REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 22 OF 2014

JAMLECK MUGO KARANI…..……..…….APPELLANT

-VERSUS-

REPUBLIC…….....…….…….....RESPONDENT

(An appeal from the conviction and sentence of the Senior Principal Magistrate's Court (Teresia Ngugi) at Kerugoya, Criminal Case No. 362 of 2011 dated 5th August, 2013)

JUDGMENT

1. **JAMLECK MUGO KARANI** is the appellant herein who was tried and convicted vide **Kerugoya Senior Principal Magistrate Criminal Case No. 362 of 2011** for two counts which were:

i. ***Grievous harm contrary to Section 234 of the Penal Code.***
ii. ***Assault contrary to Section 251 of the Penal Code.***

In the 1st count, the Appellant was charged with unlawfully causing grievous harm to one **ROBERT KARIMI** on the 7th May, 2011 at Kaimuri Village, Kirinyaga County. He was convicted and sentenced to serve five (5) years imprisonment for the offence, while on the 2nd count, the Appellant was accused of assaulting one **LILIAN NYAWIRA** occasioning her actual bodily harm. He was also convicted for the 2nd count and sentenced to a fine of Kshs.5000/- or in default to serve 6 months in jail with both sentences ordered to run consecutively.

2. The Appellant was aggrieved by both the conviction and the sentence imposed by the trial court and preferred this appeal raising the following grounds:

i. ***That the learned Senior Principal Magistrate erred in law and fact in failing to analyse the sworn statement of defence by the Appellant and the evidence adduced by the defence witnesses.***
ii. ***That the learned Senior Principal Magistrate erred in law and fact in dismissing the evidence of the defence without giving any reason.***
iii. ***That the learned Senior Principal Magistrate erred in law in awarding a sentence of 5 years and six months imprisonment consecutively which was excessive in light of the circumstances of the case.***
iv. ***That the Senior Principal Magistrate erred in law in awarding custodial sentence to the appellant which was against the recommendation of the probation officer's report dated 5th August, 2013 which the trial magistrate had called for before sentence.***

3. The Appellant elected to proceed in his appeal through filing of written submissions in support of his grounds in the petition of appeal. Although the Respondent through the office of Director of Public Prosecutions failed to file their submission on time or at all, this Court is mandated to consider the appeal on merit which I have.
4. The Appellant combined the 1st and 2nd grounds of his appeal in his submissions and it has been submitted that the Appellant's defence and that of his witness were disregarded and/or was not given due weight by the trial court. The trial magistrate was faulted by the Appellant who opined that the said learned magistrate never evaluated the evidence properly especially the evidence of D.W.2 – ERIC KINYUA KAGAI. It has been submitted that the evidence of P.W.1, P.W.2 and P.W.3 in some parts show that the attack at the home of Appellant occurred thirty minutes prior to the attack of the complainants.
5. The Appellant has also submitted that Appellant's claims of adultery against his wife committed by husband to the complainant (Lilian Nyawira) in count 2 was not properly considered by the trial court.
6. This Court has evaluated the evidence adduced in respect to the above ground 1 and 2 of the Petition of the Appeal. The issue of suspicion of an affair between the Appellant's wife and P.W.3 – **Lilian Nyawira Muthii** or complainant in count 2 in the charge that faced the Appellant was well captured by the learned trial magistrate in her judgment. The evidence of the Appellant and that of his witness were well considered in the judgment. It is clear from the evidence at the trial that D.W.1 – ERIC KINYUA KAGAI arrived at the scene after the incident that is after the complainants in count 1 and count 2 had already been harmed. The learned trial magistrate correctly concluded that if the house belonging to the Appellant had its windows shattered and destroyed, then it was after the 2 complainants were attacked and it was a reaction to the said incident. The Appellant's submissions that the Appellant was the first to be attacked is not supported by the evidence adduced at the trial.
7. I have further considered what the Appellant told the Court in his defence and observed that he clearly admitted that at the material time he was armed and that "he hit someone as he ran away." Though the reasons offered for arming himself was that he sensed danger for his safety and that of his children, it is telling that the Appellant did not deny assaulting the complainants. He in fact admitted assaulting them when cross examined. His defence was that the two complainants had gone to his house to attack him. However, an evaluation of the evidence tendered by the prosecution and the defence shows that the attack on the complainants was unprovoked and in any event self defence is not a defence to a charge of grievous harm or an assault causing actual bodily harm. This Court finds that the trial court considered the defence put forward and properly evaluated the evidence tendered before it.
8. I have subjected the evidence tendered to my own evaluation and as analysed above I find that the 1st and 2nd ground of appeal is without any merit.
9. On the 3rd ground of appeal, the Appellant faulted the trial court for meting out sentences in count 1 and 2 to run consecutively rather than concurrently and that the sentences were rather excessive. It was submitted that the two offences were part of the same transaction and that the trial court did not record the reason why the sentences were to run consecutively. In support of this contention he cited the authorities in the cases of **1**. **MULE –VS- R (1983) KLR 246** and **2. ODERO –VS- R (1984) KLR 621**.

10. This Court has looked at the authorities and found out that a distinction exists between the said authorities and the current appeal. In the first case the Appellant was charged with creating disturbances and challenging a person to a duel and the appellate court found that the two charges really arose from the same behavior or transaction. In the 2nd authority the Appellant was charged with publishing alarming publications and in the alternative creating disturbances likely to cause a breach of the peace. The appellate court found that the two counts showed a series of acts so connected together by proximity of time, criminal intent, continuity of action and purpose, relation to the cause and effect that it constituted one same transaction.
11. In the present appeal however, the actions of the Appellant were directed at different persons with different degree of harm. Although the crime was committed at the same place and almost at the same time, the criminal acts were different and distinct. Each complainant was separately attacked by the complainant. ***Section 14 (1)*** of the **Criminal Procedure Code** provides as

follows:

> ***"Subject to sub section (3), when a person is convicted at one trial of two or more distinct offences the court may sentence him, for those offences to the several punishments prescribed……..and those punishments when consisting of imprisonment shall commence the one after expiration of the other in the order the court may direct, unless the court directs that the punishment shall run concurrently."***

A trial court is not allowed under sub ***section 3*** of the above section to impose a consecutive sentence whose aggregate is more than 14 years or twice the amount of imprisonment which the court in its exercise of its jurisdiction is competent to impose.

12. The Appellant has not faulted the trial court for imposing an illegal sentence or contravening the above quoted section. This Court finds that the trial magistrate made no error when she imposed the sentences to run consecutively.
13. This Court also is not convinced that the sentence of five years can be termed as excessive given the gravity of the offence and the punishment prescribed by law which as admitted by Appellant's counsel is life imprisonment. I have looked at the medical reports produced by the prosecution at the trial and contrary to what is submitted by the Appellant, the intention as demonstrated by of the injuries inflicted to the complainants by the Appellant were bad. The trial court correctly found that the Appellant at the time was a "bitter man".
14. Furthermore as a principle an appellate court can only interfere with the discretion of a subordinate court where the subordinate court disregarded a material fact, or considered an irrelevant fact or that the sentence was manifestly so excessive as to constitute an error of principle. (See the following authorities:

1. **Ogolla s/o Owuor –Vs- R. (1954) E.A. 70.**
2. **Macharia –Vs- R (2003) 2 E.A. 559.**
3. **Nancy Muthoni –Vs- R [2011] eKLR.)**

15. I find that the sentence of five (5) years imprisonment and a fine of Kshs.5,000/= or 6 months imprisonment in default to be modest perhaps due to mitigating circumstances considered by the trial court. They cannot be described by any stretch of description to be excessive. I am unable to interfere with the sentences or punishment imposed by the trial court for reasons aforesaid.
16. On the ground that the trial court in this case never considered a probation report which was favourable to the Appellant's being given a non-custodial sentence, it has to be noted that by law such reports are not binding to a trial court. The report can only act as a guide. It can adopt it or ignore it altogether depending on the circumstances obtaining in each case. In the case of **Haron Mandela Naibei – Vs- R (2014) eKLR** an appellant appealed against a sentence imposed by trial court which was 3 ½ years stating that the trial court erred in disregarding the probation report. Mabeye J., in dismissing the appeal made the following observations which I fully agree with:

> ***"A court is entitled to call for a probation report on an accused before passing its sentence. However, such a probation report is not binding on the court. The report only acts as a guide. A court can either adopt the report or ignore it."***

The trial court in this case was not bound by the probation report and was at liberty to note the report and pass such sentence as deemed just and as prescribed by law which she did.

17. In conclusion the entire evidence adduced at the trial court in totality left no doubt in the mind of the trial court that appellant had committed the offence. The Appellant was well known to the complainants as they are close relatives. They had differences which unfortunately led to the Appellant thinking that the best way was to physically sort them out. I do find that the trial court in her judgment considered all the aspects of the case and the evidence tendered before her and having done so came to a proper and inevitable conclusion. The Appellant was found guilty and was sentenced in accordance with the law.

I find no merit in this appeal. The same is dismissed. The conviction and the sentences are upheld.

Dated and delivered at Kerugoya this 16th day of February, 2016.

R. K. LIMO

JUDGE

16.02.2016

Before Hon. Justice R. Limo J.,

State Counsel Omayo

Court Assistant Willy Mwangi

Appellant present

Jamleck Mugo Karani present

Omooria for State present

Muchira for accused present

COURT: Judgment signed, dated and delivered in the open court in the presence of Omooria for the State and Muchira advocate for the Appellant.

R. K. LIMO

JUDGE