REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO 21 OF 2017

JACKSON NASHERA......................APPELLANT

VERSUS

REPUBLIC.......................................RESPONDENT

(**From original conviction and sentence in Criminal**

Case Number 122 of 2016 in the Senior Principal

Magistrate's Court at Taveta by Hon G. K.

Kimanga (RM) on 9th March 2017)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Jackson Nashera, was charged with two (2) Counts. In respect of Count I, he was charged with the offence of causing grievous harm contrary to Section 234 of the Penal Code Cap 63 (Laws of Kenya). The particulars of this charge were that on 10th day of April 2016 at around 1000 hours at Abori Village within Taita Taveta County, he unlawfully did grievous harm to Pius Samuel (hereinafter referred to as "PW 1").

2. In respect of Count II, he was charged with the offence of stealing contrary to Section 275 of the Penal Code. The particulars of this charge was that on the 10th day of April 2016 at around 1000 hours at Abori Village within Taita Taveta County, he stole a spade and a panga worth Ksh 950/=, the property of Christopher Meliki (hereinafter referred to as "PW 3").

3. The Learned Trial Magistrate Hon G.K. Kimanga(RM) sentenced him to serve twenty (20) years imprisonment on Count I and two (2) years on Count II. He directed that the sentences were to run concurrently.

4. Being dissatisfied with the said judgment, on 21st March 2017, the Appellant filed a Notice of Motion application seeking leave to be allowed to file an Appeal out of time, which application was allowed and the Petition of Appeal deemed to have been duly filed and served. He relied on seven (7) Grounds of Appeal which appeared to have been more of mitigation grounds.

5. His Written Submissionsand seven (7) Amended Grounds of Appeal were filed on 27th July 2017. He filed his Further Written Submissions in response to the State's Written Submissions dated 17th October 2017 and filed on 19th October 2017 on 16th November 2017.

6. When the matter came up on 14th December 2017, both parties asked this court to deliver its Judgment based on their respective Written Submissions. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. As this is a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

8. It appeared to this court that the issues that had been placed before it for determination were as follows:-

a. Whether or not the Charge Sheet was defective;

b. Whether or not the Appellant's right to fair trial was infringed upon;

c. Whether or not the Prosecution proved its case beyond reasonable doubt:

d. Whether or not the sentence that was meted upon the Appellant by the Learned Trial Magistrate was excessive warranting interference by this court.

9. The said issues were dealt with under the following distinct heads.

I. <u>CHARGE SHEET</u>

10. Amended Ground of Appeal No (4) was dealt with under this head.

11. The Appellant contended that the Charge Sheet was defective because the P3 Form and OB Report showed different particulars from those that were given in the Charge Sheet. He added that PW 1 testified that he was sent for examination on 10th April (sic) yet the P3 Form showed that he was sent to hospital on 6th April (sic).

12. He submitted that the Prosecution ought to have amended their Charge Sheet but it did not do so and consequently, the Learned Trial Magistrate erred when he convicted him without considering that the variances, contradictions and discrepancies ought to have been corroborated. He cited the case of **<u>Agustino Njoroge vs Republic CA No 188 of 1982</u>** where the Court of Appeal held that contradicted evidence is unreliable to buttress his argument herein.

13. On its part, the State submitted that even if there was an error in the Charge Sheet, then the same was curable under Section 382 of the Criminal Procedure Code Cap 75 (Laws of Kenya) that provides as follows:-

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

14. It pointed out that No 91607 PC Komora (hereinafter referred to as "PW 4") confirmed that the OB was made on 10th April 2016 and that the Clinical Officer, Peterson Mwapulu (hereinafter referred to as "PW 4) had made an error when he testified that the date was 6th April 2016 because he had testified that his colleague treated PW 1 on 10th April 2016.

15. The fact that the Charges and evidence by the Prosecution witnesses gave different times of when the incident occurred did not render the said Charge Sheet defective. Indeed, a charge sheet does not become defective merely because the evidence that has been adduced during trial does not prove the facts in such a charge sheet.

16. If the evidence that is presented in court does not prove any offence, the trial court is obligated to acquit an accused person as envisaged in Section 210 and Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya) as the prosecution will either have failed to demonstrate that a *prima facie* has been established or to prove its case beyond reasonable doubt.

17. In the absence of any demonstration by the Appellant of the prejudice that he suffered from the way the Charge Sheet was drafted, this court found and held that the said Charge Sheet was defective. In the circumstances foregoing, Amended Ground of Appeal No (4) was not merited and the same is hereby dismissed.

II. <u>APPELLANT'S RIGHT TO FAIR TRIAL</u>

A. <u>RIGHT TO BE INFORMED OF CHARGES</u>

18. Amended Ground of Appeal No (1) was dealt with under this head.

19. The Appellant submitted that his rights under Article 50(2)(b) and (j) of the Constitution of Kenya, 2010 were violated as he was not informed by the Prosecution the charges that had been preferred against him or provided with the evidence that it was going to rely upon in the case herein, an assertion the State vehemently denied.

20. According to the State, the Appellant was informed of the Charges that were preferred against him at the plea stage in Kiswahili, a language that he understood. It added that the Learned Trial Magistrate directed that he be supplied with Witness Statements at his own cost, a fact that was recorded in the court proceedings.

21. A perusal of the proceedings shows that the Appellant was arraigned in court for the first time on 12th April 2016. He denied the charges and a plea of not guilty to the charge was entered. The Learned Trial Magistrate then directed that the matter be mentioned on 26th April 2016 and fixed the hearing for 10th May 2016. He also ordered that the Appellant be furnished with Witness Statements at his own costs, a fact that was rightly pointed out by the State.

22. When the matter came up in court on 10th May 2016, he informed the said Learned Trial Magistrate that he was not ready to proceed with the trial as he did not have the said Witness Statements. The Learned Trial Magistrate adjourned the matter to 27th May 2016 and directed once again, that he be supplied with the Witness Statements and Charge Sheet. The Charge Sheet was subsequently amended.

23. The matter came up in court several times and on 18th July 2016, he indicated that he was ready to proceed with the hearing of the case. At no time did he complain that he did not have the said Witness Statement and Charge Sheet or alert the Learned Trial Magistrate that he had encountered difficulties in obtaining the same.

24. Indeed, he could not purport to complain that his rights to fair trial had been infringed upon after the trial had been concluded and he had been convicted.This court was therefore not persuaded to find that his right to fair trial had been infringed upon on the ground that he was not informed of the charges that had been preferred against him.

25. In the circumstances foregoing, this court found no merit in Amended Ground of Appeal No (1) and the same is hereby dismissed.

B. LEGAL REPRESENTATION

26. Amended Ground of Appeal No (2) was dealt with under this head.

27. The Appellant contended that he was a layman in matters of law and consequently, he ought to have been assigned legal representation. He argued that because this was not done, his constitutional rights under Article 50 (2)(h) of the Constitution of Kenya, 2010 were infringed upon.

28. The State argued that it was not in every case that an accused person was assigned legal representation and that such right was progressive in nature currently been accorded to those persons who had been charged with capital offences.

29. It placed reliance on the case of **Cr Appeal No 497 of 2007 David Njoroge Macharia vs Republic [2014] eKLR** where the court therein explained that legal representation ought to be assigned to an accused person where substantive injustice would occur in complex issues of law or fact, where the accused is unable to conduct his own defence or where public interest requires that representation be provided.

30. The limitation of the right to be assigned legal representation by the State was addressed by the Court of Appeal in the cases of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic [2015] eKLR**and In the **case of Dominic Macharia vs Republic (Supra)**amongst many other cases.

31. In the case of **Dominic Macharia vs Republic (Supra)**, the Court of Appeal rendered itself as follows:-

> ***"Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."***

32. In the case of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic**(Supra),the Court of Appeal also stated as follows:-

> **"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result' and to include *all situations where an accused person is charged with an offence whose penalty is death.* This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.**
>
> **Again, this Court differently constituted in the case of Moses Gitonga Kimani v Republic, Meru Criminal Appeal No. 69 of**

2013, recognized that the Constitution has placed an obligation on Parliament to enact legislation which would ensure realization of an accused person's right to a fair trial under Article 50 of the Constitution within four years of the promulgation of the Constitution. In that regard the court stated as follows:

"It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. While appreciating that the framers of the Constitution intended the right to legal representation to be achieved progressively we implore Parliament to enact the requisite legislation."

Article 261 of the Constitution provides *inter alia*:-

(i) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.

(ii) Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-thirds of all members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year

It is therefore apparent that the provisions of Article 261 and the Fifth Schedule to the Constitution, that would give effect to the provisions of Article 50, including Article 50(2)(h), are to be implemented within a period of between 4 and 5 years. We must however lament the obvious lack of the appropriate legislation almost five years after the promulgation of the Constitution to provide guidelines on legal representation at State's expense. We believe time is now ripe and nigh for the enactment of such legislation. That right cannot be aspirational and merely speculative. It is a right that has crystalized and which the State must strive to achieve. We say so while alive to the fact that right to fair trial is one of the rights that cannot be limited under Article 25 of the Constitution."

33. Whilst this court agreed with the Appellant that there was discrimination relating to the provision of legal representation, it took cognisance of the aforesaid decision by the Court of Appeal and only hoped that the right to assign legal representation to **<u>all</u>**(emphasis court) accused persons will be realised progressively but sooner than later.

34. In light of the aforesaid limitations on assignment of legal counsel, this court was not persuaded to find that the Appellant's rights to fair trial had been infringed upon as he had initially contended. In the premises foregoing, this court did not find any merit in the Appellant's Amended Ground of Appeal No (2) and the same is hereby dismissed.

III. <u>PROOF OF THE PROSECUTION'S CASE</u>

35. Amended Grounds of Appeal Nos(3), (5) and (7) were dealt with under this head.

36. The Appellant submitted that any fact that is presented before any court must be proved beyond reasonable doubt and that the more serious the offence, the heavier was the burden is on the Prosecution to prove its case. He argued that the Prosecution witnesses adduced contradictory evidence which made it difficult for the court to distinguish who was telling the truth. He relied on the cases of **<u>CA No 33 of 2001 Nyeri Charles Kibara vs Republic</u>** and **<u>CA No 106 of 1950 Denkeri RamkishanPandey vs Republic</u>** to support his case.

37. He submitted that PW 1 and Fredrick Mweke (hereinafter referred to as "PW 2") did not identify him as having been the perpetrator of the offence because the circumstances were stressful, sudden and terrifying requiring corroboration by an independent witness.

38. He referred this court to the case of **<u>Joseph Ngumbau Nzalu vs Republic (1991) 2 KLR pg 272</u>** where the Court of Appeal rendered itself as follows:-

"A careful direction regarding the conditions prevailing at the time of identification and the length of time for which the witness had the accused person under observation together with thepossibility of error was essential."

39. He pointed out that Grace Wakesho who examined him at Taveta District Hospital, the police officer who arrested him, Meshack Willy Mbali who appeared in the Charge Sheet, Kiko and Msea were not called as witnesses in the case. He argued that the Learned Trial Magistrate ought to have summoned the said witnesses in line with Section 150 of the Criminal Procedure Code.

40. He added that the panga which was said to have been blood stained was not taken for DNA analysis to establish whether there was presence of his finger prints or if the blood belonged to PW 1 and that the error by PW 5 on the date PW 1 was sent for medical examination was not an excusable error because it was him who filled that part of the P3 Form to enable PW 1 seek medical attention at the hospital.

41. He also stated that PW 5's evidence that he was informed that PW 1 had been assaulted contradicted the Charge Sheet which showed that he had caused PW 1 grievous harm.

42. He was emphatic that he had provided a tight alibi defence which the Learned Trial Magistrate failed to consider. He placed reliance on the case of **<u>Kiarie vs Republic [1982] KLR 739</u>** where it was held as follows:-

"An alibi defence raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."

43. On its part, the State submitted that both PW 1 and PW 2 identified the Appellant as having been the attacker herein and that he went away with the panga after he attacked PW 1.

44. It stated that it was not necessary to call Grace Wakesho as a witness in this matter because PW 4 testified that they were colleagues and PW 4 knew her handwriting sufficient to have authenticated the P3 Form in accordance with Section 77 of the Evidence Act Cap 80 (Laws of Kenya).

45. It added that Section 143 of the Evidence Act gives the Prosecution the discretion to decide the number of witnesses to prove a fact and consequently, it was also not necessary to call Kioko and Mseaor the Arresting Officer because PW 3's evidence was sufficient to have proven the Appellant's arrest.

46. It was its further submission that the offence the Appellant was charged with was proper as PW 1 and PW 2 adduced sufficient evidence to show that he caused PW 1 grievous harm after he cut him on his hand, which injury was documented in the P3 Form and required a specialised operation. It therefore urged this court to find the Appellant's Appeal was not merited because his unsworn evidence was not subjected to Cross-examination.

47. A perusal of the proceedings in the lower court showed that in hisevidence,PW 1 testified that on 10th April 2016 at about 10.00am, he was at PW 3's farm together with the Appellant and one Mueke waiting to be allocated work. PW 3 was their employer on that day. He hit a cigarette that he had with a piece of glowing wood**(sic)**. The Appellant asked him for the stick but he declined to give it to him.

48. It was then that the Appellant hit him with his fist and after he fell, the Appellant cut him on the hand with a panga. People separated them and the Appellant carried his spade. Musea called PW 3 to the scene. PW 1 was treated at Taveta District Hospital but the Appellant refused to meet his treatment costs. The incident was reported at Taveta Police Station.

49. According to PW 2, he was at PW 3's farm when the Appellant came and asked PW 1 to give him a glowing stick so that he could light his cigarette. However, PW 1 refused to do so. He said that the Appellant then punched PW 1 with his fist before picking PW 1's panga and cutting PW 1 on his hand. He corroborated PW 1's testimony that it was Musea who went to call PW 3, their employer and PW 1's evidence that the Appellant carried a spade and panga and left the farm.

50. On his part, PW 3 testified that on 10th April 2016 at about 10.00 am, he was called by Musea who informed him that the Appellant had cut PW 1 with a panga. He stated that the fight was over a fire stick. He said that before he arrived at the scene, he met the Appellant along the way. He was carrying a blood stained panga and a spade..In his Cross-examination, he denied ever having had any dispute with the Appellant herein prior to the incident herein.

51. PW 4 testified on behalf of Grace Wakesho who examined PW 1 on 10th April 2016. She confirmed that PW 1 who was examined after two (2) months and eighteen (18) days had a history of a deep cut wound and had a scar on his left hand and fingers. She opined that PW 1 would require specialised treatment to have the fingers function again.

52. PW 5 reiterated the evidence that was adduced by PW 1, PW 2, PW 3 and PW 4. He stated that he charged the Appellant herein with the offence of causing grievous harm.

53. In his unsworn statement, the Appellant stated that on 10th April 2016 at 10.00am, he had left Church when he met PW 3 with his sons. They had a panga with them and took him on board to Taveta Police Station. He attributed his woes to a dispute between PW 3 and his deceased father because he heard PW 3 tell police that he was the son of the deceased they had talked about.

54. Whereas the circumstances of the incident herein were stressful, sudden and terrifying as the Appellant admitted, that did not affect his identification. The incident occurred at 10.00am a time of the day time when lighting conditions were favourable. PW 1, PW 2 and the Appellant had been together immediately prior to the incident which length of time was sufficient for them to have not mistaken that it was the Appellant who injured PW 1.

55. The Appellant's submissions regarding the possibility of him there having been a case of mistaken identity did not arise and consequently, the case of **Joseph Ngumbau Nzalu vs Republic** (Supra) that he relied upon was not applicable in the circumstances of the case herein as the facts therein were distinguishable from the facts of this case.

56. Going further, as PW 2 was present when the Appellant cut PW 1 with a panga, it was not necessary to call Musea and Kioko as witnesses to rehash the same evidence that PW 2 had adduced. Indeed, as the State rightly pointed out, the State retains the discretion of deciding the number of witnesses it will call during trial to prove a particular fact as provided in Section 143 of the Evidence Act.

57. It was also not necessary to have called Grace Wakesho to tender in evidence P3 Form because it was public document that could be produced by any other person and not necessarily by author of the same as provided in Section 77 of the Evidence Act. The said Section 77 of the Evidence Act stipulates as follows:-

> **"In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence."**

58. However, such expert report can only be tendered in evidence by a skilled expert as provided in Section 48 of the Evidence Act. The same provides as follows:-

"When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions."

59. Evidently, PW 4 was skilled in medical matters.He was a Clinical Officer at Taveta Hospital and he confirmed that he had worked with the author of the P3 Form, Grace Wakesho, for a long time. He would therefore have been in a position to confirm that she was the one who signed the said P3 Form. The Appellant did not object to PW 4 adducing in evidence the said P3 Form. Consequently, he could not be heard to complain that Grace Wakesho ought to have been called to produce the said P3 Form personally at the appellate stage.

60. This court therefore found the Appellant's submissions regarding the failure not to have called the aforesaid witnesses not to have been meritorious as the ones who were called were sufficient.

61. Notably, he opted to adduce unsworn evidence whose veracity was not tested through Cross-examination. However, that was his right as he had the option of remaining silent and leaving the Prosecution to prove its case. In fact, he was under no obligation to give evidence or assist the Prosecution prove its case.

62. Be that as it may, having weighed his evidence against that of PW 1, PW 2, PW 3 and PW 4, this court was more persuaded by the evidence that was adduced by the Prosecution witnesses that he did in fact inflict injuries on PW 1. Their evidence was consistent, cogent and had no contradictions. In fact, the indication of 6th April 2016 in the P3 Form was not a material contradiction that would have affected the integrity of the case herein because all the witnesses were clear in their testimonies that the incident occurred on 10th April 2016.

63. Evidently, the P3 Form showed that PW 1 had restricted function of 2nd, 3rd, 4th and 5th fingers. The degree of injury was recorded as "maim."

64. In Section 4 of the Penal Code, **"maim"** and **"grievous harm"** have been defined as follows:-

> **""Maim" means the destruction or permanent disabling of any external or internal organ, member or sense.**

"grievous harm" means any harm which amounts to a 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."

65. It was evident that PW 1 sustained severe injuries that occasioned him permanent disfigurement and incapacitation. PW 4 opined that he would need specialised surgery for the fingers to work. There was no other way of classifying PW 1's injuries other than that they were grievous injuries that fell within the definition given in Section 4 of the Penal Code.

66. It was not necessary that DNA analysis be carried out to establish if the blood PW 3 had said was on the panga belonged to PW 1 because PW 1' s and PW 2's evidence was clear that the Appellant inflicted the injuries on PW 1. The Appellant's contentions that the said analysis should have been done before he was convicted were therefore misplaced.

67. Having considered the evidence that was adduced by PW 1, PW 2, PW 3 and PW 4, this court came to the firm conclusion that the Prosecution proved its case beyond reasonable doubt and the Learned Trial Magistrate therefore arrived at the correct conclusion when he convicted the Appellant for having caused PW 1 grievous harm.

68. In the premises foregoing, this court found and held that Amended Grounds of Appeal Nos (3), (5) and (7) were not merited and the same are hereby dismissed.

IV. <u>SENTENCE</u>

69. Amended Ground of Appeal No (6) was dealt with under this head.

70. On the one hand, the Appellant submitted that the Learned Trial Magistrate erred in not considering that he was a first offender and meted upon him a sentence that was severe, harsh and manifestly excessive in the circumstances.

71. On the other hand, the State was categorical that the sentence that was meted upon him was within the discretion of the Learned Trial Magistrate because a person who had been convicted of causing grievous harm was liable to life imprisonment. It referred this court to the case of **<u>Hamisi Mungale Burahe vs Republic [2015] eKLR</u>** where the Court of Appeal affirmed conviction and sentence of fifteen (15) years for the offence of grievous harm.

72. It, however, stated that the sentence was too severe and harsh considering that the Appellant was a first offender. It opined that an imprisonment of ten (10) years would suffice.

73. Section 234 of the Penal Code provides as follows:-

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

74. In the case of ***Shadrack Kipchoge Kogo vs Republic, Eldoret Criminal Appeal No253 of 2003*** **(quoted in *Arthur Muya Muriuki vs ~Republic* *(2015)* eKLR),** the Court of Appeal stated the following on principles of sentencing:-

> ***"Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred."***

75. While this court agreed that sentencing is an exercise of discretion by a trial court, this court nonetheless agreed with both the Appellant and the State that since he was a first offender, he ought to have benefitted from a lower sentence. It would be safe to say that very long sentences do not necessarily reform a convict. Sometimes, they have the capacity of making a convict a more hardened criminal.

76. The circumstances of this case point to a case of poor anger management by the Appellant herein.While poor anger management over a stick of fire to light a cigarette could not be treated lightly, it was the considered view of this court that a sentence of twenty (20) years for causing grievous harm was severe, harsh and excessive for the reason that the Appellant was a first offender.

77. Whereas the State averred that ten (10) years imprisonment would have been sufficient in the circumstances of the case herein, which was within the prescribed punishment under Section 234 of the Penal Code, this court took the considered view that five (5) years imprisonment was adequate in the circumstances of the case.

78. In arriving at this conclusion, this court had due regard to length of sentences it had imposed for similar offences in previous cases to ensure that it was consistent in the punishments it meted out.Courts must take care not to mete out punishments that are so wide apart when circumstances of cases are somewhat similar.

79. In the case of **Knight Peter Ambale vs Republic [2016] eKLR**, the applicant therein had been charged with the offence of causing grievous harm. She had hit her co-wife on head with a blunt object and also poured a corrosive substance on her face as a result of which her co-wife had suffered bruising and cut wounds on the head, chemical burns and loss of consciousness.

80. The doctor who completed the said P3 Form observed visible peeling of her co-wife's skin and bleeding from her ears and nose. The said doctor categorised her injuries as "grievous harm." This very court therefore rejected the said applicant's application for Revision and upheld the sentence of five (5) years that had been meted out to the applicant therein. This was is in line with the sentence of five (5) years that this court found would suffice in the circumstances of the case herein.

81. Turning to Count II, this court noted that the offence of stealing connotes an element of a person taking an item from another person without that person's authority when he or she is not being seen and without having an intention to return the same to the rightful owner. Bearing in mind the said elements, this court did not find any evidence that seemed to prove that the Appellant stole PW 3's panga. The fact that PW 3 stated that he met the Appellant carrying a blood stained panga that belonged to him did not amount to proof that the Appellant had stolen the said panga.

82. It was not correct as the Learned Trial Magistrate had stated in his Judgment that the evidence about stealing the panga and spade was undenied**(sic)** and unchallenged. It was the considered opinion of this court that he applied the wrong principles leading to the conviction of the Appellant herein on Count II when clearly no evidence was adduced to prove the said offence, which offence appeared to have been abandoned by the Prosecution.

DISPOSITION

83. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 21st March 2017 was partly successful. As no evidence was adduced before the Trial Court to prove Count II, the conviction in respect of the said Count is hereby quashed and sentence set aside as it was unlawful and it was unsafe to confirm the same.

84. For the reason that the Prosecution proved its case beyond reasonable doubtin respect of Count I, his conviction in respect of Count I is hereby upheld as the same was lawful and fitting.

85. However, this court hereby sets aside the sentence that was meted upon him by the Trial Courton Count I as the same was severe, harsh and manifestly excessive in the circumstances of the case and replaces the same with a sentence of five (5) years imprisonment.

86. For the avoidance of doubt, the computation of the sentence shall run from 12th April 2016 when the Appellant was first arraigned in court as there was no indication that he ever came out of custody during the hearing.

87. It is so ordered.

DATED and **DELIVERED** at **VOI** this **27th** day of **March** 2018

J. KAMAU

JUDGE

In the presence of:-

Jackson Nashera-Appellant

Miss Anyumba for State

Susan Sarikoki– Court Clerk