REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 27 OF 2016

JOHN GITAHI THEURI……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Appeal against sentence in Othaya Senior Resident Magistrates' Court Criminal Case No. 414 of 2014 (Hon. B.M. Ekhubi, SRM) delivered on 13th April, 2016)

JUDGMENT

The appellant was charged with the offence of grievous harm contrary to **section 234** of the **Penal Code**. The particulars were that on the 13th day of December, 2014 at Gitundu sublocation in Nyeri County within the Republic of Kenya, the appellant unlawfully did grievous harm to David Wachira Wangui. The trial court found him guilty and sentenced him to serve 10 years in prison. He appealed against the sentence on the grounds that it was harsh and excessive. He urged that the prison term should be reduced because he had contracted tuberculosis and also because he is now rehabilitated and he is no longer a threat to the complainant.

Apart from repeating these grounds in his written submissions, the appellant added that he committed the offence while under the influence of alcohol. He stated that he was remorseful and therefore this court should consider reducing the prison term which, in his view, was harsh and excessive. He also submitted that he would now be useful to the community because of the training programs he has undertaken while in prison.

The state opposed the appeal and its counsel urged that the maximum sentence provided for the kind of offence for which the appellant was convicted is life imprisonment; in these circumstances, the prison term of 10 years is neither harsh nor excessive.

The prosecution case was that on 13th day of December, 2014 at about 3 AM, the complainant was walking home from a party when he was confronted by the appellant. The appellant suddenly hit him on his left eye with a club. He fell down and raised alarm. **Mercy Nyaguthi (PW2)** at whose home the complainant had been attending the party, responded and came to his rescue. She found the appellant assaulting the complainant and she too screamed for help. The party attendees or some of them responded and came to find out what was happening but just then the appellant fled.

Mercy Nyaguthi (PW2) corroborated the complainant's evidence and testified that she saw the complainant leave but shortly thereafter she heard him scream at the gate to her home. She proceeded

there and found the appellant standing beside the complainant who was lying on the ground, injured. She asked him why he was assaulting the complainant and he responded that the complainant had insulted him that he was uncircumcised.

One of the party goers who responded to **Nyaguthi's (PW2's)** call for help was **Robert Makanga (PW3)**; he found the appellant stepping on the complainant who was bleeding from his left eye. The appellant ran away when more people came to the scene. He took the complainant to hospital.

Both **Mercy Nyaguthi (PW2) and Robert Makanga (PW3)** knew the complainant and the appellant before and they were able to see and recognise them because there was sufficient light from the lamp that **Nyaguthi (PW2)** was carrying.

Peter Karanja (PW5) a senior clinical officer in the eye department of Nyeri provincial general hospital testified that the complainant was admitted in hospital with multiple facial bruises and that he had suffered loss of his left eye. According to him, the eye was beyond repair and therefore it was removed. He classified the extent of the injury as "grievous harm" which was probably occasioned by a blunt object.

In his brief sworn statement, the appellant denied assaulting the complainant though he admitted that he had attended the same party as the complainant except that he left earlier. He called his brother **Kariuki Theuri (DW1)**, as his witness; **Theuri (DW1)** was in the same party as the complainant. He admitted that the complainant was injured on the material morning but it was his evidence that the complainant could have probably fallen and hurt himself. According to him, the appellant was not at the party at the material time though he joined them much later.

The stance adopted by the appellant at his trial is diametrically opposite to that he assumed in this appeal. As noted, he does not contest his conviction but his case appears to be that at the time of committing the offence he was intoxicated to the extent that he did not know what he did was wrong or he simply did not know the nature of his actions. He appears to suggest that he had a defence of intoxication which ordinarily would be available to an accused person under **section 13(2)** of the **Penal Code** subject, of course, to the accused person meeting certain criteria prescribed in that provision of the law.

It is certainly a bit late in the day for the appellant to raise such a defence at the appellate stage; the appropriate forum it would have been properly considered was at the trial court. In any event, I doubt that the appellant would have gone very far with this kind of defence because, as far as I can gather from the record, he had threatened the complainant a few hours before he attacked him and therefore he would have been hard put to show that he did not have the necessary intention.

Since the conviction is not in dispute, it is not for this court to bother itself with whether the appellant committed the offence or not but to direct its mind to the alleged severity of the sentence. **Section 234** of the **Penal Code** under which the appellant was charged defines the offence of grievous harm and the prescribed sentence. It states as follows:

> ***234. Grievous harm***
>
> ***Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.***

Before sentencing the appellant, the learned magistrate considered the extent to which the complainant had been maimed; one of his eyes was literally gouged out. He also considered the appellant's mitigation and the fact that he was a first offender. Having taken all these factors into account, he settled on 10 years which is, in my humble view, a proportionate if not a lenient sentence considering that the appellant may well have been condemned to a life sentence. More importantly I do not find any ground upon which I could possibly interfere with the sentence meted out against the appellant.

I must add that the fact that the appellant has contracted tuberculosis is not a sufficient reason to reduce or

commute his sentence. No doubt the prison authorities are adequately equipped to deal with such illnesses; at least there is no evidence that the one in which the appellant has been incarcerated has no capacity to administer the prescribed medication for this sickness as and whenever it is necessary.

I am minded to conclude that there is no merit in the appellant's appeal and I hereby dismiss it.

Signed, dated and delivered in open court this 30th January, 2017

Ngaah Jairus

JUDGE