REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 61 OF 2013

EDWARD KIPRUTO……..…..……..…..……..APPELLANT

VERSUS

REPUBLIC……..……....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 2635 of 2012 Republic vs Edward Kipruto in the Resident Magistrate's Court at Kapsabet by B. Limo Resident Magistrate dated 21st March 2013)

JUDGMENT

1. The appellant was convicted on two counts: Assault causing grievous harm contrary to section 234 of the Penal Code; and, assault causing actual bodily harm contrary to section 251 of the Code. The complainants were Hurun Kimaiyo and Joseph Koech. The offences were committed on the 2nd November 2012 at Kabiemit Sub-Location in Nandi County. The appellant was sentenced to life imprisonment on the charge of assault causing grievous harm. The sentence on the other charge was suspended.

2. The appellant was aggrieved by the conviction and sentence. His petition of appeal is dated 2nd April 2013. It urges six grounds. The first five grounds challenge the sentences handed down: that the sentence was manifestly excessive; and, that it did not take in to account the mitigation tendered, the circumstances of the offence and the relationship between the appellant and the complainants. The last ground is that the learned Magistrate erred in finding that the prosecution had proved its case prove beyond reasonable doubt.

3. At the hearing of this appeal, learned counsel for the appellant informed the court that he would confine the appeal to the *severity* of the sentence. For the avoidance of doubt, he abandoned all the grounds that went to the root of the *conviction*. He submitted that the genesis of the assaults was a *family feud*; and, that the appellant was under the influence of *alcohol*. He said that the appellant was an uncle of the complainant; that they had lived peacefully for ten years. Learned counsel submitted that the sentence was harsh and excessive in all the circumstances of the case. He pleaded with the court to substitute the custodial sentence with a non-custodial punishment.

4. The appeal is contested by the State. The case for the State is that the conviction was safe. It was submitted that the sentence was lawful. Learned state Counsel underscored that the attack on the second complainant led to *permanent disability*. I was implored not to disturb the sentence.

5. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki*

Karanja v Republic [1986] KLR 190.

6. I have carefully studied the records of the trial court. I have in particular considered the defence proffered at the trial. The appellant at no time stated that he was *drunk*. I find that matter to be an afterthought. PW2 is the *father* of the appellant. On the material night at 8.00 p.m., he was asleep. The appellant asked him to come out. PW2 asked him what the matter was. The appellant said he wanted to talk to him. PW2 told him to return in the morning. The appellant then kicked the door open. He found his father on the bed. His father lit a torch. The appellant got hold of a *jembe* and hit him on the right leg and knee. They started to wrestle. He punched PW2 on the face. PW2 raised an alarm.

7. PW1 is a nephew to the appellant. He responded to the alarm raised by his grandfather, PW2. The appellant, who had left briefly, returned and attacked PW1. The appellant was armed with a *panga*. As PW1 tried to defend himself, the appellant cut off his hand with the *panga*. PW1 was taken to hospital. The evidence of PW1 and PW2 was confirmed in all material particulars by PW3, a son to PW2. PW4, a clinical officer, examined both complainants. He confirmed that PW1's left forearm was *amputated* by a sharp object. The degree of injury was *grievous harm*. In respect of PW2, the degree was *harm*.

8. From that evidence, I do *not* entertain any *doubt* that the appellant viciously *assaulted* the complainants. The complainants knew him. He was a *son* and *uncle* respectively. The identification was thus *positive*. As I have stated, the appellant is no longer challenging his *conviction*. I have reached the inescapable conclusion that the two counts were proved beyond reasonable doubt.

9. That leaves the matter of the *sentence*. Sentencing is at the discretion of the trial court. But power still reposes in an appellate court to review the sentence if material factors were overlooked; or, the sentence was founded on erroneous principles. See *Amolo v Republic* [1991] KLR 392, *Omuse v Republic* [1989] KLR 214, *Macharia v Republic* [2003] 2 E.A 559.

10. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

> *"The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may…..…(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or….. "*

11. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

> *"The Court would 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 would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors. …The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirely before settling for any given sentence."*

12. The learned trial Magistrate upon convicting the appellant called for his mitigation. The prosecutor had informed the court that the appellant was a *first* offender. The appellant offered *no* mitigation. The learned trial Magistrate correctly found that the appellant was *not* remorseful. He sentenced him to *life* imprisonment on the charge of assault causing grievous harm. The sentence on the other count was suspended. The plea for clemency before this court must be looked at through those lenses. The appellant is to blame for forfeiting an opportunity to mitigate in the lower court.

13. Although the appellant was a first offender, he committed a grave felony. He amputated PW1's forearm. The injury is permanent. Section 234 of the Penal code provides that a person who commits grievous harm is liable to *life* imprisonment. The appellant was imprisoned for life. Considering he offered no mitigation, I find he was *unrepentant*. He injured his father and nephew in a *brutal* and

unprovoked attack. The sentence was well *within* the law. I cannot then say that the learned trial Magistrate *acted upon some wrong principles or overlooked some material factors*. I am unable to find that the sentence was *harsh* in the circumstances. The sentence in this case was *commensurate* with the *moral blameworthiness* of the offender. *Omuse v Republic* [1989] KLR 214, *Macharia v Republic* [2003] 2 E.A 559.

14. The upshot is that there are no grounds to disturb the findings of the learned trial Magistrate. I uphold the conviction and sentence. The entire appeal is hereby dismissed.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 24th day of March 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

Appellant.

No appearance by counsel for the accused.

Ms. R. N. Karanja for the State.

Mr. J. Kemboi, Court clerk.