



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KABARNET

HCCR NO 87 OF 2017

[FORMERLY ELDORET HCCRA NO. 109 OF 2016]

TITUS SEREM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was convicted and sentenced to serve imprisonment for (5) years for the offence of grievous harm contrary to section 234 of the Penal Code.

2. In finding the appellant guilty after trial, the trial court held that:-

“PW 1 and PW 2 corroborated un their evidence that it was the accused who had assaulted PW 1 while in the company of his brother and that evidence was not contradicted at all and the accused’s to reason that it was his brother who had assaulted the complainant alone was only made to exonerate him but that was an afterthought as PW 1 and PW 2 in evidence that the complainant was assaulted by two persons that is the accused and his brother was beyond any doubt.. The complainant lost a tooth and I do not find that the injuries were grievous as for the clinical officer’s evidence on P 3 that was produced as exhibit P 1 herein. I thus do find that the prosecution had proven their case beyond any reasonable doubt that the accused was one of the persons that had assaulted the complainant. I thus find the accused guilty and I convict him for the offence of causing grievous harm contrary to section 234 of the Penal Code as charged. ”

3. The appellant filed its ground of appeal as follows:-

(i) That I the trial magistrate erred in matters of law and in fact by convicting on prosecution case which was not properly investigated beyond reasonable doubt.

(ii) That, the trial magistrate erred in matters of law and in fact by convicting me without observing that No. P 3 form was issued to the complainant and produced as an exhibit in court of law.

(iii) That, the trial magistrate erred in both law and fact by convicting and sentencing me without considering that my constitutional right was violated as I was not issued or have accesses to the statements recorded by the complainant to the police.

(iv) That, the trial magistrate erred in both law and fact by convicting me without observing that the doctor did not observe any other injury nor blood oozing from the injury claimed by the complainant.

(v) That, the trial magistrate erred in both law and fact by convicting me while rejecting my defence without giving any convincing reason for the rejection.

(vi) That, the trial magistrate erred in both law and fact by convicting me on prosecution case which was not proved beyond reasonable doubt as required by the law.

4. At the hearing however, the appellant only urged that the sentence be reduced and sought a non-custodial sentence citing his injury facing as a 30 year old. He also decried that he was the only one who was charged although the complainant had testified against him and his brother at P. 12 of the record line 5, p. 12.

5. For the DPP, Ms Onkoba Prosecution counsel submitted as follows:-

***“We oppose the appeal, appellant abandons the grounds and prays for leniency, under section 234 of the Penal Code, he offence of grievous harm attracts a penalty of life imprisonment The court was lenient when it convicted the appellant to serve (5) years. It could have been harsh if the appellant was sentenced to serve life imprisonment as per the law, the sentence was appropriate and we ask the court to uphold the trial court and dismiss the appeal.*”**

Non custodial sentence, is not appropriate as the matter was referred to Probation Officer and the report was negative. I refer to P. 37 of the typed proceedings line 6, 7, 8 and 9. Appellant is not fit for non-custodial sentence and he should serve his full sentence as passed by the trial court. At p. 21 line 1, 2 & 3 accused charged with other offences”

6. Following the abandonment of the ground of appeal against conviction the only live challenge on the trial courts finding is on the severity of sentence. However, as a first appellate court, this court has graciously passed the evidence of the trial court and confirmed that the prosecution evidence presented by the complainant PW 1 and his customer PW 2, the complainant was attacked and assaulted by the appellant with his brother whom the read as Yator at 4.00am on 11/8/2014. The two witnesses were able to identify the two attackers as there were electric lights at the shops which the complainant was standing. PW 1 knew the attackers by name as they came from the area. PW 2 knew the accused by name and the other attackers by appearance only. The complainant had told me of the tooth which was produced before the court and the injury was confirmed by PW 3 clinical officer who testified on the medical examination of the complainant and produced a medical examination report P 3 form with details on loss of one tooth on the lower side and fresh injury at the point where the tooth had come out. The appellant confirmed he knew the witness. PW 1 and PW 2 as watchman in the area. Accordingly, I will agree with the trial court that the prosecution had proved its case against the appellant whose unsworn statement that it was his brother and the complainant who were fighting and confirms the constant evidence of the two prosecution witnesses, PW 1 and PW 2.

7. I do not agree with the suspicion taken by the trial court as it is not based on evidence that:-

***“I have considered the nature of the offence and manner in which it was conducted. THE accused was not at midnight with other intentions which might have not been good and when the complainant who was watchman proved to be an impediment he decided to assault him in order to create way for mischief. The accused as per probation officer’s report is that of good reputation at home and thus the community is not willing to have him back soon.*”**

8. The court of Appeal has contended against wholesale acceptance of Probation Officers Report which are not subjected in the cross-examination in Kyalo v. R [2009] KLR 325, 329 as follows;

“[The probation Report, though important as it lead the court into making its mind as to whether

to put a person convicted on Probation is nonetheless composed of allegations of which had not been tested through cross-examination in court and are matters that the person convicted has not had opportunity to comment on and as such should not form any basis for sentencing. Once the court find that it is not favourable and that a convict could be put on probation on the basis of it, the court must proceed o the original mitigation factors and consider an appropriate custodial sentence of course taking into account the contents of the probation report.”]

9. While sentencing, the trial court said;-

“The accused’s action and offence deserves life imprisonment but I will not be that harsh being that he is ageing man and in need of care and guidance and a future. The accused will serve (5) year’s imprisonment to enable him learn some trade while in prison.”

10. I agree with the trial court and the DPP that life imprisonment would be harsh in the circumstances of this case. However, I consider that the present attack on a watchman who is conducting his duty in the cause of his employment where any apparent provocation and accassioning the injury in the nature of loss of tooth is a serious matter that must be discouraged by the appropriate sentence. In the circumstances, I do not consider that a sentence of (5) years is excessive or that there was any error of principle that would justify interference by an appellate court in the exercise of the discretion in sentencing by a trial court. *See Wanjama v. R [1971] KLR 493.*

11. The attack on the complainant only stopped because his colleague watchman from a nearby school came to his rescue together with other people who asked the accused and his brother to leave the complainant.

Orders

12. For the reasons stated above, I find that the appellants appeal has no merit and I dismiss the same.

DATED AND DELIVERED ON THE 20TH DAY OF DECEMBER, 2017.

EDWARD M. MURIITHI

JUDGE

Appearances: -

Appellant in person

Ms. Macharia, Ass. Director of Public Prosecutions.