REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CRIMINAL REVISION NO. 17 OF 2017

(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 120 OF 2017 OF

THE PRINCIPAL MAGISTRATE'S COURT AT MARIMANTI- delivered by Hon L.N. Mesa SRM on 18/10/2017)

STATE..APPLICANT

VERSUS

DANIEL GITONGA NTHIGA.................RESPONDENT

R U L I N G

1. **DANIEL GITONGA NTHIGA**, the Respondent herein was charged with the offence of causing grievous harm contrary to **Section 234** of the **Penal Code** vide ***Marimanti Principal Magistrate's Court Criminal Case No. 120 of 2017***.

The particulars of the charge as presented were that on 10th April 2018 at Muyoya village Tharaka South within Tharaka Nithi County unlawfully caused grievous harm to Gladys Karimi Kathenya.

2. The case went on for full trial after the Respondent denied committing the offence. The trial court however found him guilty convicted him and placed him on Community Service Order for period of 210 hours after considering that he had spent 6 months in custody during trial.

3. The Officer of Director of Public Prosecution, the applicant herein was dissatisfied with sentence meted out and applied for review of sentence through a letter dated 14th December 2017. In their application, the Office of Director of Public Prosecution opines that the sentence imposed by the trial court was manifestly lenient given that the law Section (234 of the Penal Code) prescribed life imprisonment for that sort of offence.

4. The State contends that the non custodial sentence handed out was illegal and applied for intervention by this court as the Respondent in its view should have served a custodial sentence. They have relied on the decision of ***Lawrence Miano -vs- Republic [2015] eKLR*** where the High Court set aside an incorrect conviction and sentence. They have further cited the decision in the case of ***Griffin -vs- Republic (1981) KLR 121*** where the Court of Appeal held that the appellate court can interfere with the exercise of discretion where the trial court is found to be manifestly harsh or manifestly lenient or where the sentence is illegal. The State has asked this court to invoke its powers under **Section 362** of the **Criminal Procedure Code** and determine the correctness, legality and propriety of the sentence imposed on the Respondent.

5. This court has considered this matter on review. The provisions of **Section 362** of the **Criminal Procedure Code** provide as follows:

> ***"The High Court may call for and examine the record of any criminal proceeding before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court."***

6. This court, in the light of the above provisions called for the lower court file (***Marimanti Principal Magistrate's Court Criminal Case No.120 of 2017)*** and upon perusal I have noted that the Respondent was as I have observed above charged with the offence of causing grievous harm contrary to **Section 234** of the **Penal Code**. Under the provision of **Section 234** of the **Penal Code,**

> ***"any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."***

A look at what constitutes grievous as per the definition given under **Section 4** of the **Penal Code** show that grievous harm;

> ***"means any harm which amounts to 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. It is clear from the evidence tendered that the Respondent herein used a machete in causing grievous harm to the complainant who happened to be his stepmother. He cut her with the machete on her hand which forced her to be admitted for one week at Marimanti Sub-County Hospital. The medial officer who filled the P3 (P. Exhibit 1) classified the injuries as ***'maim***' and maim in a P3 form indicates;

> ***"maim means destruction or permanent disabling of any external or internal organ, membrane or sense."***

On the other hand ***"Grievous harm"*** is defined as;

> ***"any harm which amounts to maim, or endangers life 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."***

8. From the classification of injuries above it is quite clear that an injury classified as ***'maim'*** or ***'grievous'*** may attract a charge of causing grievous harm depending on the degree of harm. I therefore find that the charge upon which the Respondent was charged and convicted was proper as per the evidence tendered. Given that conviction is not an issue here, this court will look at legality and propriety of the sentence meted out against the Respondent.

9. It is important to note sentencing is both a matter of law and judicial discretion under **Section 26(2)** of the **Penal Code** being a discretionary matter it must be exercised judicially which means a trial court must be guided by evidence and sound legal principles. In doing so it must take into account all relevant factors in mitigation and exclude extraneous ones.

10. The Judiciary Sentencing Guiding Principles is in place to guide courts in factoring in principles under pinning the sentencing policy. The principles are;-

> i. Proportionality of the sentence to the offending behavour
>
> ii. Uniformity of sentence- similar offences should attract similar penalty/sanction.
>
> iii. Deterrence - A deterrent sentence to discourage or eliminate a vice in the community/society
>
> iv. Retribution- Appropriate sentence to act as a punishment for wrong done to help the victim see that justice has been served.
>
> v. Transparency - consideration taken as to what sanction the law provides.

11. It is now trite that an appellate court as a general principle would not normally intervene where a trial court has exercised its discretion unless a material fact has been overlooked, or it has considered an irrelevant factor or where a sentence is either too harsh or too lenient as to constitute an obvious error of principle(s) as enumerated by the law or the above cited guiding principles of sentencing.

12. I have considered the sentence imposed by the trial court in this instance for an offence of grievous harm. The learned trial magistrate gave the Respondent 210 hours of Community Service Order (CSO) which is a non custodial sentence. I have perused at the Community Service Order Act No. 10 of 1998 and Section 3 of the said Statute provide as follows:-

> ***"Where any person is convicted of an offence punishable with;***
>
> ***a) Imprisonment for a term not exceeding 3 years, with or without option of fine or***
>
> ***b) Imprisonment for a term exceeding 3 years but for which the court determines a term of imprisonment for 3 years or less with or without option of a fine to be appropriate, the court may,.................. make a Community Service Order requiring the offender to perform Community Service."***

13. The trial court in this instance as I have observed determined that because the Respondent had spent six months in custody during trial a sentence of 210 hours Community Service Order which translated to approximately 8 days and some hours would suffice. That sentence in my view was, given the nature of the offence committed far too lenient and infact constituted a big error of principle. In the first place, the Community Service Order Act, 1998 provides that Community Service Order applies to misdemeanors and instances where the law prescribes 3 years and below or where the court prescribes a sentence of 3 years and below. Grievous harm is a felony and it attracts a penalty of life imprisonment because it is a serious offence. I have looked at the probation officers report dated 18th October 2017 presented to the trial court prior to the sentencing and the report is quite adverse to non custodial sentence owing to the fact that the Respondent was repeat offender. The report states in part;

> ***"The local leaders strongly disapprove the accused conduct and character but they also apportion some blame on his father. They say the accused is a brutal and dangerous person who keeps to his words. He is also not a first offender as he was once convicted in Criminal Case No. 480/2011- conveying stolen goods whereby he benefited from court's leniency of being placed on Community Service Order (CSO) for (560 hours) and he failed to show a remarkable degree of behaviour change by the time he was arrested and charged with this offence."***

The trial court in the face of such an adverse social inquiry report showing that the convict was clearly undeserving of another Community Service Order, and the fact that the felony he had committed which in principle was not amenable to Community Service Order clearly fell

into error by imposing a non custodial sentence. The trial court ought to have been guided by the law and the sentencing policy guidelines. He in my view, took into account an insignificant and extraneous factor in the circumstances because he noted that the Respondent had spent 6 months in custody during trial when is the sanction in life imprisonment.

14. It is quite apparent that the Respondent is a step son to the complainant and lives within close proximity and given his history and what he did to her step mother, he really required a custodial sentence in order to protect the victim from threat of further harm and at the same time give the Respondent time to change and reform within the confines of a correctional facility. The sentence meted out against him was not deterrent at all, neither was it an appropriate sentence in law. A Community Service Order was not appropriate in regard to what the Respondent committed (felony) and further in regard to social inquiry report filed in that court prior to the sentencing.

In the end I find that revision is merited in this matter. The sentence of 210 hours Community Service Order is hereby set aside. In its place I substitute it with an imprisonment of five years in order to give the Respondent sufficient time to reform and transform both in behavour towards his parents and character in order to be useful to not only his immediate family but the community at large.

Dated, signed and delivered at Chuka this 24th day of July, 2019.

R.K. LIMO

JUDGE

24/7/2019

Ruling dated, signed and delivered in the open court in presence of Kirimi for Respondent and Maari for Applicant.

R.K. LIMO

JUDGE

24/7/2019