REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 211 OF 2017

IVINE LOKOSIO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 287 of 2017 delivered on the 17th day of November, 2017 by Hon. S.O. Temu, PM]

JUDGMENT

1. The appellant who was convicted and sentenced to imprisonment for 5 years for the offence of grievous harm contrary to section 234 of the Penal Code appeals from the said sentence and in submissions filed in this Court pleads as follows:

> *1. That I am a first offender which I pray this honourable Court to give me non-custodial sentence as indicated by Probation Officer on their report page 22 line 4.*
>
> *2. That your lordship as per now I have learnt a lesson and ought to be accorded and opportunity to put together my life once again, I have been in prison for one year and I have reformed.*
>
> *3. That your lordship the period I have served in prison I have undergone a lot of rehabilitation program and now I am a law abiding citizen.*
>
> *4. That your lordship I submit that the trial Magistrate did not consider my mitigation in sentencing. Being a single mother of three children who are school going and while in custody one of my child passed away.*
>
> *I hereby pray this honourable Court to grant me a non-custodial sentence or set me free since I have suffered given the state of my health and the plight of my children.*

2. At the hearing of the appeal, the appellant relied on the written submissions set out above and the DPP in oral submissions opposed the appeal as follows:

> ***"Appellant***
>
> *I have written submission. I do not have anything to add.*
>
> ***DPP***
>
> *The appeal is opposed. The appellant was convicted of grievous harm contrary to section 234 of Penal Code and sentenced to serve 5 years on 17/11/17.*
>
> *Appellant was positively identified by Pw1 and Pw2 as she was well known to them. The four witnesses stated that the appellant was a neighbor and the complainant's Pw1's child had been living with the appellant since February 2017. On the material day the complainant had gone for the child from the appellant after learning that the appellant had been feeding the child with alcohol.*
>
> *The appellant had been unhappy and she attacked the complainant and Pw2. There was moonlight and Pw1 and Pw2 knew the appellant. In her defence the appellant confirmed that she knew the complainant and the complainant's child was living in her home. She further confirmed that the complainant had gone for the child on that date, which clearly show that the complainant and the appellant were together on the same date at the time of the crime. There is no doubt that the appellant attacked Pw1.*

Pw2 is a Clinical Officer who examined the complainant and filled the P3 form. On examination he found the complainant's left eye had injury and it was totally not in use. He classify the injury as grievous harm. The appellant was sentenced to serve 5 years imprisonment and has served 1 year. Since arrest, there has been no indication of the appellant considering the complainant. At page 9 of the proceedings only cross-examination of Pw2 the Court noted that the appellant had a demeanor of pride despite causing the complainant permanent disability and the complainant's eye was completely damaged.

The appellant deserves the deterrent sentence. The complainant needs time to learn how to deal with the disability.

Appellant in reply

I first pray for leniency as my child is suffering at home with no one to look after her."

3. In sentencing the appellant, the trial Court considered the gravity of the offence and ruled as follows:

"***Sentence***

Court – I have considered the nature of the offence and Probation Officer's Report before sentence.

The Probation Officers indicated on their report that the accused is in denial but she can serve under non-custodial sentence.

I do not find that proper given the gravity of the offence.

The complainant lost an eye completely and that is an injury which is severe.

The accused had followed the complainant to her house and that was where she had attacked her.

I do not find the accused fit to serve under non-custodial sentence due to the gravity of the offence and manner in which it was committed.

The accused is thus sentence to serve 5 years imprisonment. Right of Appeal 14 days.

S.O. TEMU [PM]

17.11.17"

4. As a first appellate Court despite there being no appeal from the conviction, I have considered the evidence before the trial Court and established that the appellant had following an incident where the complainant had gone to pick her child from the accused's house, assaulted the complainant causing her grievous harm, which medical examination revealed loss of use of her left eye. In her defence by unsworn statement the appellant while denying assault on the complainant, confirmed that "***the complainant's child used to come to my house earlier and on the date of incident the complainant had found her child playing with other children and she had caned her***". The appellant confirmed all aspects of the complainant's case excretion attacking the complainant. I would find the Prosecution's case proved beyond reasonable doubt.

5. The principle for interference by an appellate Court with the trial Court's discretion in sentencing is set out in ***Wanjema v. R*** (1971) EA 493, 494 as follows:

"*A sentence must in the end, however, depend upon the facts of its own particular case. In the circumstances with which we are concerned a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand. An appellate Court should not interfere with the discretion which Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this Court's interference with it on each of these grounds. No account was taken, as it should have been, of the fact that the appellant pleaded guilty: Skone (1967), 51 Cr. App. R. 165 and Godfrey (1967), 51 Cr. App. R. 449."*

See also ***Omuse v. R*** (2009) KLR 214.

6. The accused had in mitigation said that she had children to take care of and no husband to help. The offence is, however, serious and the magnitude of the injury also called for a deterrent sentence which is what the trial Court set out to do in rejecting the recommendation of the Probation Officer's Report for non-custodial sentence. I do not find any good reason to interfere with the sentence of the trial Court.

7. Appeal dismissed.

Order accordingly.

DATED AND DELIVERED THIS 19TH DAY OF JUNE 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.