



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 18 OF 2018

KURA LOROCHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Senior Principal Magistrate's Court at Kabarnet Criminal Case no. 1101 of 2018 delivered on the 8th day of March, 2018 by by Hon. N.M. Idagwa, SRM]

JUDGMENT

1. The appellant was on 8th March 2018 convicted and sentenced to imprisonment for six years for the offence of grievous harm contrary to section 234 of the Penal Code, the charge and particulars where were set out in the Charge Sheet dated 18th July 2017 that:

PARTICULARS: KURA LOROCHA: On the 14th day of July 2017 at about 1700 hrs at AKIRIAMET Village in East Pokot Sub-County within Baringo County unlawfully cause Grievous Harm to CHEPOCHEPTOCH DOMOCHIPA.

2. The appellant challenged both the conviction and sentence on grounds set out in the Petition of Appeal and elaborated these in the written submissions presented to court as follows:

"PETITION OF APPEAL

My lordship, I do hereby beg leave to petition my appeal on leniency as follows:

1. That I'm first offender.
2. That my lord I am still young and I beg this Court to consider that this is my first offence.
3. That my lord my family is residing in Kenya and due to my absence they are suffering including my livestock.
4. **That my lords I do pray that may the harsh sentence be reduced as the honorable Court may deem lenient.**
5. **That my lords I do pray that a non-custodial sentence be allowed.**
6. **That my lords, I have learned the mistakes given the tough conditions in prison and I promise to be an upright citizen and show lawful acts that may not gross purpose with the laws of the land.**

WRITTEN SUBMISSIONS

1. That I am a first offender and I humbly pray that may the honorable Court consider the appellant as a first offender.
2. That I am the bread winner in my family my aged parents and my siblings who depended on me now depends on my aged parents who are able to provide all their basic needs.
3. Your honor I have trained in prison and gained skills in prison and I am still a young and energetic citizen I promise to make a good use of my skills which will benefit my neighbouring citizens and build the economy of our great nation Kenya now that I understand the rules of the land.

4. I kindly pray for a second chance to build up the nation through my skills and provide for my family now that I have learned my mistake of which they emanated from the use of alcohol and influence of bad company which I promise to shun and be a good citizen.

5. That I have learned my mistakes, and I have gone through harsh conditions in prison facility I promise this honorable Court that I will not engage myself to bad company that has led to conviction and separation from my family.

6. I promise to be an upright citizen and show lawful acts that may not cross purpose with laws of the land.

7. My lords since I have no previous records I pray that may this honorable Court allow me a non-custodian sentence and I promise to be an upright citizen and show lawful acts that may not cross purpose with laws of the land.

8. That the honorable Court may re-consider my Appeal and quash this conviction and sentence so that I may be set at liberty or given a non-custodial sentence.”

3. The DPP opposed the appeal in oral submissions before the Court as follows:

“DPP

The appeal is opposed.

Appellant convicted of grievous harm contrary to section 234 of Penal Code and sentenced to 6 years on 8/3/2018. He has served 1 year 4 months.

Appellant identified by Pw1 and Pw2 as he was a person well known to them. Pw4 stated that the appellant went to the homestead and started throwing stones at her. One stone hit her on the leg and the second on the eye after which she lost consciousness.

Pw1 stated that she heard the complainant screaming, and when he went to check he saw the appellant running away from the complainant’s compound. He together with others assisted complainant to hospital.

Pw3 Clinical Officer filled P3 form. He stated that when the complainant appeared before him, her dress was soaked with blood. There was a deep cut wound on her right eye which was still bloody. It was very swollen and the eye could not be seen. There was also a cut wound on the left side of the head and the left leg. The wounds were still bloody.

The complainant could not speak as she was serious and he classified the nature of injury as grievous harm.

At the time Pw4 was giving her testimony she stated that she could not use the eye as it was damaged. The injuries were serious as it formed a permanent disability. Six (6) years imposed was lenient in the circumstances. The appellant should serve the sentence for deterrence.”

DETERMINATION

Conviction

4. Although the appellant primarily challenged the sentence and not his conviction, having admitted his **“mistake of which emanated from the use of alcohol and influence of bad company”**, and seeking only that the sentence be reduced, the court has re-evaluated the evidence before the trial court in accordance with its duty as a first appellate court (see ***Okeno v. R*** (1972) E.A. 32) to determine the question before the court whether the offence of grievous harm has been proved against the appellant.

5. On the evidence, the prosecution and the defence’s alibi evidence weighed as a whole, the offence of grievous harm is proved by the evidence of the deep cut wound on the left side of the complainant’s (PW4’s) head as testified by the examining nursing officer (PW3) who classified the degree of injury as grievous harm on the Medical Examination Form P3 which set out definitions of the various categories of injury – *harm, maim and grievous harm* – consistently with definitions under section 4 of the penal Code, to which the trial magistrate adverted.

6. The medical evidence of PW3 was that –

“On her right eye lid there was a deep cut wound which was still bleeding it was very swollen until the eye could not be seen. There was a cut wound on the left side of the head and the left leg which were bleeding. The patient could not speak, she was sub-conscious.”

It is a serious injury to an external organ at the very least within the meaning of *grievous harm* under section 4 of the Penal Code.

7. The appellants bare alibi did not raise any doubt as to the prosecution’s case by the eye witnesses – the complainant PW4 who knew the appellant well as a relative in the status of her mother who stated that the appellant had gone to her home seeking the return of a goat paid to her by the appellant’s father upon elders’ arbitration of a case where the appellant had previously taken her goat the appellant throwing stones at her and injuring her leg and head, and the uncle (cousin) PW1 who said he was a relative of the appellant, that - *“Kura is my uncle;*

his mother and my mother are sisters” - and who responded to the complainant’s screams and saw the appellant running away upon seeing him. I do not find any questions of identification as the two eye witnesses knew the appellant as their relative and only recognized him during the attack; and the act of grievous harm was proved by medical evidence of the nursing officer (PW3).

Sentence

8. In sentencing the appellant to imprisonment for six years the trial court ordered, properly in my view by virtue of section 333 (2) proviso of the Criminal Procedure Code, that the period of six years runs from 18/7/2017 when he was remanded upon arraignment before the court as follows:

“Sentence

Accused mitigation noted. But due to the gravity of the offence I sentence him to six (6) years imprisonment. 14 days right of appeal. Sentence to start running from 18/17.”

9. Being cognisant of the test for appellate interference with trial court discretion in sentencing in **Wanjema v. R** (1971) EA 493, I consider, however, that the sentence of imprisonment for six years for the offence of grievous harm contrary to section 234 of the Penal Code in the circumstances of this case is excessive.

10. I consider a sentence of four (4) years meets the justice of the case having regard to extent of the complainant’s injury, which was not shown to be debilitating and aggravated; the apparent youth age of the accused (he told this court that he was 23, born in 1996); and the punishment objectives of reform and rehabilitation of the offender. Significantly, the appellant was remorseful right from his mitigation before the trial court where he prayed for forgiveness.

ORDERS

11. Accordingly, for the reasons set out above, the appellant’s conviction for the offence of grievous harm contrary to section 234 of the Penal Code is upheld but the appeal from the sentence is allowed for being excessive in the circumstances of the case.

12. The sentence of imprisonment for six (6) years is set aside and substituted with a sentence of imprisonment for **four (4) years** commencing as ordered by the trial court from the date of arraignment before the trial court on **18th July 2017**.

Order accordingly.

DATED AND DELIVERED THIS 25TH DAY OF NOVEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.