



REPUBLIC OF KENYA

IN THE HIGH COURT

AT VOI

CRIMINAL APPEAL No. 31 of 2018

HIGNE MWANDAU KILAMBOAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Decision of Hon N. N. Njagi in the SPM's Court in Wundanyi delivered on 31st May 2018 in Criminal Case No 131 of 2018)

J U D G M E N T

1. The Appellant before the Court was convicted and sentenced on 31st May 2018 of grievous harm. The sentence handed down was 35 years. The Appellant filed his Petition of Appeal on 17th July 2018. At the same time the Appellant filed an application for leave to appeal out of time. Leave was granted by on 20th September 2018. The Appeal was admitted for hearing on 2nd October 2018.

2. The Appellant is appealing against both conviction and sentence. His Grounds of Appeal are:

“1. I pleaded not guilty charges

2. The investigating officer did a shoddy job as far as the alleged matter of grievous harm is concerned, he never visited the scene of crime

3. That the appellant was not provided with witness statements thus my constitutional rights were violated

4. Your honor I am the sole bread winner of my family after my parent's demise.

5. Supplementary grounds of appeal to follow when and if furnished with a certified true copy of the proceedings of this case.

6. In the view of circumstances of this case, the custodial sentence of 35 years is harsh, severe and manifest excessive punishment,

7. Your honour I beg your honorable court to reduce the conviction, give option of fine, quash conviction or order re-trial or whichever your honorable may deem fit.

8. That in the event of my humble appeal may find merits. I would wish to be allowed to be present during the hearing of my appeal.

After receiving a copy of the Certified Proceedings the Appellant, On 28th November 2018 filed Amended Grounds of Appeal. These are:

“(1) That the Law Learned trial magistrate erred in both law and fact fail to note that there was none disclosure of all the evidentiary materials by the prosecution in disregard of the application for the same by the appellant

(2) That the Law Learned trial magistrate erred in both Law and fact fail to note that the appellant was not assigned an advocate during my trial.

(3) That the Law Learned trial magistrate erred in both Law and fact fail to noted that the burden of proof was not discharged beyond reasonable doubt.

(4) That the Law Learned trial magistrate erred in both Law and fact to note that the appellants were first Offenders hence deserved an alternative sentence.

4. The Parties were directed to file their written submissions. The Appellant did so on 28th November 2018 and 13th February 2019. The Respondent on 29th January 2019. The Appellant argues firstly that he did not have a fair trial in accordance with **Article 50 CoK**. He says that in two respects firstly that he was provided with an Advocate and secondly, he was not provided with the Prosecution evidence in the form of witness statements and exhibits. In relation to the provision of an Advocate, the Respondent argues that the Appellant's constitutional rights were not infringed because the right is an incremental right and at present is only available as of right to those charged with capital offences or where substantial injustice would occur if no advocate was provided. "*Under the new constitution state funded legal representation is a right in certain instances. Article 50 provides that an accused shall have an advocate assigned to him by the state and at the state expense. If substantial injustice would otherwise result. Substantial injustice is not defined under the new constitution however provisions of international conventions that Kenya is a signatory to are applicable by virtue of article 2(6). Therefore provisions of the ICCPR and commentaries by the human rights committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where substantial injustice would otherwise result persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense*". (Court of Appeal in **David Macharia Njoroge vs Republic Criminal Appeal No 497 of 2007**). This Court also notes that the Appellant did not, during the trial, request an advocate to be provided for him. At present funding is only available for persons accused with capital offences.

5. The Appellant argues that he was not provided with the prosecution statements and evidence. The Respondent states that on 29th March 2018 the Appellant pleaded not guilty and on 24th April 2018 the Trial Court directed that witness statements be provided. The Trial proceeded on 10th May 2018 and the Appellant stated that he was ready to proceed. He did not state at any time that he had not received the statements. The Respondent relies on the authority of **Francis Macharia Gichangi & 3 Others v. Republic Criminal Appeal No. 1 of 2004** where the Court of Appeal stated that it is reasonable to expect that an accused person who believes that rights have been infringed at trial would raise the issue with the trial court. The record shows that the Appellant, in the expectation that he would receive the witness statements, informed the Trial Court that he was ready to proceed, thereby sending the message that he had received the witness statements. In relation to the physical evidence, the only evidence produced to the Court were the Complainant's medical records that were produced in open Court.

6. As this is a first appeal, this Court is required to re-consider and re-evaluate the evidence before the Lower Court. The Appellant was charged with the Offence of Grievous Harm contrary to **Section 234** of the **Penal Code**. The Particulars of the Offence were that "**HIGNE MANDAU KILAMBO: ON THE 2ND DAY OF March 2018 at around 3.00 p, at Mlambwenyi Village Mgange Location within Taita Taveta Court Willfully and unlawfully did grievous harm to Cornelius Kitolome Maghanga.**". The Charge Sheet was amended. The initial charge was actual bodily harm. That was reviewed to grievous bodily harm, on 10th May 2018. Section 934 of the Penal Code provides: "Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life". Section 3 of the Penal Code defines Grievous Harm as "**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;

7. The evidence before the Court is that an elderly gentleman was injured as a result of an assault. The effect of the assault was that he broke both arms (not hands as recorded in the proceedings). The assault had the effect of causing a fracture to the radius and the ulna of both the right and left sides. The radius and ulna are the bones of the forearm. The Complainant was aged 87 at the time of the assault. The medical evidence adduced by the Prosecution comprise treatment notes and a P3 Form. The Treatment Notes were marked Prosecution Exhibit 1. They show that on 2nd March 2018 Cornelius Maghanga attended the Hospital (Wesu) and his injuries suggested a fracture. He was then moved to Moi Teaching and Referral Hospital in Voi for x-rays. The notes record that he was diagnosed with "closed bilateral midshaft Radioulnar fracture of both the forearm(s). He was also given an "Echo" and ECG. Thereafter he was operated upon for radioulnar plating. He was discharged on 22nd May 2018 but had to go back for stitch removal. The P3 (Prosecution Exhibit 2) was completed on 24th April 2018. It records that both forearms were fractured as a consequence of blunt force trauma and that the Complainant also had multiple bruises on both limbs. The injury was categorized as grievous harm. The Exhibits were introduced into evidence by Dr Mohammed Machi from Wesu Sub-County Hospital. He adopted the Form prepared by Dr Katsiya of Moi Hospital. The Accused decided he did not need to cross-examine the Dr Mohammed.

8. The Court must then satisfy itself as to the identity of the assailant. The Court heard the evidence of 3 eyewitnesses. Starting with PW2, Pamela Maganda says she is a farmer and was in her shamba in Mgange. She told the Court she saw the Appellant, Kitambo holding his grandfather. The grandfather was Cornelius Kitolome. The Accused was holding a piece of wood and he was beating the Complainant with the stick. The Record states hands but the injuries show it was the forearms and therefore this Court takes the correct translation of "mkono" to be forearms in the circumstances of this case. She said she heard the Accused threatening to kill the Complainant. She says she screamed. She also explained to the Court that she was related to both the Complainant and the Accused who is her nephew. She said the "hands" were badly swollen. Under cross-examination she confirmed she was at the scene and she saw the Appellant assault his grandfather. She said the old man was cutting grass and he was "on his land". She identified the Assailant as the Accused. PW3 told the Court he was also in the neighbourhood, He was at the home of John Mwasaru who employed the Appellant. He said on 2nd March 2018 at 3 pm he too saw the Accused assault the old Man Cornelius with a big piece of wood. "Both Hands were hit and fractured". The Complainant was said to be in pain. PW-3 said the Accused was saying the Complainant was cutting napier grass. However, the Appellant does not own the neighbouring land. He identified the assailant as the Accused. He also said the accused left the scene with the stick. Under cross examination the Witness confirmed he saw the Accused run towards the Complainant and hit him with the stick. He also stated that he took a panga away from the Accused. PW-4 Frederick Mwavula Mwambure, a nephew of the Complainant, took him to hospital and confirms he said the Accused assaulted him. However, he did not witness the assault therefore his evidence is hearsay in that respect.

9. The Court heard the evidence of PW-1 Adrine Mukiwa Singa Maricho, the ECDEE supervisor who seemed to be giving evidence on her own behalf as well as an intermediary appointed by the Court. The record does not say why the Complainant was not able to give evidence. For instance was it due to the trauma or because of the hospital treatment. In any event, the evidence was that on 2nd March 2018, at 3pm PW1, She was called and informed that the Complainant was badly injured. She says she went to the Hospital to see the complainant and that

“The arms of the complainant had been fractured” and he was in pain. She also told the Court that both the Accused and Complainant are relatives and that they are all from the same claim. She confirmed that the Assailant was in the dock and she had known him for 5 years and that the Complainant was 87 years old at the time. Under cross-examination she stated that the land where the Complainant was beaten by the Accused belonged to the Complainant and it was “because of napier grass”. By way of Defence the Accused did not provide a testimony. He simply gave an unsworn statement denying the offence. In relation to the injuries he said that the Complainant fell against a tree when he pushed him. He suggested that the old man was attacking him with a panga.

10. In the circumstances, the Accused was identified by people who were related to him and therefore knew him well. He admitted being in the vicinity of the Complainant at the time of the assault. In relation to the assault weapon, it was not found. That absence is not sufficient to detract from the fact of the eye witness account and consequent injuries. The Accused was correctly convicted. The Appeal against conviction is dismissed.

11. On the issue of sentence. The Accused argues that the sentence is harsh and manifestly excessive. He relies on the authority of ***Jackson Masher vs Rep CA No 21 of 2017 High Court Voi***. The Respondent opposes any change to the sentence of 35 years imprisonment. The Respondent argues that sentencing is a matter of discretion for a trial court and therefore an appellant court should not interfere with the sentence unless it is based on wrong principles or is manifestly excessive or harsh. In the circumstances of this case, it is clear that the Learned Trial Magistrate did not simply apply the statutory sentence of life imprisonment. He considered the evidence, including the relationship between the Complainant and Appellant, the ferocity of the offence, the age and vulnerability of the Complainant and the fact that the Accused then ran away. He said the offence was serious and formed the view that a deterrent sentence was required. Therefore, it cannot be said that the Learned Trial Magistrate applied wrong principles. Although the sentence may appear harsh to the Appellant, it must be weighed against the seriousness of the offence and the vulnerability of his victim. The aggravating features being the age of the victim taken with the threats to kill and the fact that the attack was completely unprovoked. Therefore, the appeal against sentence is also dismissed. That does not detract from the Appellant’s right to seek a review of his sentence, in the correct circumstances.

Order accordingly,

Farah S. M. Amin

JUDGE

Dated: 14th April 2020

Signed and Delivered in Voi this the 27th day of April 2020

In the Presence of

Court Assistant: Josephat Mavu

Appellant: In Person through Video Link (Skype) with Manyani Prison

Respondent: Ms Mukangu through Video Link (Skype) with ODPP Voi