



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL APPEAL NO. 19 OF 2019

ESBORNE OMONDI OTIENO *alias* KADWALO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the sentence by Hon. R. K. Langat Senior Resident Magistrate

in Rongo Senior Resident Magistrate's Court Criminal Case No. 420 of 2018

delivered on 28/12/2018)

JUDGMENT NO. 2

1. This is an appeal against sentence.

2. **Esborne Omondi Otieno *alias* Kadwalo**, the Appellant herein, was charged with the offence of *grievous harm* contrary to **Section 234** of the Penal Code.

He denied the offence.

3. The Appellant was subsequently tried, found guilty and convicted as charged. He was accordingly sentenced to 12 years' imprisonment.

4. Being dissatisfied with the sentence, the Appellant preferred an appeal through **Messrs. Odondi Awino and Company Advocates** who filed a Petition of Appeal on 21/03/2019. The Petition of Appeal was filed about 3 months from the date of the sentence with the leave of this Court to file the appeal out of time.

5. On 10/02/2020 this Court rendered a judgment and struck out the appeal for having been filed out of time without the leave of the Court. That judgement was however set-aside on appropriate application hence this judgment. For avoidance of any confusion, I have deliberately referred this judgment as No. 2.

6. The appellant argued the appeal through Counsel. He submitted that the sentence was excessive given that the victim was not seriously injured, the appellant had been in custody during the trial and that he has so far lost several close family members.

7. The appeal was opposed. The State submitted that the offence was very serious and the maximum sentence was life imprisonment. It was further submitted that the victim was so seriously injured yet he did not provoke the appellant. It was also argued that loss of relatives is not material in sentencing. This Court was urged to dismiss the appeal.

8. This is an appeal on sentence. The High Court in **Wanjema v. Republic (1971) EA 493**, rightly so, laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

9. I have considered all the issues in this matter and noted that the sentencing court took into account several relevant factors. Going by the nature of the case and the evidence I am of the considered view that the court ought to have called for a Pre-Sentence Report. In this particular case the Report would have given the court more latitude in exercising its discretion in sentencing.

10. I hereby, albeit reluctantly, allow the appeal. The sentence is set-aside. I direct that a Pre-Sentence Report be availed. Needless to say, I have noted the nature and gravity of the injuries and the sentencing record of the trial court. I further note that in re-sentencing, this Court is not bound to render a lesser sentence than the one earlier on handed down.

11. This matter shall be fixed for mitigations and sentencing on 19th /03/20120.

12. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 5day of March, 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Awino Odondi, Counsel for the Appellant.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant