REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 10 OF 2014

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 1465 of 2014 of the Chief Magistrate's Court at Naivasha – E. Kimilu, Ag. PM)

RODGERS ANTON EMRIA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein pleaded guilty to the offence of Attempted Murder contrary to Section 220(a) of the Penal Code. The charge particulars stated that on the 2nd day of August 2014 at Kamere Trading Centre in Kongoni area of Naivasha Sub-County within Nakuru County, he unlawfully attempted to cause death of **William Ekiro Abei** by cutting him on the head, stomach and hands using a *panga*. He was convicted and sentenced to life imprisonment.

2. By his amended grounds of appeal and submissions the Appellant attacks the sentence as unconstitutional. In his view, there is a conflict between Sections 220(a) and 389 of the Penal Code, and that by virtue of Article 50 (2) (p) of the Constitution, he was entitled to benefit of the less severe sentence which is stipulated in Section 389 of the Penal Code.

3. He submitted that the life sentence penalty provided under Section 220 (a) of the Penal Code was not mandatory. Thus, he was not accorded equality and equal protection of the law as envisaged under Article 27 (1) of the Constitution.

4. For the Director of Public Prosecutions Mr. Koima opposed the appeal and asserted that the sentence meted out was not only legal but also commensurate with the offence and facts of the case.

5. I have given consideration to the matters raised and also perused the record of lower court. Two issues are raised by this appeal namely, the legality and the extent of the impugned sentence. In order to resolve the first issue, it is necessary to set out the provisions of Section 220 (a) of the Penal Code. It provides:-

> **"Any person who-**
> **(a) attempts unlawfully to cause the death of another; or**
> **(b) with intent unlawfully to cause the death of another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life,is guilty of a felony and is liable to imprisonment for life."**

6. The Appellant's submissions that the penalty is not mandatory is correct. The law give the court discretion in sentencing under the section. However, there is no merit in the submission that Section 389

of the Penal Code is in conflict with Section 220 (a) of the Penal Code. The latter **Section** is a self-contained provision in that the penalty is provided therein.

7. Section 389 of the Penal Code states:-

> **"Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, <u>if no other punishment is provided</u>, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years."**

8. Section 389 of the Penal Code cannot be imposed on Section 220 (a) of the Penal Code, because the latter contains a provision for the punishment. Thus the Appellant's arguments that Article 50 (2) (p) and Article 27 (1) of the Constitution were violated in his case have no merit. There is only one punishment is provided for the offence he was charged with. The sentence imposed is therefore perfectly legal.

9. On the second question, the Appellant is aggrieved by the extent of the sentence which he describes as harsh and excessive. Sentencing lies within the discretion of the trial court and this court will not ordinarily interfere with the court's decision on punishment unless it is demonstrated that the discretion was improperly exercised. And there are some well-known principles developed by the courts to guide the appellate court in reviewing sentences on appeal.

10. In **Ogalo s/o Owuora –Vs- Republic [1954] 19 EACA 270** the Court of Appeal for Eastern Africa observed that:-

> **"(1). The Court does not alter a sentence on the mere ground that if the member of the Court had been trying the Appellant, he might have passed a somewhat different sentence, and it would not ordinarily interfere with the discretion exercised by the trial Magistrate unless it is evident that the Magistrate acted upon some wrong principles or overlooked some material factors. (See also JAMES VS REPUBLIC (1950) 10 EACA 147)**
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> **(2). The test criterion is that if the sentence is manifestly excessive in view of the circumstances of the case, the sentence will be disturbed. The Appellate Court should not interfere with the sentence of a lower Court unless it is satisfied that the same was so severe as to amount to a miscarriage of justice. (SEE NILSON VS REPUBLIC (1970) EA 599)."**

11. In **Wilson -Vs- Republic (1970) EA 599**, the court stated that the appellate court will not interfere with the sentence of the lower court unless satisfied that it is so severe as to amount to a miscarriage of justice. In **Wanjema -Vs- Republic (1971) EA 493**, the court observed that:

> **"[The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."**

12. The Director of Public Prosecution has defended the sentence citing the extensive injuries sustained by the complainant and asserted that the sentence is legal.

13. I have perused the record of the lower court as required. No previous convictions were brought to the, court's notice by the prosecution and neither did the Appellant address any mitigation to the court when given the opportunity. In her notes before sentence, the trial magistrate stated that:-

> **"I have considered the nature of the offence and issues raised in facts (read out). I have perused the P3 form. Indeed Accused person caused grievous injuries to complainant. He is hereby sentenced to serve life imprisonment."**

14. The trial court's observations are supported by the record and the P3 form wherein the injuries on the complainant were assessed as grievous harm. In as much as the court was entitled to award a sentence commensurate with the offence, it is my view that the Appellant being a first offender ought to have received a less severe sentence, the circumstances of the offence notwithstanding. The appellant did not help matters himself as he did not put up any mitigation.

15. Reviewing all the foregoing I am convinced that though a deterrent sentence was called for, the imposition of a life sentence appears excessive in the circumstances of this case. I am inclined to interfere with the said sentence by reducing it to a period of 15 years imprisonment from the date of sentencing, that is, from 1/9/2014. To that extent the appeal herein has succeeded.

Delivered and signed at Naivasha, this **13th** day of **April, 2017.**

In the presence of:-

Mr. Mutinda for the DPP

Appellant – present

C/C – Barasa

C. MEOLI

JUDGE