REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA CASE NO. 16 OF 2015

JAMES MWANDIKI MURITHI ..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. Ireri B. Nyaga Ag. PM in the Principal Magistrate's Court at Chuka in Criminal Case No.1527 of 2011 dated 27th October, 2014)

J U D G M E N T

1. JAMES MWANDIKI MURITHI, the appellant herein was charged with the two counts of grievous harm contrary to **Section 234** of the **Penal Code** vide ***Chuka Chief Magistrate's Court Criminal Case No.1527 of 2011***. The particulars of both counts are that on 25th day of December, 2011 at Wiru village, Kianjagi sub-location within Tharaka Nithi County, the appellant did grievous harm to Florence Kanjira (Count1) and Ezekiel John (Count II). The appellant denied the offence and the case went for full trial whereupon the trial court found him guilty of both counts and sentenced to life imprisonment in respect to count1 and suspended sentence in respect to count II.

2. The brief background of the case at the trial court reveals that both the complainants in the case were grandparents of the appellant and the appellant reportedly brutally attacked them both on 24th December, 2011 and 25th December, 2011. The 2nd attack was apparently more vicious than the 1st and resulted into the two complainants Florence Kajira (PW1) and Ezekiel John Njiru (PW2) to lose consciousness as a result of which they were hospitalized at Chogoria Hospital for about one and half months

3. Florence Kajira (PW1) testified that the Appellant, her grandson used to stay with her and that he attacked her on 24th December, 2011 by beating her and threatened her husband (PW2) with a panga when he tried to rescue her. Again on 25th December, 2011, the witness told the trial court that she was attacked again by the appellant and this time seriously by strangling &beating her unconscious by claiming that the grandmother had stolen his phone. As a result of the assault, the witness lost consciousness and later regained it at Chogoria Hospital. Hillary Kangichu (PW4), a clinical officer who filled the P3 and tendered it as P.Exh8 testified that the grandmother (PW1) was taken to Chogoria Mission unconscious and only regained consciousness after 10 days of being admitted at the said Hospital. According to the clinical officer, PW1 suffered blunt head trauma multiple burnt injuries to the thorax and abdomen. He also observed that her right side of her body had general weakness and he classified the nature of injuries as ***"grievous harm".***

4. Ezekiel John Njiru (PW2) gave corroborating evidence to PW1 and confirmed that he was the grandfather to the appellant. He testified that the appellant attacked both of them (PW1&PW2) on 24th December, 2011 and they reported the incident to the police. He testified that on 25th December, 2011,

the appellant attacked his grandmother (PW1) at night until she fell unconscious before turning on him (PW2) and first poured ***"Chang'aa"*** on his eyes blinding in the process before carrying him outside into a maize field, ***"so as to kill him".*** He told court that he was cut with a panga 3 times on the head and had his ears and the bridge of his nose pierced and left unconscious in the maize field. He told the trial court he regained consciousness while admitted at Chogoria Mission Hospital. The nature of the injuries suffered were confirmed by the clinical officer (PW5) who testified that PW2 arrived at the Chogoria Mission Hospital while unconscious having suffered multiple scalp wounds on his head, cut on the right small finger and a prosumal phalanx fracture from a sharp object. He classified the injuries suffered as grievous harm and tendered the P3 form as P.Ex 6.

5. When placed on his defence, the appellant, from the handwritten record from the lower court (the record of this defence for some reason is missing from the typed record of proceedings an anomally this court only realized when writing this judgment) raised an alibi as a defence stating that he had been placed in police custody from 21st December 2011 for the offence of theft. He denied being at the scene of crime on 25th December 2011 as according to him he was still being held in police custody.

6. The trial court upon evaluation of the evidence tendered found that the prosecution's case had been proved beyond reasonable doubt and found the defence tendered as a sham and full of lies. It then went ahead and convicted him on both counts.

7. The appellant felt aggrieved and preferred this appeal where initially raised five grounds. The appellant's counsel at the hearing of this appeal, abandoned the five grounds and based this appeal on two grounds in his supplementary record. The grounds raised are as follows:-

> ***(i) That the learned trial magistrate erred in law and fact in imprisoning him for life which sentence he felt was too excessive.***
>
> ***(ii) That the learned trial magistrate erred in law and fact in explicating a clear bias against the appellant hence denied him a fair trial.***

8. Mr. Mutani, learned counsel for the appellant submitted that the learned trial Magistrate was biased against the appellant at the trial and when pressed to explain why he felt that there was some bias at the trial, he pointed out at the contents of the judgment where the learned trial magistrate observed that the appellant had not cross-examined any prosecution witness during trial. The appellant pointed out he had atleast cross-examined Gerald M. Arithi (PW3) and that the observation by the learned magistrate was erroneous. The appellant also contended that it was wrong for the learned trial magistrate to term his defence as sham and that the same showed that learned trial magistrate had a bad attitude towards him.

9.The respondent through Mr. Machirah learned counsel from the office of the Director of Public Prosecution contested this ground and submitted that there was no evidence of bias warranting a re-trial. He conceded that the learned trial magistrate made an error of Judgment when he observed that the appellant had not cross-examined any of the witnesses called by the prosecution but contended that the error was curable under **Section 382** of the **Criminal Procedure Code**. He contested that the rights of the appellant during trial were not infringed.

10. The respondent has justified the sentence handed out to the appellant as in its view the same is not excessive as the sentence is provided for under **Section 234** of the **Penal Code.** The state has pointed out the injuries sustained by the complainants are serious enough to warrant life imprisonment. Mr. Machirah pointed out at the evidence tendered by the clinical officer (PW4) showing that the complainants had suffered among other injuries fractures and that PW1 in particular was unconscious for a period of 10 days. The state also pointed out that the conduct of the appellant was material in the sentence he received because he had previously assaulted his grandparents and threatened to kill them. It was contended that the appellant had not shown any mercy towards his grandparents and should expect none from court.

11. The only issues raised by this appeal are basically two;

(i) Whether the learned trial magistrate was biased towards the appellant rendering the trial unfair to the appellant.

(ii) Whether the sentence was manifestly excessive.

12. The appellant in this appeal has contested his conviction. He only says that the trial magistrate was unfair and biased towards him and when pressed to give the particulars or evidence of bias he pointed at the observations made by the trial court in its Judgment and in particular the erroneous wrongly observation that he did not ask any questions in cross-examination when the prosecution witnesses testified during that time. I have perused through the record of proceedings and noted that the appellant though unrepresented did actually cross-examined some of the prosecution witnesses. He cross-examined his grandmother Florence Kajira (PW1), his grandfather Ezekiel John Njiru (PW2) and Gerald M. Arithi (PW3). He cross-examined three prosecution witnesses The questions he posed to the said witness though brief were questions all the same and I find it erroneous for the learned trial magistrate to make the observations he did that the appellant ***"did not ask the witness a single question,"*** The error in my view appears to be an error of judgment rather than a demonstration of bias by the learned trial magistrate towards the appellant. This is because the appellant has not pointed out anything else that show or demonstrate that he was exposed to unfair trial because of the trial court's attitude towards him. I agree with the respondent's contention that the erroneous observation regarding cross-examination of witnesses was an error curable under **Section 382** of the **Criminal Procedure Code**. This is because the error did not on the over all affect or prejudice the appellant in any way. The appellant himself as observed above is not aggrieved with his conviction so he cannot say that he was convicted because the trial was biased against him. The evidence tendered proved beyond reasonable doubt (which is the threshold required in criminal cases) that he was guilty for the offences he was charged with **Section 382** of the **Criminal Procedure Code** provides as follows:-

> ***".....no finding, sentence or other passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, proclamation, order, Judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code unless the error, omission or irregularity has occasioned a failure of justice.". (***emphasis added).

The appellant herein has not indicated that the erroneous observation in the Judgment by the trial court occasioned him a failure of justice and that is why I have found that the error is curable under **Section 382** of the **Criminal Procedure Code.**

13.On the question of sentence I have noted that the appellant was charged and convicted of a serious offence (felony) of causing grievous harm contrary to **Section 234** of the **Penal Code**. The cited provides that,

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

The maximum sentence provided is life imprisonment and of course that does not mean that a court cannot exercise its directions under **Section 26 (2) of Criminal Procedure Code** and give a lesser sentence. That section provides as follows:-

> ***"Save as may be expressly provided by law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term."***

The trial court therefore in this instance, exercised its discretion, upon finding the appellant guilty, and handed him the maximum sentence provided by law. The appellant has termed the sentence excessive and contended that it was unusual for courts to hand out life sentences for offenders found guilty under **Section 234** of the **Penal Code**. He cited the case of **Bernard Ochieng Opiyo- vs- Republic [2015]** where the appellate court decided that a sentence of 20 years handed out to a person who had been found

guilty for the offence of causing grievous harm was excessive and reduced it to 5 years. The appellant has contended that the learned trial magistrate was influenced by external factors and pointed out the observations made by the prosecution at the close of defence hearing regarding the medical conditions of one of complainants as a factor that influenced the trial magistrate to hand out the life sentence.

14. It is now well settled principle that an appellate court can rarely interfere with the decision of a trial court based on its exercise of discretion. An appellate court can only interfere with the discretion of a trial court where it is shown that the court in the exercise of discretion took into account an irrelevant factor or omitted or failed to take into account a relevant one or that a wrong principle was applied or that the sentence itself is so harsh and so excessive that an error in principle is inferred. This is a common position taken in this court and the Court of Appeal as exemplified in the following decisions.

(i) Nyamohaga Paul Gati- vs- State [2013] eKLR

(ii) Ogolla s/o Owuor -vs- Republic (1954) E.A 270

(iv) Macharia -vs- Republic (2003) 2 EA 559.

15. I agree with the appellant's counsel that the prosecution upon conviction made submissions on the gravity of the injuries suffered by the complainants and apparently tendered new evidence showing that one for the complainant had turned blind as a result of the attack while the other was walking on crutches. The prosecution and the trial court was however in order to do so in order to be well guided in passing an appropriate sentence. The provisions of **Section 216** of the **Criminal Procedure Code** provides as follows:-

> "***The court may, before passing sentence or making an order against the accused person under Section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made."***

It is on the basis of the above provision that courts at times call for social inquiries and do receive probation reports upon which they use to pass appropriate sentences whether custodial or non custodial sentences. I do therefore find that the trial magistrate was justified to receive more information touching on the conditions of the complainant after convicting the appellant herein. I have carefully looked at the evidence tendered by the clinical officer, **Hillary Kangichu** (PW4) who filled the P3 form in respect of the two complainants and made the observations I have re-stated above The first complainant (PW1) **Florence Kajira** and the grandmother of the appellant who senselessly beaten and left for dead by the appellant. The P3 form (P.Exh 2) reveal the gravity of the injuries. She suffered multiple blunt injury to the thorax abdomen, lower limbs and blunt trauma to the head which left her unconscious and remained unconscious for 10 days in Chogoria Mission Hospital. The medical observation made by PW4 in my view were simply corroborated by the further evidence adduced by the prosecution after conviction which showed that the first complainant was unable to walk without the assistance of crutches. Those injuries are serious in my view and even if I was to discount a medical report dated 27th December, 2011 by one Dr. F. Ntarangwi tendered by prosecution because a doctor ought to have tendered it, I am still pursuaded that the material properly placed before learned trial magistrate was sufficient to warrant his findings that the injuries were permanent and would ***"cause agony to the complainants for the rest of their lives"***. The grandfather (PW2) apart from going blind as a result of the attack suffered multiple scalp would and when he testified that the appellant carried him to a maize field before viciously attacking him and leaving him for dead, one would find the justification by the state counsel that the appellant really showed no mercy to his grand parents. He surely expected none from the trial court and in the same breathe he cannot expect any from this court either.

16. This court finds that the learned trial magistrate in meting out the life sentence took into account all the relevant factors he ought to have been considered. I am not persuaded that the trial court was influenced by external factors or extraneous matters. I have considered what the appellant said in mitigation and in my view, he did not show any remorsefulness for the agony he caused to his grandparents who had been taking care of him. I did at the hearing of this appeal put questions to the

appellant albeit off the record to see if he had changed his stand but he appeared defiant showing no remorse at all. He infact denounced them that they were not his grandparents despite evidence to the contrary tendered at the trial. So in situations where an accused person has been convicted and show no remorsefulness about the offence he is charged with, a court cannot be faulted for handing a maximum sentence provided by law. That situation obtains in this case and on the basis of that I do not find any reason to interfere with the trial court's discretion to hand life sentence to the appellant. The complainants who are grandparents to the appellant are certainly safer without him and that played in the mind of the learned trial magistrate when sentencing the appellant.

In the premises, I find no merit in this appeal. I find no option but to uphold both the conviction and the sentence meted out against the appellant. The appeal is therefore dismissed.

Dated and delivered at Chuka this 17th day of October, 2017.

R. K. LIMO

JUDGE

17/10/2017

Judgment signed, dated and delivered in the open court in the presence of Mutani for the appellant and Ndobi for the state.

R.K. LIMO

JUDGE

17/10/2017