



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HIGH COURT CRIMINAL REVISION NO. 131 OF 2018

(CORAM: R.E. ABURILI – J.)

BERNARD ODHIAMBO WAHONGO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an application against the sentence dated 4.5.2018 in Criminal Case No.238 of 2014 in Siaya Principal Magistrate’s Court before Hon. J. Ongondo – P.M.)

JUDGMENT

1.The Applicant convict in this revision case is **Bernard Odhiambo Wahongo**. On 4.5.2018 he was convicted for the offence of Grievous Harm Contrary to **Section 234 of the Penal Code** and sentenced to serve 3 years imprisonment by Hon James Ongondo, Principal Magistrate, Siaya Law Courts in Siaya PM Cr. Case No. 238 of 2014. He did not appeal against the conviction and sentence. He has however, applied for revision of his sentence which he is serving at Siaya G.K. Prison. On 25.5.2018, upon receipt of the application, the Deputy Registrar of this Court Hon T.M. Olando ordered for a Probation Officer’s report to inform the Court on the suitability of a non-custodial sentence for the convict.

2. On 29.5.2018 the Probation Officer, Siaya Mr. Marvin Ngany, filed a comprehensive sentence review report and concluded that the convict lacked employment and needs guidance and counseling and community service as an intervention strategy for the convict.

3. The Probation Officer’s report appears very positive on the suitability of the convict for a non-custodial sentence. However, it is one sided in that only the family of the convict and those close to him were interviewed by the probation officer. In addition, unemployment can never be a reason why one would butcher another human being. It could possibly relate with an offence of stealing!

4. The report shows that the victim of the offence, Mr. Joseph Amolo was not interviewed and that he was a student at Moi University, Eldoret and that his mother has no problem for the convict to be granted non-custodial sentence. Nonetheless, the victim’s mother’s name is not given. There is also no indication that she was interviewed and even if she was, the victim of the crime is an adult of sound mind and does not have to speak through his mother as a proxy.

5. In my view, therefore, the Probation Report is incomplete and lacks integrity in so far as it leaves out the most important person the victim of the offence. The undisclosed mother of the victim cannot legally speak for a victim who is alive and who according to the evidence of PW3 Jared Obiero Opondo a Clinical Officer, was an adult aged 18 years as at 2014 and who is about 22 years now.

6. I would therefore not consider that Probation report to be a favourable report in so far as the victim of the offence of grievous harm is concerned. Victims of crimes are protected under the Victim’s Protection Act and their statements carry weight in determining what sentence or whether the Court should revise sentence meted out on the convict.

7. The trial record shows that throughout the trial, the convict denied the offence or knowledge of the offence. The Offence took place at 5.00 p.m. during the day hence, as stated by the trial Court, there was no issue or possibility of mistaken identity of the Applicant offender/convict herein.

8. There is also no evidence on record to show that the victim in any way provoked the convict for the victim to deserve such vicious attack. If the victim’s brother who was a teacher had punished the convict’s child at school, the victim could not be held to account for his brother’s sins. The convict should have approached the teacher to establish the reasons for the punishment meted out on his child.

9. The convict had the intention of harming or maiming the victim because after passing the victim, the convict returned after 20 minutes, with a rungu and hit the victim on the head from behind. The victim fell down unconscious. The P3 form produced in Court by the Clinical Officer Mr. Jared Obiero Opondo shows that the victim sustained a blunt injury on the right parietal region of the head leading to intracranial

haemorrhage resulting to weakness of left side of the body, upper and lower limbs. The injury was classified as grievous harm.

10. The Convict had, during the trial, been released on bond but he absconded for one month and as a result, his bond was cancelled by the Court after a warrant of arrest was issued against him. The surety was discharged.

11. In his unsworn statement of defence made on 25.4.2018, the convict, 41 years old, denied ever injuring the complainant/victim who was a young man of about 18 years only. The injuries sustained by the victim, according to the P3 form produced in evidence, are not minor. They resulted in loss of functioning of his upper and lower limbs. The victim suffered inter-cranial hemorrhage – bleeding in the brain. He could have lost life or even been rendered a vegetable by the reckless unprovoked act of the convict.

12. In his mitigation, the convict stated that he had 2 children in secondary.

13. In his application for revision dated 2.5.2018 he claims to be married with four children all of whom are school going age and that he was sentenced to serve 2 years imprisonment.

14. He now appears to be remorseful and that he is a young man of 33 years contrary to his defence that he was 41 years old. He is also responsible for supporting his old mother, from his peasantry farming income. He has learnt lessons barely 2 months in Prison. He wants to serve non-custodial sentence and abide by the Court's instructions. Further, that condition in Prison have had an adverse effects on his health and social and family.

15. The trial Court did consider the convict's mitigation before sentencing him. The Probation Officer's report only gives names of dependants who are five children whose respective ages are not given but are in classes 3, 6, Form two and nursery.

16. The report also states that the convict abuses alcohol and when under that influence of alcohol, he becomes rowdy. He comes from a relatively poor family. His wife and children welcome him back home because of his supplies and provision to them before he committed the offence and that members of the community have no issue with him.

17. On the other hand, as earlier stated, very little is said about the victim of the offence who sustained near fatal injuries. The convict's statement of defence, his mitigation out the trial and in support of his request for revision of sentence to non-custodial sentence are contradictory and very inconsistent. He even appear not to know the length of the sentence imposed on him, his age, and the number of dependants or children.

18. The Applicant convict seeks to invoke this Court's powers under **Section 362 and 364 of the CPC** which gives this Court revisionary powers to call for and examine the record of any criminal proceedings before any subordinate Court for purposes of satisfying itself as to the correctives, legality or propriety of any finding, sentence or order recorded or passed and as to regularity of any proceedings of any subordinate Court.

19. **Section 364 of the CPC** gives to the High Court powers to deal with any issues relating to revision.

20. However, as earlier stated, the convict was convicted of grievous harm contrary to **Section 234 of the Penal Code**. The maximum punishment under the Section on conviction is life imprisonment. The trial Magistrate after considering the Accused Person's mitigation sentenced him to serve only three (3) years in prison. The Applicant never regretted the incident at the trial stage.

21. In the view of this court, the Probation Officer was not assisted the Court either, as he has not obtained a statement of the victim as required under the victim protection Act No. 17 of 2014. The power to sentence an Accused person is discretionary upon hearing out mitigation of the Accused/Convict. The Applicant had the option of filing an appeal to challenge the sentence meted out on him but he has not. The victim sustained very serious injurious as per the P3 form produced in evidence.

22. The sentence of 3 years for grievous harm, in my view having regard to the circumstances of the case was extremely lenient and lawful. There is no impropriety, illegality or irregularity in the sentencing of the Applicant convict. This is sentence which could have been enhanced had the Prosecution applied for such enhancement by this Court. The victim did not deserve such brutal force exerted on his head with a blunt object by the Convict who was old enough to be his father.

23. I do not find any compelling reason to interfere with the discretion of the trial Court in meting out sentence of 3 years imprisonment for a convict who would otherwise be liable to serve a longer sentence of up to a maximum of life imprisonment.

24. The convict and his family are extremely lucky that he was sentenced to serve such short sentence compared to the serious crime that the convict committed against a young person who would have lost his life. He must learn to deal with his incarceration in prison. Crime does not pay and each life and limb is precious. No one deserves to be brutalized by another person, for whatever reason. The sentence meted out was too lenient.

25. **Accordingly, I refuse to interfere with it. I dismiss the application for revision and order the Convict to serve to full prison sentence of 3 years.**

Dated, signed and delivered in open Court at Siaya this 13th day of June, 2018.

R. E. ABURILI

JUDGE

In the presence of:

Miss Odumba Prosecution Counsel for the Sate

Applicant in person present

Court Assistant: Brenda