REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 30 OF 2015

APPELLATE SECTION

ZACHARY NGANGA NGUGI...……...APPELLANT

Versus

REPUBLIC…….…….…….....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 1745 of 2014 in a Judgement delivered by Hon. E.A. Mbicha (RM) on 4.6.2015)

JUDGEMENT

This is an appeal against a sentence of 7 years imprisonment against the appellant who was indicted and convicted of the offence of causing grievious harm contrary to Section 234 of the Penal Code.

Background of facts at the trial:

The appellant herein **ZACHARY NGANGA NGUGI** was on 29.10.2014 within Kajiado South Sub-County during the day. The complainant PW2 was in company of PW3 around Kiwanja Ndege area. As they moved around the complainant saw appellant who is his neighbour coming towards where the two were walking.

The complainant and PW3 tried to make a way for the appellant to pass and leave them to continue with their business. The appellant did not bypass but instead he removed a panga and stated ***"panga yangu lazima leo ifanye kazi"*** (meaning this panga of mine today must do some work).

The appellant hit the complainant with the panga occasioning injuries to the head and face. The complainant was seen by a medical doctor at Loitokitok Hospital who opined in the P3 that the degree of injury was grievious harm. The matter was reported to the police. The appellant was arrested and charged accordingly. The trial magistrate on considering both the prosecution evidence and the defence, convicted and sentenced the appellant to 7 years imprisonment.

Being dissatisfied with the sentence and with leave of the court a memorandum of appeal was duly filed. His appeal to this court against sentence is stated as follows:

"That the sentence of 7 years by the trial magistrate was harsh and excessive in the circumstances of the mitigating factors and the same be reduced to that of non-custodial sentence."

Appellant's submissions:

The appellant argued his appeal in person and relied on mitigation of appeal filed together with the memorandum of appeal. The appellant reiterated the mitigating factors to persuade this court to consider reduction of sentence.

According to the appellant he is a family man with school going children who depend on him and hence any further incarceration is not in their best interest. The appellant further argued that in the event the sentence is reduced by this court to non-custodial one; he will consider a reconciliation with the complainant. He claimed that he suffers from ill health due to a heart condition which occasion's difficulty in breathing. It was therefore his contention that the court considers reduction of sentence to enable him support his family and access proper medication.

Respondent submissions:

Mr. Akula the Senior Prosecution Counsel for the respondent opposed the appeal on sentence. He argued that the sentence passed by the trial magistrate was lenient taking into account the maximum sentence for grievious harm is life imprisonment. The learned respondent counsel further submitted that from the prosecution's evidence the appellant's action was premeditated. The victim according to the learned respondent counsel sustained severe injuries and no mitigation was undertaken by the appellant at the time.

He contested the theory alluded to by the appellant in his submissions that the cause of his action was due to a land dispute with the complainant. The learned counsel for the respondent invited the court to peruse the record and it would be established that no title or legal document was produced at the trial by the appellant. He challenged the appellant's submissions that a land dispute existed between him and the complainant. He prayed that the court dismiss the appeal.

Analysis and resolution:

It is trite law that an appellate court will not interfere with the discretion of the trial court in sentencing for reason only that the appellate court would have exercised discretion and passed a different sentence.

The principles upon which an appellate court will act to exercise discretion to review, or alter sentence imposed by the trial court was settled as far back as 1954 in the Classic Case of **OGALLO S/O OWUOR v REPUBLIC [1954] EACA 270**. See also **JORAM S/O JORAM v REPUBLIC [1950] 18 EACA 147**. The East African Court of Appeal held as follows:

> **"The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge as was said in JAMES v REPUBLIC 1950 18 EACA 147. It is evident that the judge has acted upon some wrong principle or overlooked some material factors. To this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case."**

These principles were reiterated by the Court of Appeal in the case of **SHADRACK KIPKOECH KOGO v REPUBLIC Eldoret Criminal Appeal No. 253 of 2003**. The court held as follows:

> **"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factors, or that a wrong principle was applied or that short of those, the sentence itself is so excessive and therefore an error of principle must be inferred."**

KIWALABYE BERNARD v UGANDA SUPREME COURT CR. APPEAL NO. 143 OF 2001; the court held:

> **"The appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence unless exercise of the discretion is such that it result in the**

sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."

It is crystal clear that an appellate court can only interfere with a sentence of the subordinate court if it is tainted with irregularity, misdirection, improper exercise of discretion or application of a wrong principle. Where these circumstances exist the appellate court is entitled to consider the sentence of the trial court afresh. The trial court is therefore expected to articulate factors considered in exercising discretion on sentencing to enable the appellate court to understand why a particular sentence was meted out and not the other.

Besides the penalty section of the offence, in our jurisdiction there are tools to guide trial courts in exercising that discretion judiciously. I have in mind the Constitution of the Republic, the Victim Protection Act, Sentencing Guidelines Policy of the Judiciary 2016, the Probation Act, Community Service Order Act and The Regional and International Instruments Guidelines and Principles.

I have had the opportunity to peruse the trial magistrate's court record and dealing with appeals, I am of the view that there is a need for a paradigm shift in the manner sentencing of an offender is commenced and concluded by the trial court.

The court records contain very brief information on sentence. The familiar phrase is usually crafted and reads as follows:

"Mitigation considered, the accused is a first offender, accused is hereby sentenced to such a sentence of imprisonment, or a fine of so much in default a term of imprisonment. If multiple indictments the sentences to run consecutively or concurrently."

I should pause and highlight that sometimes statements like these renders a sentencing magistrate's court overlook certain critical factors. I have in mind the National Values and Principles of Governance as outlined under Article 10 (2) and the provisions of Article 2 (5) of the Constitution 2010. The principles of governance under the constitution together with Sentencing Policy Guidelines of the Judiciary 2016 are tools which cannot be ignored by any sentencing judge in ensuring the interest of justice is served in its entirety.

Beyond the consideration which sentence to impose against an offender, there is likely multifactoral issues to take into account, purpose of punishment and deterrence. The nature and gravity of the offence, the time and period spent in remand awaiting trial in order to discount the period as provided for under Section 333 (2) of the Criminal Procedure Code.

In dealing with the offender as a persistence or a first offender, the public interest concerns in the nature of crime facing the offender. The offender profile prior to commission of the offence. Questions like whether on gainful employment, permanent residence, family ties, education levels, community perspective on the offender. What peculiar and aggravating factors/features are present in case before sentencing court. All these can be accounted for by insisting for a pre-sentence report by the Probation Officer.

As a general rule the sentencing court should factor the victim impact statement as per the provisions of Victim Protection Act in particular where the overall nature of the offence can occasion restorative justice to take effect as a way of reconciliating the offender and the victim. The utilization of the provisions of the community service order Act by sentencing non-serious offenders to work within communities would be of great benefit.

It is only when a sentencing court has considered the totality of the legal framework can either open for different combination of sentences or adjust the statutory prescribed sentence. The question as to which sentence runs concurrently or consecutively can only be rationally applied by considering any of the

intervening factors deduced from the law and principles on sentencing. The penalty section of an offence upon conviction allows the sentencing court an entry point to commence proceedings and apply a multifactoral approach to arrive at a right decision on sentence.

Based on the foregoing I am of the considered view that sentencing hearings are necessary in order to inform the decision that all the enabling provisions of the constitution, the statute and principles have been factored in exercising discretion to arrive at an appropriate decision on sentence. Sentencing is therefore a critical factor in any criminal trial. It is no wonder public confidence in the Judiciary has had sentencing disparities and others as one of the major complaints.

As an appellate court I would be looking at whether the trial court called for a pre-sentence report, what were the appellant's previous criminal record if any, whether the court considered the appellant's statement in mitigation and the victim impact statement, whether the court took into account the proviso under Section 332(2) of the Criminal Procedure Code on the period in remand for offender's in custody pending trial, application of the principles of governance under Article 10 (2) of the Constitution. It is only then that an appellant's sentence can be said to be within the statutory limitations and therefore not contrary to the law.

Based on the foregoing I hereby see the trial magistrate's holding, sentencing and hearings to inform the decision that all the enabling provisions of the law on sentencing were explained and there was no error in law or principle in the decision.

I have perused the well reasoned judgement of the learned trial magistrate where in finding the appellant guilty held thus:

> **"I am satisfied with the prosecution's evidence. I find that the prosecution have proved their case beyond reasonable doubt and I proceed to convict the accused of the offence of assault causing grievious harm contrary to section 234 of the Penal Code."**

On sentencing the trial magistrate had this to say:

> **"I have considered the accused mitigation. The accused acted in a barbaric manner towards the complainant whereas there was a land difference. The accused shed blood and brutally attacked the complainant. For his action, the accused shed blood. He may now not enjoy the land which he shed blood to try and retain such action was a receipt for chaos and disorder. I sentence the accused to serve 7 years imprisonment."**

There is no dispute the appellate was charged with the offence of causing grievious harm contrary to section 234 of the Penal Code. The acts intended to cause grievious harm are provided for under section 231 of the Penal Code.

> **"On conviction for an offence of unlawfully causing grievious harm based on any of the acts mentioned under Section 231 the offender is liable to imprisonment for life."**

The trial magistrate on considering the evidence and other factors during sentencing hearings imposed an imprisonment term of 7 years. I must point out that causing grievious harm is a very serious crime which in the circumstances of each case calls for an appropriate custodial sentence not only to punish the offender but also in the hope of preventing it.

In this appeal considering the charge and prescribed sentence under Section 234 of the Penal Code, the question is what did the trial magistrate factor in deciding the cut off period to be 7 years from the life imprisonment provided for.

I consider this to be a case where the trial court should have called for a pre-sentence report and also victim impact statement before imposing sentence. Taking all factors into account the absence of presentence report and victim impact statement did not occasion injustice on the part of the appellant.

DECISION

On the merits of the appeal I have considered the arguments by the appellant and submissions by learned counsel for the respondent on the issue of sentence. I have also set out the general approach of the appellate court's jurisdiction on sentence in the case of **OGOLLA OWUOR** and **KIPKOECH (Supra)**.

In applying the principles in the authorities cited to the present appeal i am satisfied that there were no material misdirections nor application of wrong principles by the trial court to warrant interference by this court. Further, I find no exceptional circumstances raised in the memorandum of appeal that would render the sentence of 7 years unjust.

It is only if one or more of these principles elucidated in **OGOLLA Case (Supra)** are considered in the affirmative that this court could have interfered with the sentence by the trial court.

I hereby dismiss the appeal for lack of merit. I affirm the judgement of the trial court delivered on 4.6.2015.

Dated, delivered in open court at Kajiado on 19th day of May, 2016.

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R. NYAKUNDI

JUDGE

Representation

Appellant present

Mr. Akula Senior Prosecution Counsel - present

Mr. Mateli Court Assistant