REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 115 OF 2018

REPUBLIC.....APPELLANT

VERSUS

MWERO BEMANDU.....RESPONDENT

(An appeal from the original conviction and sentence by Hon. P.K. Mutai

delivered on 28th April, 2017 in Kwale Chief Magistrate's Court

Criminal Case No. 485 of 2016).

JUDGMENT

1. The respondent was convicted for the offence of causing grievous harm contrary to Section 234 of the Penal Code. The particulars of the charge were that on the 29th day of April, 2016 at around 10:00 a.m., at Kona-Mwele village Mwaluphamba location in Kwale County within Coast region unlawfully did grievous harm to John Mwavuo Bemaundu.

2. The respondent was found guilty of the said charge and convicted accordingly. He was sentenced to pay a fine of Kshs. 30,000/= and in default to serve 6 months imprisonment. He was directed to compensate the complainant with Kshs. 20,000/= being reasonable costs of seeking medical attention.

3. The Director of Public Prosecutions (appellant) being dissatisfied with the said decision filed a petition of appeal on 26th October, 2018 raising the following grounds:-

(i) That the Trial Magistrate erred in law and fact by deliberately and willfully ignoring to remit the lawful sentence to the respondent therein as provided in law upon conviction for the offence of grievous harm contrary to Section 234 of the Penal Code;

(ii) That the Trial Magistrate erred in law and fact by failing to record reasons in the proceedings as to why the said Magistrate could not remit the lawful sentence to the respondent for the offence of grievous harm contrary to section 234 of the Penal Code;

(iii) That the Trial Magistrate erred in fact and law in sentencing the respondent to pay a fine of Kshs.30,000/= and in default 6 months imprisonment and additional compensation of Kshs. 20,000/= to the complainant which was manifestly lenient; and

(iv) That the Trial Magistrate erred in law and fact by failure to discharge his duties judiciously in exercising his discretion in sentencing the respondent thus passed an illegal sentence.

4. The appellant through Ms Ogweno, Prosecution Counsel, filed a Notice of enhancement of sentence under the provisions of Section 354(3)(a)(2) of the Criminal Procedure Code, seeking variation of the sentence that was imposed against the respondent, to life imprisonment.

5. While taking cognizance of the fact that sentence is a discretionary matter for the Trial court, she cited the cases of **Diego vs Republic** [1985] KLR 621 and **Dismas vs Republic** [1984] KLR 634, where the courts held that an appellate court should not interfere with the discretion of the Trial court in sentencing except in such cases where it appears that in assessing the sentence, the court acted on some wrong principle or has imposed a sentence which is manifestly inadequate or manifestly excessive.

6. The Prosecution Counsel submitted that the offence of grievous harm fetches a punishment of life imprisonment. She prayed for the

sentence passed on 28th April, 2017 to be set aside for being manifestly lenient. She urged the court to substitute it with life imprisonment.

7. The respondent filed his submissions on 28th January, 2019. He stated that after being convicted he paid a fine of Kshs. 30,000/= on 2nd May, 2017 and paid compensation to the complainant in the sum of Kshs. 20,000/= on 15th May, 2017.

8. According to the respondent, once he paid the said amount, it marked the end of his prosecution as the complainant was satisfied by the decision of the court and accepted the compensation. He further stated that thereafter, they had a harmonious co-existence albeit short lived.

9. The respondent submitted that 2 months thereafter, the complainant wrote to the prosecution office seeking assistance to file an appeal against the sentence. He submitted that the appeal amounted to double jeopardy and that the appellant should not have been allowed to file the appeal out of time as the appeal is malicious, an abuse of the court process and violation of his fundamental constitutional rights.

10. On the issue of sentence, the respondent submitted that the Trial Magistrate exercised his judicial discretion in imposing the sentence he meted out against him and that Section 234 of the Penal Code does not attract a mandatory sentence. He cited the case of **David Mwikwale Machugu vs Republic** [2016] eKLR on a Trial court's discretion in sentencing.

11. The respondent submitted that the custodial sentence of life imprisonment that was being sought by the prosecution was harsh and prejudicial to him.

12. The respondent referred to the provisions of Section 31 of the Penal Code which provides that a court can order a person convicted to pay compensation to the complainant either in addition to or in substitution for any other punishment. He also made reference to the Judiciary Sentencing Guidelines which recognize compensation as a means of punishment.

13. Although the respondent submitted that the appellant in its petition of appeal applied for retrial of the case, having read the petition of appeal filed on 26th October, 2018 I do not see any such ground of appeal. That submission is therefore misconceived and is without any basis. The respondent prayed for the appeal to be dismissed.

ANALYSIS AND DETERMINATION

14. The duty of a first appellate court is to analyze and re-evaluate the evidence that was adduced before the lower court and reach its own independent decision while bearing in mind that it neither saw nor heard the witnesses testify. In **Okeno vs Republic** (1972) EA 32 the Court of Appeal held as follows:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

15. Although this is an appeal against sentence, a brief recap of the evidence tendered before the Trial court will enable this court to make a decision of whether the appeal herein is merited or not.

16. PW1 was John Mwaivu Bemaundu, a step-brother to the respondent herein. He testified that in the year 2010, he differed with his brother (the respondent) over inheritance after their father died. He stated that after his father's death, his brothers took everything. It was his evidence that on 29th April, 2016 when he was constructing a house, the respondent went there. At that time PW1 was in the company of one Ngoloko. PW1 testified that he saw the respondent approach him from behind and made an attempt to cut him on his left hand. PW1 fell down and the respondent cut him on the hand.

17. The respondent aimed at his neck and PW1 protected himself using his hand. At that time PW1 was bleeding and he asked Ngoloko to take him to hospital. They passed through Kwale Police Station to report. PW1 then went to hospital where he lost consciousness. He was admitted to Kwale Hospital for a day and later at Kilifi. He said that his relationship with the respondent was bad as they were still looking for ways of killing him.

18. PW2, Cornelius Machange a Clinical Officer at Kwale Hospital produced a P3 form in respect to PW1, as p. exh.2. PW2 testified that PW1 sustained a deep cut wound on his left hand. There was a scar on the left hand and palm surface between the small and middle finger. He was admitted for a day and the wound was treated in theatre. PW2 testified that PW1 requested to continue with treatment at Kilifi. He stated that PW1 sustained a permanent scar.

19. PW2, Ngoloko Tsangari testified that he was with PW1 on 29th April, 2016. The respondent then went to where they were while carrying a panga and a jembe. He asked PW1 why he was a problematic person. PW2 then heard a loud bang and saw PW1 being attacked. He saw that the respondent had dropped the jembe and was holding the panga in his right hand as he attacked PW1.

20. PW2 stated that he feared intervening because the respondent was using a panga. He then saw PW1 fall down. PW2 seized the panga and started running towards the road as the respondent followed him. The respondent then went back towards PW1 and wanted to cut him again. It was PW2's evidence that PW1 was bleeding as at that time and he took him to the Police Station where he reported the matter. He was booked and given a P3 form. He was admitted to hospital for a day.

21. PW4 was No. 67723 Corporal Kahindi Masdel of Kwale Police Staion. On 16th January, 2017 he took over the investigation file from Inspector Njoroge who went on transfer to Mandera. A panga was also handed over to him which he produced as an exhibit in the Trial court.

22. In his defence, the respondent denied having committed the offence. He stated that PW1 went to their land on 29th April, 2016 and uprooted cashew nuts and threw them away. He confronted PW1 who started throwing a panga at him. The respondent stated that in an attempt to wrestle the panga from him, PW1 cut himself. He stated that they fought but he did not cut PW1.

The issue for determination is if this court should enhance the sentence imposed against the respondent.

23. The appellant was convicted under the provisions of Section 234 of the Penal Code. The said provision states that any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life. The foregoing provisions show that life imprisonment is not a mandatory sentence but in order for a court to impose the said sentence it would have to consider whether the circumstances before it warrant such a sentence.

24. In the present case the Trial Magistrate imposed a fine of Kshs. 30,000/= against the respondent and ordered him to pay the complainant Kshs. 20,000/= which he considered a reasonable amount for medical expenses.

25. It is a well accepted principle of sentencing that an appellate court will normally not interfere with the exercise of discretion by a Trial court unless the said court took into account irrelevant considerations or the sentence is manifestly excessive.

26. The Court of Appeal in **Bernard Kimani Gacheru vs Republic**, Criminal Appeal No. 18 of 2000 stated thus:-

> ***"It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds of interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."***

27. In his Judgment, the Hon. Magistrate took into account the defence raised by the respondent and said that considering the extent of injuries suffered, it is not easy to believe that a person can inflict such injuries on himself. He then went on to consider the injuries the complainant (PW1) sustained which were classified as grievous harm in the P3 form. The Hon. Magistrate further considered what constitutes grievous harm and stated that it is any harm which amounts to maim or endangers life or seriously or permanently injures health which extends to permanent disfigurement.

28. It is thus obvious that the Hon. Magistrate was aware that the injuries sustained by the complainant were serious as captured on the P3 form. It is therefore not understandable to how the Hon. Magistrate imposed a lenient sentence against the respondent. It is apparent that the Hon. Magistrate overlooked some material facts when it came to sentencing the respondent.

29. PW1 was suddenly attacked by the respondent who approached him from the back. He cut PW1 on his left hand which led to him being taken to theater for the deep cut wound to be sutured. He was admitted to Kwale Hospital for a day. PW2 testified that PW1 was left with a permanent scar on the left hand and palm surface between the small and middle finger. The attack was a vicious one and as narrated by PW1, an attempt was made by the respondent to cut his neck when he fell down. PW1 however blocked the blow with his hand.

30. The respondent brought up issues of the application for leave to appeal out of time having been heard *exparte* and that this appeal offends the rule against double jeopardy. A court of concurrent and competent jurisdiction granted leave to the DPP to appeal out of time. The respondent had no objection to that application being allowed as per the proceedings that took place when the application was made. His submissions about this appeal going against the rule of double jeopardy has no basis at all as this is a first appellate court that is seized of powers to hear appeals brought either by convicts or against them. In addition, the DPP has a right to appeal as any other affected party.

31. The respondent's argument that since the complainant took Kshs. 20,000/= as compensation means that the lower court case was settled cannot hold. The complainant took the money following a court order to reimburse him for medical expenses.

32. In the circumstances of this case, I am persuaded by the submissions by the appellant (DPP) that the Trial Magistrate failed to exercise his discretion judiciously when it came to sentencing the respondent. I therefore set aside the sentence imposed against him requiring him to pay a fine of Kshs. 30,000/= and in default to imprisonment for a term of 6 months imprisonment. I hereby substitute the sentence with imprisonment for a period of 3 years effective from the date of this judgment. The fine paid of Kshs. 30,000 shall be reimbursed to the respondent. I uphold the order for compensation. The appeal succeeds only to the above extent.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **21st** day of **June, 2019**.

NJOKI MWANGI

JUDGE

In the presence of

Appellant present in person

Ms Ogweno, Prosecution Counsel for the DPP

Ms Bancy – Court Assistant