent

CA Geoffrey