



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

(GRIEVOUS HARM)

H.C. REV. CASE NO. 84 OF 2018

TIMOTHY OTIENO ONGINJO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both the conviction and the sentence dated 13.12.2017 in Criminal Case No.385 of 2015 in Siaya Law Court before on. J.O. Ongondo (Principal Magistrate)

JUDGMENT OF THE COURT

1. The **Appellant Timothy Otieno Onginjo** was vide Siaya P.M. Cr. Case No. 385 of 2015, where he was charged with the offence of **Grievous Harm contrary to Section 234 of the Penal Code**.
2. The particulars of the charge were that on the 26th day of June 2015 at Mur Malanga Sub-Location in Siaya District within Siaya County, jointly with another namely Charles Otieno Oguda, did grievous harm to **Paul Owuor Otieno**.
3. The Appellant was tried before Hon. J. O. Ongondo Principal Magistrate and on 13.12.2017, he and his Co-Accused Person were each convicted and sentenced to serve five years imprisonment.
4. The Appellant herein being dissatisfied with the conviction and sentence meted out on him filed an appeal and also applied for bail pending appeal.
5. On 20.3.2018 the Appellant who was unrepresented appeared before Hon. Makau – J., and applied to withdraw his application for bail pending trial. He also applied to withdraw his appeal stating that he wished to apply for revision of sentence only.
6. The Hon. Justice Makau allowed the withdrawal of the application for bail pending appeal and also proceeded to allow the Appellant's application to withdraw his appeal. The Court further ordered that the Appellant/convict was at liberty to file an application for revision.
7. On 22.3.2018 the Applicant wrote his request for revision filed on 17.4.2018 urging this Court to review his sentence of 5 years under mitigation on grounds that:
 - 1) ***He was not challenging the sentence at all.***
 - 2) ***He is a first offender and he is quite remorseful for the offence that he committed.***
 - 3) ***He is the sole breadwinner in his family of four and he has a very tender family who depend on him solely.***
 - 4) ***He has learnt his lesson for the period he had served in prison.***
 - 5) ***He seeks for a non-custodial sentence or any other remedy that this Court deems fit.***
8. The appellant prayed for the Court's indulgence and favourable consideration.

9. Upon receipt of the request for revision of sentence, the learned Hon. Makau – J., directed that a Probation Officer's report be filed on the convict by 15.5.2018 for consideration by the Court.

10. The Probation Officer Mr. Marvin Nganyi, Siaya Probation Office did file his report in Court on 14.5.2018. The report shows that the Applicant is aged 33 years. He is currently serving his 5 year prison term at Siaya G.K. Prison for grievous harm, from 22.12.2017 which term ends on 21.12.2022 and that since his conviction and imprisonment, he has learnt farming.

11. The Probation Officer interviewed several people including the Applicant himself, his Area Assistant Chief and neighbors and the victim of the crime of grievous harm.

12. The Applicant was unemployed at the time of commission of the offence. He comes from a relatively poor family that fends from hand to mouth and that he abuses alcohol. He is married with 4 children who are very young with the oldest being in class one. He used to be a mason. It is reported that his home environment is conducive for non-custodial sentence and rehabilitation as his family is willing to support him in the rehabilitation and that he has a good relationship with other members of the society.

13. The victim of the grievous harm crime orchestrated by the Applicant is the convict's village-mate. He is Mr. Paul Oduor Otieno. On his part, the victim prays that the Convict serves a custodial sentence since he fears that if set free the convict will attack the victim again.

14. The Community at large is positive that if the convict is set free, he is hardworking and as he had no previous criminal record he will help His family.

15. According to the Probation Officer's Report, the convict is suitable for release to the community on a non-custodial sentence and he recommends that the convict be released to serve the Community at Mur-Malanga Dispensary, Subject to the Court's discretion.

16. I have carefully considered the convict's plea for revision of sentence and the Probation Officer's Report which is 'favourable,' only, in so far as the convict and his family at large are concerned. The victim tells a different story. He is apprehensive that if released, the convict will strike again.

17. **Section 362 of the Criminal Procedure Code Cap 75 of Kenya** stipulate that:

“the High Court may call for and examine the record of any criminal proceedings 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.”

18. Under its revision Jurisdiction, the High Court is empowered to do any of the following as stipulated in **Section 364 of the Criminal Procedure Code**:

(a) In the case of a conviction, exercise any of the powers conferred on it as a Court of Appeal by Section 354, 357 and 358 and may enhance the sentence;

(b) In the case of any other Order, other than an order of acquittal, alter or reverse the Orders.

2) No Order under this Section shall be made to the prejudice of the Accused person unless he has had an opportunity to be heard wither personally or through an advocate in his own defence, provided that this Section shall not apply to an Order made where a subordinate Court has failed to pass a sentence which it was required to pass under the written Law creating the offence concerned.

3) Where the sentence dealt with Under this Section has been passed by a subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the Accused has committed than have inflicted by the Court which imposed the sentence.

4) Nothing in this Section shall be deemed to authorize the High Court to correct a finding of acquittal into one of conviction.

5) When an appeal arises from a finding sentence or Order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

19. From the above statutory stipulations, it is clear that the High Court has wide powers in its revision jurisdiction. However, there are some limiting factors to those powers. Thus, the power of this Court in revision is not absolute.

20. The Court cannot in exercise of its revision power reverse or alter an Order of acquittal and it cannot make an order which is Prejudicial to the Convict unless the Convict is given an opportunity to be heard either personally or through an Advocate. In addition, when an appeal arises from such sentence or finding or order of the Magistrate's Court, and no appeal is brought, revision proceedings cannot be sustained at the insistence of the party who could have appealed.

21. This Court observes that the maximum sentence for a conviction for grievous harm is life imprisonment. This is under **Section 234 of the Penal Code** which states that **“a person who unlawfully does grievous harm to another is guilty of a felony and is liable for imprisonment for life.”**

22. In **Daniel Kyato Mwewa V. Republic [2009] eKLR, the Court of Appeal** held that unless a contrary intention is shown, where an Accused Person is convicted and is “**Liabile to Imprisonment for Life,**” it connotes the maximum Penalty and not the Mandatory Penalty that can be meted out. In addition, it was held that a Court can impose a fine in place of a custodial sentence by virtue of **Section 26 (3) of the Penal Code.**

23. In this case, there is no contention that the 5 years imprisonment meted out to the Applicant was lawful, as the maximum is life imprisonment. Therefore, for this Court to interfere with the discretion of the trial Court in meting out sentence, it must consider all the circumstances of the case.

24. In the instant case, there is on record evidence that led to the Applicant’s conviction that the convict had a plank whereas his co-convict carried a panga. It was at 7.30 p.m. They warned the Complainant/Victim that he was in a War Zone and the Convict herein hit the Victim with the plank wood in the eye area. The Victim’s eye is now totally blind and according to Doctor Hillary Kandie who examined and prepared the Victim’s Medical (P3) report dated 19.10.2016 after treating the victim, the victim will not benefit from further intervention. The injuries are permanent and irreversible.

25. There is nothing on record to show that the convict was in any way provoked into attacking the victim whose life has completely changed by the loss of sight in one eye, due to the grievous harm occasioned to him by the merciless convict herein.

26. Albeit the convict now appears remorseful and repentant as shown by the Probation Officer’s Report ordered by this court, the injuries inflicted on the victim were very serious. The victim risked losing his life in the process of being attacked by two armed men with a common intention. The said assailants pleaded not guilty and the prosecution had to mount witnessed to prove the appellants’ guilt beyond reasonable doubt.

27. I find and hold that the learned Principal Magistrate was extremely lenient when he sentenced the convict herein to serve 5 years imprisonment. Indeed, this Court, taking into account all the circumstances of this case, has the power to enhance that sentence as stipulated in **Section 364 (1) (a) of the Criminal Procedure Code** (Supra). However, as the Probation Report reveals that the convict was a first offender albeit he had initially appealed and withdrawn the appeal which would have been considered on its merits, and as the state has not asked this Court to enhance the sentence; and taking into account the interests of the victim who is now permanently blind in one eye for which he may never be compensated. Further, as the Probation Report shows that the convict has no such means as to compensate the victim, and as the Convict has not offered to compensate the victim for the vicious attack that blinded him in the eye, I would hesitate to interfere with the discretion of the trial Magistrate in meting out sentence which I have found to be very lenient and more so, lawful. The trial magistrate judiciously exercised discretion in meting out sentence having regard to the nature of the offence and circumstances under which the offence was committed. I find no reason to interfere with that discretion.

28. For the above reason, I hereby dismiss the Application/Request for revision filed on 17.4.2018 by Timothy Otieno Onginjo for lack of merit and I proceed to affirm the sentence that was meted out upon him on 13.12.2017 as by law established. In doing so, I have balanced the rights of the victims of the heinous vicious crime of grievous harm and its effects on him and the rights of the Accused person under the law. His dependent young family will have to live with that. The Community at large too must live with an understanding and knowledge that choices have consequences and that crime does not pay.

29. I so order.

Dated, Signed and Delivered at Siaya this 23rd day of May 2018

R. E. ABURILI

JUDGE

In the presence of:

Miss Odumba Prosecution Counsel for the State

Timothy Otieno Nginjo appellant in person

CA: Laban and Brenda