REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO.115 OF 2014

[consolidating Cr. Appeals Nos.115& 116 of 2014]

NAHASHON NG'ANG'A

PETER IRERI NG'ANG'A ..... APPELLANTS

VERSUS

REPUBLIC ……..... RESPONDENT

(From the original conviction and sentence in Criminal Case No.149 of 2014 of the Principal Magistrate's Court at Kandara by Hon. C. Kithinji – Ag. Senior Resident Magistrate)

JUDGMENT

The appellants, **NAHASHON NG'ANG'A** and **PETER IRERI NG'ANG'A,** were convicted of the offence of grievous harm contrary to section 234 of the Penal Code.

The particulars of the offence were that on 22nd February 2014 at Gathunguri village, Kandara District of Murang'a County, jointly and unlawfully did grievous harm to **ELIJAH KIRUTHI NDUNGU**.

They were each sentenced to 12 years imprisonment. They now appeal against both conviction and sentence.

The appellants were in person. The first appellant appealed against sentence only and raised several mitigating points. The second appellant raised five grounds of appeal that can be compressed as follows:

1. That the trial learned magistrate erred in law and in fact by failing to appreciate that he was the first to report to the police.

2.That the trial learned magistrate erred in law and in fact by the fact that there existed a grudge that made it possible for him to be framed up in the offence.

3. That the trial learned magistrate erred in law and in fact by failing to consider his alibi defence.

The state opposed the appeal through M/s. Lydia Wang'ombe, the learned counsel.

Briefly the facts of the prosecution case are as follows:

When the complainant was looking for a person he was to deliver some bananas to, the second appellant on seeing him alleged that he had stolen their metal. The two chased him. When they caught up with him, they cut him in turns using a machete the first appellant had.

In his defence the first appellant contended that the complainant was the one who assaulted him. The second appellant denied any involvement in the offence and pleaded an alibi.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC 1972 EA 32.**

Whoever reports to the police first does not matter when it comes to establishing who should be charged. Speed is very important in a race track but not in matters of reporting to the police. A good investigating officer weighs all the available evidence in order to conclude whom to charge. This therefore cannot be a valid ground for appeal. It can only be a ground if evidence can show that the report made after the first was calculated to defeat justice. This is not what comes out in the instant case.

During his defence the second appellant pleaded an alibi. On appeal he contended that he was framed up due to an existing grudge. The learned trial magistrate weighed the alibi of the second appellant before dismissing it. he cannot be heard to say it was not considered. The evidence of **JAMES NDUNGU MUNGAI (PW2)** was very clear as to his (second appellant's) presence at the scene and his participation in the commission of the offence. I therefore find that his conviction was safe and was based on sound evidence.

Both appellants have contended that the sentence was harsh. In **JOHN MUENDO MUSAU Vs. REPUBLIC [2013]eKLR** the court of appeal held:

On the sentence, section 26 (2) of the Penal Code provides that where the prescribed sentence is imprisonment for life or any other period, the trial court has the discretion to pass a sentence of imprisonment for a shorter period. Situations where an appellate court would interfere with the discretion of a trial court on the issue of sentence have in the past been clearly defined by this Court. An appellate court would interfere only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. Those circumstances were well illustrated in the case of Nelson vs. Republic [1970] E.A. 599, following Ogalo Son of Owuora vs. Republic (1954) 21 EACA 270 as follows:

"The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. 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 unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewsity (1912) C.CA 28 T.LR 364."

In the instant case I have looked at the circumstances under which the offence was committed and I find nothing to persuade me to interfere with the sentence imposed by the learned trial magistrate.

The upshot of the foregoing analysis of evidence is that the appeal by both appellants must fail. The same is dismissed. Each will serve the sentence meted out by the learned trial magistrate.

DATED at MURANG'A this 19th day of August 2016

KIARIE WAWERU KIARIE

JUDGE