REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 33 OF 2018

ANDREW MUDAKA OGANG'A..........APPELLANT

VERSUS

REPUBLIC...RESPONDENT

[Being an appeal against the sentence of the Senior Principal Magistrate's Court at Winam

(Hon. C. N. NJALALE RM) dated the 23rd October 2018 in Winam SPMCCRC No. 184 of 2014]

JUDGMENT

The Appellant, **ANDREW MUDAKA OGANG'A**, was convicted for the offence of **Grievous Harm** Contrary to **Section 234** of the **Penal Code**. He was then sentenced to Seven (7) years imprisonment.

1. In his appeal, he asked the Court to take into consideration the mitigation which he had presented before the trial court.

2. He was of the view that the learned trial magistrate had overlooked the Probation Report, which was favourable to the Appellant.

3. As a result, the trial court is said to have handed down a sentence which was excessive.

4. The Appellant put forward a plea that this court should review the sentence, and that the court should consider sentencing him to either Probation or to Community Service.

5. When canvassing the appeal, the Appellant noted that the Complainant had offered to withdraw the complaint. The only hurdle which stood in the path of the withdrawal of the complaint was the fact that the Complainant did not have her National Identity Card.

6. The Appellant also submitted that the trial court violated his right to a fair trial because it proceeded with the trial before the court had given to the Appellant the evidence which he intended to rely upon.

7. The Appellant reiterated that he was remorseful for the wrongs he had done.

8. He said that if the court were to give him a non-custodial sentence, he would live away from any other crimes.

9. Currently, because he was in prison custody, the Appellant says that his sickly mother, together with his wife and young son, as well as his young siblings were all suffering. He used to be their sole bread-earner.

10. Therefore, the Appellant sought an opportunity that would enable him provide the much needed social support to his mother and to the young children, who would otherwise never enjoy their fundamental rights.

11. In a brief answer to the appeal, Miss Barasa asked the court to dismiss it, as the sentence was legal.

12. In my understanding, the Appellant was not challenging the conviction.

13. But in the event that he had intended to challenge his conviction, I find that he failed to articulate the reasons which could persuade the court to quash the conviction.

14. The record of the proceedings shows that the trial court granted Bond to the Appellant, on 10th February 2014. That was the day when

the plea was taken.

15. On 28th March 2014, the prosecution was not ready to proceed with the trial, because the Police File had not arrived from Kondele Police Station.

16. The court allowed the prosecutor, time to enable him get the Police File.

17. Later that day, after the Police File was received, the prosecutor said that he was ready to proceed with the trial.

18. The record shows that the Appellant also told the court that he was ready to proceed.

19. He did not ask the court or the prosecution to provide him with anything, before the trial could start.

20. There is no way that the court could have known that the Appellant was not provided with something which he would have needed before the trial could begin.

21. And when the trial commenced, the Appellant cross-examined the prosecution witnesses.

22. When the first two witnesses testified, the presiding magistrate was Hon. J. Sala RM.

23. Thereafter, the trial went on before Hon. C.N. Njalale RM.

24. On 11th March 2015, the succeeding magistrate explained to the Appellant about his rights under **Section 200 (3)** of the **Criminal Procedure Code.**

25. The record shows that the Appellant made a choice to have the trial continue from where it had reached, rather than start de novo.

26. Secondly, the Appellant made a choice that he did not wish to have any witness who had already testified, recalled for further cross-examination.

27. I point out these facts because they show that the Appellant had the opportunity to ask that the case starts afresh, but he chose to proceed from the stage where the case had reached. He did not even require any witness to be recalled for further cross-examination.

28. In the circumstances I find that the trial court did not violate any of the Appellant's rights to a fair trial.

29. As regards the intention of the Complainant to withdraw the complaint, I note that the trial court listed the case for Mention on 3 occasions, with a view to having it withdrawn.

30. However, on 15th August 2014, the Complainant expressly withdrew her intention to withdraw the complaint.

31. It is because the Complainant changed her mind that the trial proceeded to its logical conclusion.

32. The trial court had made it clear that if the parties still wished to reconcile, they could still have done so prior to the conclusion of the case.

33. In the meantime, the trial court directed that the trial ought to proceed. The said conduct of the learned trial magistrate was perfectly justified as the issue of the intended withdrawal of the complaint had already held up the case for over one year.

34. In any event, as the trial court stated, the parties were still at liberty to reconcile, if they wished to do so prior to the conclusion of the case.

35. However, the parties did not reconcile, even though the case went on for over 2 more years before it was concluded.

36. The trial court cannot be blamed for the failure by the Appellant and the Complainant, to reconcile.

37. In my considered view, the failed attempt at reconciliation was not a reason to justify a reduced sentence.

38. I now turn to the question as to whether or not the sentence was excessive.

39. The learned trial magistrate listened to the Appellant's mitigation and then ordered for a Social Inquiry Report. As the court said, the Inquiry Report was deemed necessary as it would;

> ***"enable this court reach a just sentence."***

40. Having received the Inquiry Report, the trial court observed that the Probation Officer who prepared it, had concluded that the accused

person was a suitable candidate for probation.

41. Notwithstanding that recommendation, the trial court sentenced the Appellant to 7 years imprisonment.

42. The basis for that sentence was the fact that the offence of Grievous Harm was a serious one, and also because the court was of the view that there was need for a deterrent sentence, which would deter the Appellant from committing the same kind of offence again.

43. As was stated by the High Court at Bungoma, when it handled the appeal in **HARUN MANDELA NAIBEI Vs REPUBLIC, CRIMINAL APPEAL NO. 116 OF 2013**, a Probation Report ought to guide the court, but it is not binding.

44. The trial court herein appears to have been alive to the role of a Social Inquiry Report, as it appreciated the fact that that Report would enable the court reach a just sentence.

45. In the Social Inquiry Report, it is clear that the Probation Officer was well aware that the Appellant was charged with the offence of Grievous Harm.

46. Therefore, I hold the view that when the Report recommended Probation, it did so with the full knowledge about the seriousness of the offence for which the Appellant had been convicted.

47. Therefore, if the trial court wished to deviate from the recommendation, to the extent of rejecting Probation and ordering imprisonment, it would have been necessary to explain the decision leading to the sentence which was meted out.

48. Of course, the report by the Probation Officer was not binding on the trial court. But because it was supposed to offer guidance, a complete deviation from the report ought to be explained. If such a deviation was not explained, it would imply that the court had ignored the Report which it had said it needed for the purposes of reaching a just sentence.

49. Accordingly, I allow the appeal against sentence, and set aside the sentence of 7 years imprisonment.

50. However, I order for a fresh Social Inquiry Report in order to enable this court determine the most appropriate sentence.

51. The said Report should be provided to the Court within the next 2 weeks, and it shall guide the Court in determining an appropriate sentence.

DATED, SIGNED and DELIVERED at KISUMU this 30th day of January 2019

FRED A. OCHIENG

JUDGE