REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

(GRIEVOUS HARM)

CRIMINAL APPEAL NO 105 OF 2017

(CORAM: R. E. ABURILI – J.)

MOSES OWITI T RAJUOLA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against Sentence and conviction of Siaya PMCCR 720 of 2014 dated 23.10.2017 before Hon. J.O. Ongondo – P.M.).

JUDGMENT

1. This is an Appeal against the findings, decision and sentence in respect of Siaya Principal Magistrate's Court Criminal case number 720 of 2014, R. vs. Moses Owiti Rajuola delivered on 6.12.2017

2. The Appellant - Moses Owiti Rajuola was charged with the offence of grievous harm contrary to Section 234 of the Penal Code. The facts as per the charge sheet are that on 18th day of September, 2014 at Barsauri Sub-location in Gem District within Siaya County, Moses Owiti Rajuola unlawfully did grievous harm to Hellen Maroko Omolo.

3. After full trial the Appellant -Moses Owiti Rajuola was found guilty of and sentenced to serve 5years imprisonment.

4. Aggrieved and dissatisfied with the findings, decision and sentence, Moses Owiti Rajuola– the Appellant filed a Petition of Appeal and an Amended Petition of Appeal dated 25/01/2018, raising the following grounds:

> 1. ***That the conviction of the accused appellant herein was against the trite principle of conviction and sentencing especially given the circumstances of the case.***
>
> 2. ***That the sentence was excessively harsh and manifestly excessive in the circumstances given the advanced age of the Appellant.***
>
> 3. ***That the sentence amounted to misappropriation of judicial discretion by the trial magistrate.***

5. In determining this Appeal, the court must fully understand its duty as the first Appellate court as espoused in the case of **Okeno v. R** which is to subject "*the evidence as a whole to a fresh and exhaustive examination* and for this court to arrive at its own independent decision on the evidence, it must weigh evidence and draw its own conclusions and its own findings while making allowance for the fact that only the trial court had the advantage of hearing and seeing the witnesses.

6. Examining what transpired during the pendency of the case in lower court, PW**1,** Hellen Maroko Amolo and the Complainant in the case stated in evidence that on 18/9/2014 while on her farm at about 12 noon,Moses Owiti Rajuola who is her brother in law came armed with a panga and cut her on the right side of her head and on the lower leg. The court then recorded that there was a visible scar on the right side of the head and a tissue scar clotted on the lower right leg.

7. PW1 testified that the accused also had a panga and a rungu which he used to assault her on the ribs and all over her body and she screamed until when rescued by the passing neighbouring children who found her bleeding and swollen all over and was then taken to Yala Level 4 Hospital where she states that she was stitched six times before being taken to Yala Police Station then went back to hospital where she was admitted for a day. She also stated that she identified the accused to the police.

8. Pw1 was later recalled for the identification and marking of exhibits i.e. the panga marked as MFI P 3, piece of wood –MFI P4, a checked skirt in black and pink colour-MFI P5, a reddish white prints colour blouse- MFI P6 and a head scuff that was in black and white colour-MFI P7 that she had that day, which got stained with blood. She proceeded to identify the person that attacked her in court as being the appellant herein.

9. PW1 was not cross –examined, and on 1/8/2016 PW2 testified. **Pw2,** Charles Odhiambo Ombaya stated on oath that on 18/9/2014 at 12 noon, he was at his father's homestead with Ken Owino when he heard a bang and a loud scream and that it was from the direction of a neighbour. That he saw Mama Hellen MARUKU who stays about 20 metres from them. That he then saw the accused who was also a neighbour for years, hold Helen by the throat and telling her that he will kill her. It was his evidence that Helen was cut on the head and the leg and was bleeding saying that Moses had assaulted her.

10. PW2 added that he saw the panga as the accused had it and it had blood stains on it. He further stated that Helen's clothes had blood all over her and stated further that Hellen had a green skirt and a blouse all soaked in blood.

11. PW2 was then recalled and stated that the clothes were a red skirt, a blouse all red in colour. Although the court recorded that the witness was able to identify the skirt, blouse and scuff.

12. During Cross Examination, PW2 stated that he may have told the court red because of the blood on the clothes and reiterated that the skirt and scuff were all red with blood and insisted that he had told the court the truth. He maintained that his home was about 20 feet from the complainant's home. He further stated as if pointing to the accused that "***Moses I know you very well, you were sitting on the chest of Mama Hellen MAROKO strangling her".*** He further responded that he could not tell whether the weapons were for self defence.

13. **PW3**, Kevin Owino Osiembe, stated on oath that on 18/9/2012 while he was at a neighbour's house called Jairus at 12 noon, he heard distress call and so he came out of the house. He stated that the distress call was from the home of Moses Rajuola and he ran out to find out what was happening there. He then identified the accused as the person he found pulling Nyamuhanda (the complainant) another neighbor; that he was seated on top of her strangling her by the neck. The witness further stated that he saw it all at a distance of 20 metres and later moved closer and told Moses that what he was doing was wrong. He added that Moses had a panga and a stick close to where they were and further alluded to the fact that the accused and the woman live next to each other and are separated by a road. He further stated that never came to know why the accused assaulted the woman.

14. During cross-examination, PW2 told the court that he saw the accused with two weapons, that he was using to beat and strangle the woman. He also disclosed in response that the appellant herein had given the witness Kshs. 1000/= to disappear to relatives so that he does not testify before court.

15. On 26/6/ 2017, another Magistrate took over the trial of the accused taking over from the previous trial magistrate and after complying with section 200 of the Criminal Procedure Cde3, the trial court despite objection from the appellant that the trial should begin denovo, ruled that it was in the interest of justice that the matter proceeds from where the earlier magistrate had left it. This was after the prosecution opposed starting the trial afresh.

16. **PW4**, No 81082 CPL Edward Simiyu a C.I.D officer from Yala Police Station testified on oath and stated that he took over investigations of the case on 10/2/2017 from Oscar Nthiga who was transferred to Gilgil. He stated that the report was made on 18/9/2014 and that investigations were launched, statements of witnesses recorded and the accused was charged. That he took over the panga, the rungu and blood stained clothes which he produced in court as exhibits for the prosecution and identified the accused person as the person who was said to have assaulted the complainant.

17. **PW5**, Everlyn Oduno, a Clinical Officer at Yala Sub-County Hospital stated that she had stepped in for Emmanuel Mwoko whom she had worked with for 5 years and was transferred to Vihiga. She stated further that she was familiar with his handwriting and signature. She produced the P3 form filled by her colleague who had attended to the complainant.

18. **She further added that her** colleague received a patient by the name Hellen Omollo, 63 years old on 19/ 9/2016. That she had been injured the same day and was in blood stained clothes. That Hellen had a cut wound on the head and with a swelling on her right lower limbs and that the weapon used was both blunt and sharp. That she was treated vide OP Card No. 11142/2014. She then produced the P3 which was filled on 19/9/2014.

19. On cross-examination, she stated that the dress of the complainant was blood stained.

20. At the close of the prosecution case the trial Magistrate found that the accused had a case to answer and placed him on his defence per Section 211 of the CPC.

21. **DW1**, Moses Owiti gave unsworn testimony and denied committing the offence and stated that that Hellen Maroko was his step brother's wife and that the complainant had falsely accused him due to a land dispute. That on the material date she was drunk, and that even her witness Charles was drunk. He added that he later found out that she was injured by a peg at his home.

22. It was his defence that the witnesses contradicted themselves in that the witnesses stated that he had 2 sticks and a panga and that the dates too did not correspond. He added that PW1 stated that he was with Kevin, that the skirt of the complainant was green and a green blouse but that later he said the clothes were red, adding that had he sat on the complainant's chest, she would have died.

23. DW1 further stated that other contradictions were that PW2 said he was with Ombonya at 12 noon and was at PW3 James Onyalo and he thus contended that he could not be at different places at different times. That Hellen also told police that she was limping not cut and that the police officer stated that he saw a black skirt and blouse and that for those contradictions, he urged the court to know that there was a land

dispute between them and not heed to the framed charges.

24. In his Judgment delivered on 23/10/2017 the trial Magistrate summarized the prosecution and defence case noting that the accused gave unsworn testimony.

25. In the court's analysis, the trial court gave the definition of grievous harm as envisaged at Section 4 of the Penal Code and stated that the Medical Officer classified the injuries as maim and stated that two witnesses saw the accused commit the offence and for that reason the trial court found and held that the prosecution had proved its case beyond reasonable doubt and rejected the accused's defence that the charges were tramped up due to a land dispute and proceeded to convict the accused of the offence of grievous harm under Section 215 of the CPC.

26. He then considered the mitigation by the accused to the effect that he was a family man and submission by the prosecution that the accused was a first offender, the trial court sentenced the appellant to serve a jail term of 5 years term hence this appeal.

Submissions:

27. In his submissions, counsel for the appellant Mr Ogonda urged the court to allow the appeal, set aside the conviction and sentence imposed on the appellant. He urged all the 3 grounds contained in the amended petition of appeal jointly. He submitted urging the court take judicial notice of the fact that the appellant was not represented by an advocate in the trial court. It was submitted that the trial court upon convicting the appellant did not consider his mitigation and circumstances surrounding the case before sentencing him to serve 5 years imprisonment.

28. It was submitted that the trial court should have inquired whether the appellant was committed to repairing the harm occasioned to the complainant before sentencing him and that to date the appellant is so prepared to repair such harm since he had begun reconciliation process as shown by a letter from the Area Chief to that effect.

29. It was submitted that the policy on sentencing guidelines was clear on the objectives of sentencing and that pages 39-40 of the judgment shows that the trial court did not take into account the objectives of the guidelines on sentencing hence he meted out sentence which was harsh and excessive in the circumstances.

30. It was submitted that the judgment did not meet the threshold set out in section 169 of the Criminal Procedure Code in that there are no issues for determination framed by the trial court.

31. It was further submitted that in writing the judgment, the trial court did not analyse or adequately consider the prosecution and defence case.

32. That given that the appellant was not represented, the trial court should have guided him on what caused the dispute and not just listen to a statement of defence and reject it hence he was in error.it was submitted that the judgment was irregular hence sentence should be reduced given the mitigating circumstances.

33. Mr Ogonda clarified that his client was appealing against sentence only.

34. In opposing the appeal, the Prosecution Counsel Mr Okachi submitted that this court has the discretion to enhance the sentence meted out to the appellant by the trial court .

35. On non representation by counsel it was submitted that this was a matter of choice by the appellant at the trial since he was not denied that opportunity upon request.

36. On mitigating circumstances of the case it was submitted that the trial magistrate accorded the appellant an opportunity to mitigate before sentencing him and took into account those mitigating factors. on sentence it was submitted that the maximun sentence in a conviction for grievous harm is life sentence hence the trial court was very lenient in passing sentence of 5 years imprisonment and therefore this court was urged to consider revising it. It was submitted that there was no documentary evidence to show that the appellant was aged 58 years and that in any event age is not a factor in sentencing but the gravity of the offence.

37. On non compliance with section 169 of the CPC it was submitted that such non compliance of any was not proved and that even if that were to be the case then such was not fatal to the conviction and sentence as it is a want of form which is not a major consideration as it is the interests of justice that matter.

38. In a rejoinder, Mr Ogonda submitted that section 169 of the CPC s clear that judgment is not just another legal document but a permanent record touching on a person's life irrespective of what the Constitution says about form and that therefore a judgment which does not comply with the law is a lame judgment. He maintained that judgments should be comprehensive.

39. On the court's discretion to enhance sentence it was submitted that this was a discretionary power which must be exercised judiciously and not arbitrarily. Further, that the object of criminal justice system is to promote ADR and enhancing sentence is not in the spirit of promoting ADR. Counsel urged the court to allow the appeal on sentence.

Determination

40. I have carefully considered the grounds of appeal the submissions by both counsel for the respective parties and the trial court record.

The issues for determination in consideration of this appeal are;

1. Whether the conviction of the Appellant by the trial court was proper;

2. Whether the sentence was excessively harsh and manifestly excessive;

41. On issue 1, it is not in dispute whether Hellen Maroko was attacked and injured as seen from the treatment records produced in court alongside the evidence of the witnesses particularly that of PW5. Further, Counsel for the appellant conceded that the appeal was only on sentence and not on conviction.

42. There is no need to belabor the point that Moses Owiti did not materially dislodge the evidence of the prosecution witnesses as regards his attack of Hellen Maroko, which incident was seen by two persons who testified as witnesses on behalf of the complainant and on examining the grounds raised in the amended Petition of Appeal, it is evident that what is in issue is the sentence preferred against the accused person as such the conviction of the Appellant was warranted. The same is accordingly upheld.

43. On issue 2, it was contented that the sentence meted out on the Appellant was against the trite principle of conviction and sentencing given the circumstances of the case and that it was excessively harsh and manifestly excessive in the circumstances given the advanced age of the Appellant.

44. In considering whether **or not the sentence meted out was harsh, severe and manifestly excessive in the circumstances of the case herein iam guided by the decision in** the case of **Francis Kariko Muruatetu & another and Republic and Others (2017) eKLR cited in Republic v Ruth Wanjiku Kamande [2018] eKLR**.

45. In the above case, the Supreme Court in the now famous **Muruatetu** case, set out guidelines to assist the courts in the determination of the sentence where mitigation was not considered prior to the said case. The guidelines are as follows

"As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(a) Age of the offender;

(b) Being a first offender;

(c) Whether the offender pleaded guilty;

(d) Character and record of the offender;

(e) Commission of the offence in response to gender-based violence;

(f) Remorsefulness of the offender;

(g) The possibility of reform and social re-adaptation of the offender;

(h) Any other factors that the Court considers relevant.

We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process."

46. In the Ruth Wanjiku Kamande case, the court while considering the importance of pre-sentence hearing and entertainment of mitigation from the accused person, among others made reference to the **Muruatetu** decision by the Supreme Court and stated that:

'it is during mitigation, after conviction and before sentencing, that the offenders' version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death penalty.'

47. The court in the ***Ruth Wanjiku Kamande*** case, gave its perception of what pathos is and stated:

"... I***s her version of the events of the material day heavy with pathos that would necessitate this court to consider an aspect that may have been unclear during the trial process? Pathos means* 'anguish, bleakness, despair, tragedy, sadness"**

48. From the assertions by**PW3,** he stated that the distress call was from the home of Moses Rajuola, and that the accused and the woman live next to each other and are separated by a road. In addition, to the above stated mitigating factors, provocation should also be considered at this point for it is likely that the may have infuriated the Appellant to a point that he may have acted in anger. To this end I do note that

there were indeed contradictions as contended by the accused (now Appellant) in his defence at the trial court some of which are material, particularly to the exact place of the incident for nowhere in the evidence of the prosecution witnesses, is it stated that the Appellant went back to his house to get the weapons used in the commission of the offence and neither is there clarity as to how he came into possession of the weapons; and as to whether the Appellant crossed over to PW1's farm or was is it PW1 who crossed over the road that separates the two to the Appellant's place.

49. Having said that, it should also be noted that in the notice of motion application filed by the Appellant dated 25/1/2018 and the supporting affidavit thereto, the appellant asserts in ground 2 of the application that he and the family have already initiated mediation and reconciliation process as they are close family members and that his release will give the family a humble opportunity to fast track the reconciliation process which is underway. This goes to show that the Appellant regrets any act of his, is remorseful and is making attempts to atone for the same; a mitigating factor which needs to be considered by this court.

50. Albeit the letter from the Chief was availed to late Court at the hearing of this appeal, in the view of this court, it shows the commitment by the appellant to engage in reconciliation and to promote harmony and peaceful coexistence is the duty of this court as mandated by Article 159 of the Constitution. The appellant too is willing to compensate the complainant for the injuries sustained by her and for which she is legally entitled to sue him for damages should he renege on his undertaking as pleaded and recorded in this appeal.

51. For the above reasons, I find that the appellant has made out a case for reduction of sentence meted out on him in as much as sentencing is in the discretion of the trial court. This is not to say that the 5 years imprisonment was manifestly excessive but that the appellant's sentence which was lawful can still be Interfered with by this court having regard to the circumstances of each case.

52. Albeit the prosecution urged the Court to enhance that sentence as being too lenient, they did not give any prior Notice to the appellant of the intention to seek for enhancement of sentence.

53. In my humble view, I opine that it is wrong for imprisonment as the only apt punishment for retributive and deterrent purposes considering that a convicted person is removed from society, denied to partake in responsibilities and opportunities, and more so the prisoner comes into contact with elements which are out of all proportion to that which he possibly deserves, bearing in mind the age of the appellant which has been mentioned for consideration.

54. Further, there was need for the lower court to do some substantial pre-sentence inquiry or at the very least an inquiry into the circumstances of the harm so occasioned, that is, the reason for the unlawful act, whether there was any provocation, or whether the offender committed the crime under great personal stress or duress which would serve to dispel the intent, or whether the offender was genuinely contrite or remorseful.

55. Thus if the same purpose of the criminal justice system can be achieved in regard to the interest of the public by an alternative means of punishment to imprisonment, preference should, in the interests of the convicted offender, be given to alternative punishments which are geared towards healing the rift between the offender and the victim of the offence.

56. Imprisonment is only justified if it is necessary that the offender be removed from society or if the objects striven for by the criminal justice system cannot be attained by any alternative means of punishment.

57. However, for courts to strike a balance between the needs of the complainant and that of the appellant, the nature of the offence ought to be considered and therefore it is only fair and just if parties walk away believing that the justice system and in this case this court has been considerate of them.

58. For the above reasons, I find and hold that if the mitigating factors alluded to above namely, the age, possible provocation, or possible outstanding land feud underlying the unfortunate circumstances were considered and a probation officer's report ordered, and with the appellant showing remorse and the appellant being remorseful, thereby regretting the incident, this court should give him the benefit of doubt and give him a chance to serve a non-custodial sentence.

59. The appellant has already served nearly one year of his sentence of 5 years from 6th December, 2017.

60. Taking into account his undertakings before this court and the contemplated reconciliation and willingness to compensate the victim of the crime, I hereby set aside the 5 years' jail term imposed on him and substitute it with a two years' imprisonment to run from 6the December, 2017. The remainder of the prison term to be served on probation under the strict supervision of the Siaya County Probation Officer. This will enable the parties engage in meaningful reconciliatory terms and for the appellant to receive guiding and counseling on the need to manage his anger.

61. Accordingly, the appeal on sentence reduction succeeds. Those are the final orders of the court

Dated, signed and Delivered at Siaya this 26th Day of September, 2018

R.E. ABURILI

JUDGE