REPUBLIC OF KENYA

IN THE HIGH COURT

AT VOI

CRIMINAL APPEAL No. 32 Of 2018

B E T W E E N:

JONNES MLUGHU MWAPUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Decision of Hon N. N. Njagi SPM in the PM's Court

in Wundanyi delivered on 31st May 2018 in Criminal Case No 177 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 30 years. The Appellant filed his Petition of Appeal on 17th August 2018. At the same time the Appellant filed an application for leave to appeal out of time. Leave was granted by this Court on the 20th of September 2018. The Appeal was admitted for hearing on 2nd October 2018.

2. The Grounds of Appeal contained in the Petition are:

> "*1. I pleaded not guilty to the charges.*
>
> *2. That the prosecution did not provide me with witness statements thus my constitutional rights were violated*
>
> *3. That the appellant was not caught at the scene of crime*
>
> *4. The investigating officer did a shoddy job as far as the alleged matter of grevious harm is conserned he never visited the scene of crime*
>
> *5. Supplementary grounds of appeal to follow when and if furnished with a certified true copy of the proceedings of this case.*
>
> *6. In view of the circumstances of this case, the custodial sentence of 35 years is harsh, severe and manifest excessive punishment*
>
> *7. Your honour 1 beg your honourable court to reduce the conviction, give an option of fine, slash the conviction or whichever your honourable 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.*

3. After receiving a copy of the Certified Proceedings the Appellant filed further Grounds entitled, "Reasons for Appeal". They are:

> "*1. That the appellant was given a harsh sentence considering that I am a layman in law and never knew the consequences of the charge if found guilty.*
>
> *2. That the appellant was not assigned an advocate during my trial hence this was a violation to my constitutional right under*

article (50)(2)(h)

3. That I the appellant wish to appeal as read with section 76 of the criminal procedure code chapter 75 according with Kenya laws reporting that the high court to decide in cases of doubt."

4. The Appellant was charged with the Offence of "*GRIEVOUS HARM CONTRARY TO SECTION 234 OF THE PENAL CODE*.". The Particulars of the Offence are "*JONNES MLUNGU MWAPUNGU: On the 31st Day of March 2018, at around 9.00pm at Mwambota Village of Ronge Location within Taita Taveta County jointly with others not before Court Wilfully and unlawfully did grievous harm to ELIJAH DANIEL RONGOMA.".* On 24th May 2018 the Appellant appeared before the Trial Court. He pleaded not guilty and was given a Bond of Kshs.20,000 with a surety of a like sum. The Court also ordered that the Accused be supplied with the statements of the witness.

5. As this is a first appeal, this Court is charged with the duty of re-analysing and re-assessing the evidence before the Lower Court. The Learned Trial Magistrate heard from five Witnesses for the prosecution and for the defence the Appellant gave an unsworn statement when he denied the offence. PW-1 was Dr. Mohammed Machi from Wesu Hospital. He introduced into evidence the Treatment Notes and P3 Form for the Complainant. The Complainant was Elijah Daniel. He was treated at Moi T&R Hospital in Voi. The documents were completed by Dr Katisya of that hospital. The Complainant informed the Doctor that he knew his assailants. His injuries were listed as (1) a swollen left eye, (2) clotted blood on the nostril and both eyes, bruises on the lower back, (4) bilateral fracture of ulna bone, slight displacement, (5) swelling on both limbs, and (6) broken limbs, (7) left leg swollen on the mid shaft, (8) injuries on the thighs. The Degree of Injury was classified as grievous.

6. The Record shows that the Appellant pleaded not guilty thereby making it necessary for the Trial Court to go through the process of finding him guilty. In that process the Court heard the evidence of several witnesses and received the medical evidence that is set out above. The Complainant gave evidence as PW-2. He informed the Learned Trial Magistrate that as well as being a farmer, he was a community policing officer at Mengo Location. He says he went to the home of a neighbour, Charles Kidali to get a Chicken. There were people there drinking Bangara. He said he was assaulted by one of the people drinking. He identified that person as his in-law. He says that the Appellant attacked him with a jembe handle which he used as a club, inflicting the serious injuries enumerated above. He says he had no dispute with the Appellant and he does not know why he was beaten. PW-3 also identified the Appellant as the assailant. He confirmed that the assault was completely unprovoked. He also confirmed tha the "House of Charles Kadoli" was a place where people went to drink bangara liquor. PW-4 a Mary Kanjuma Mwandoe gave evidence that she sheltered the Appellant from the authorities she says she also saw the Complainant bleeding from the nose, ears, throat and legs. PW-5, the Investigating Officer PC John Mudibo 110846 gave evidence that the assault happened at a time when there were investigations relating to the sale of illicit brew. The Appellant accused the Complaint of being a police informer when he refused to purchase the brew.

7. Therefore the evidence before the Trial Court was that the Accused, in the process of consuming and possibly selling illicit brew accused the Complainant of being a police informer and then took it upon himself to severely beat the Complainant with a jembe handle using it as a club. It is common knowledge that a jembe handle is made of solid wood and is required to be strong enough to dig or plough land. Unsurprisingly, the injuries were very serious. By way of Defence the Accused gave a statement from the Dock. He denied the offence in its totality. The Learned Trial Magistrate was therefore satisfied beyond reasonable doubt that the Accused was guilty of all the particulars of the offence with which he was charged. The P3 refers to theft but that was not put before the Court. This Court is also satisfied on the evidence that the Accused/Appellant committed the Offence.

8. As to whether the Appellant had a fair trial, he relies on the fact that he was not provided with witness statements. The record shows that the Learned Trial Magistrate directed that Witness Statements be provided. At no time during the period of the Trial did the Appellant raise that issue. The Appellant also states that he was denied the provision of legal services, in particular an Advocate. The Appellant has not put forward any argument to show that he has suffered an injustice as a result. He states that he did not know the consequences of committing a crime. Ignorance of the law is no defence. At present the provision of an advocate at public expense is provided only for capital offences. Therefore the Appellant was not entitled to an advocate as of right because he did not commit a capital offence. The record shows that the Appellant was released on bail pending the trial. He did not obtain the services of an advocate and he did not request the Trial Court to provide one. In the circumstances, that can only be considered an afterthought. Therefore this Court is satisfied that the Appellant had a fair trial.

9. On the issue of sentence, the Appellant argues that the sentence handed down was a harsh sentence. He relies on his ignorance of the law to support that assessment. He argues that the intervention of the Appellate Court is justified because "the sentence meted upon him by the trial court was severe harsh and manifestly excessive in the circumstances of the case and replaces the same with a sentence of five (5) years of imprisonment (***Jackson Nashera v Republic CA No 21 of 2017)***. In his further submissions, he alleges that the Director of Public Prosecutions gave evidence that the "*we therefore call upon the appealate court to interfere with the sentence as issued"*. That statement demonstrates the lack of understanding of the author of the submissions rather than a reflection of any evidence given by the Respondent. The Respondent argues "On the sentence by the trial magistrate, the appellant was sentenced to 30 years imprisonment. Section 234 of the pernal code provides a maximum sentence of life imprisonment. Also relied on is the Authority of Republic v James Henry Sargeant [1974] where the Court stated the "*The classical principles of sentencing are summoned up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical princples in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing."*

Nevertheless, the State concedes that the sentence of 30 years was excessive. The State relies on the Authority of ***Simon Kipkogei Samoei v Republic [2017] eKLR .*** In that case the High Court sitting in Eldoret quoted from a different authority of ***Macharia v Republic [2003] 2 EA 559*** where the Court of Appeal said; "*The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors… The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence*.".

10. The Learned Trial Magistrate heard the Appellant's mitigation. The Appellant was treated as a first offender. In mitigation he said "I am taking care of my sick mother. I have children to take care of. The Learned Trial Magistrate observed that the Appellant was not remorseful at all. The State has conceded that the sentence is excessive. To assist the Court in the exercise of its discretion, the Court ordered a probation report from the probation officer in Wundanyi. That Direction was given on 23rd October 2019. The Report was not received until 16th April 2020. It is unclear why, instead of being filed as directed, it was sent to a different probation officer and only provided to the Court much later.

11. From the list of sources, it is clear that the Probation Officer, Justus Nyaga did not look at the Court File and in particular the proceedings. He considers a sentence of two years is sufficient. The Report records that the Appellant is educated and trained as an electrician, he has three surviving siblings all of whom support their elderly mother. There is no mention of illness. The Appellant had returned from Mombasa to concentrate on farming. He is said to have interacted with the community well. In prison the Appellant is said to have undergone "various training". There is also a victim impact statement aslo filed on 16th April 2020. That provides more detail to the offence. It says that the Appellant is related to the Complainant by marriage. There was no dispute between them. When he went to the home of a neighbour to get a chicken he found several people taking bangara a local home-made brew. Someone started shouting that the Complainant was a police informer. "*He was grabbed by the neck and was reigned upon with blows and kicks from all sides by all those present. One of them took a 'jembe' stick and hit him thoroughly and in the midst of protecting himself on the head both of his arms got fractured*". As a consequence, the victim was unable to work affecting his family adversely. His injuries are permanent and have been life changing in the sense that he is unable to do the things he was able to do before in particular in relation to his earnings. It has also affected him psychologically. The probation officer surmises that because the Complainant is related to his assailant, they have no issues at all. However, that did not stop the Appellant from attacking him, and encouraging others to do so too.

12. The Appellant was convicted of grievous harm. His victim was someone he knew well yet that did not prevent the attack. The injuries were serious. The other aggravating factors are that the Appellant instituted the attack and encouraged others to participate in order to avoid detection by the authorities. It is clear they acted in a mob. In the circumstances, the sentence suggested of 2 years cannot be said to be sufficient for rehabilitation. There are also the considerations of deterrence and retribution. The sale and consumption of illicit brew is widespread in this County. Of itself it is an illegal activity and it has a negative impact on the society. The fact that the Appellant was participating in the activity and willing to use extreme violence to prevent detection, suggest a much more sinister aspect to the attack. In the circumstances, this Court is of the view that a sentence that operates as a deterrent is appropriate. In the circumstances, the sentence of 30 years is reduced to a term of 10 years.

Order accordingly,

Farah S. M. Amin

JUDGE

Dated: 17th 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 by Skype Video Link to Manyani GK Prison

Respondent: Ms Mukangu by Skype Video Link to ODPP Voi.