



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 116 OF 2012**

**MARTIN MWANGE KISWII .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

(Being an appeal from the original conviction and sentence in Kithimani Principal Magistrate's Court Criminal Case No. 567 of 2011 by Hon. M.A.O. Opanga , RM on 10/8/12)

**JUDGMENT**

1. The Appellant was charged with the offence of Grievous Harm contrary to **Section 234** of the **Penal Code**. The particulars of the offence being that on the **2<sup>nd</sup>** day of **August, 2012** at **Kwa Koko Village, Kithimani Location, Yatta District** within **Machakos County** jointly with another not before court unlawfully did grievous harm to **Mutuku Kithome**
2. He admitted the charge, was convicted and sentenced to **six years imprisonment**. Being dissatisfied with the conviction and sentence meted out, he now appeals on grounds that:-
  - i. The learned trial magistrate erred in law and in fact when she entered a conviction and a sentence under **Section 234** of the **Penal Code** as read with **Section 7(1) (b)** of the **Criminal Procedure Code** together with the first schedule when she was not seized of jurisdiction thus making a judgment which is a nullity.
  - ii. The learned trial magistrate erred in law and in fact when she meted out an excessive and unjustified sentence on the appellant notwithstanding the several options for sentencing available to her.
  - iii. The learned trial magistrate erred in law and in fact when she failed to apply due diligence in examination of Medical Examination Report (P3) of the complainant as to its contents *vis-a-vis* the charge sheet and the facts duly presented by the prosecution prior to sentencing in consequence failing to note glaring discrepancies thereof occasioning the appellant prejudice.
  - iv. The learned trial magistrate erred in law and in fact when she failed to appreciate the deductions of the Medical Examination Report (P3) which is not conclusive without affording herself satisfaction of treatment and card notes in order to corroborate the evidence thus rendering the entire proceedings and judgments per incuriam.
3. Counsel for the appellant, **Mr. Njoroge** relying on grounds stated in the petition of appeal sought a retrial.
4. Learned counsel for the State, **Mrs Abuga** conceded to the appeal on the grounds that the case was tried by a Resident Magistrate who did not have jurisdiction to hear it.
5. This being the first appellate court, I am mandated to look at the proceedings before the trial court a fresh, re-evaluate and reassess it to reach my independent conclusion. (*see Njoroge verses Republic [1987] KLR 19*).

6. Under **Section 384** of the **Criminal Procedure Code**, a person has no right to appeal against a conviction resulting from his/her guilty plea. The appellant herein having admitted the charge and a conviction entered, **prayer 3** and **4** of the appeal should be disregarded. He can only question the legality of the sentence meted out.
7. What has been questioned is whether the trial Magistrate had jurisdiction to adjudicate upon the subject offence. The appellant was arraigned before **M.A.O. Opanga, Resident Magistrate, Kithimani** for the offence of grievous harm contrary to **Section 234** of the **Penal Code**. She has been faulted to have taken up a matter where she had no jurisdiction.
8. **Section 2** of the **Magistrate's Courts Act, Chapter 10** of the Laws of Kenya defines a Resident Magistrate Court as a **"Magistrate's Court of the first class"**. According to the first schedule of the **Criminal Procedure Code** the offence of doing grievous harm is triable by a Subordinate Court of the first class. This means that a Resident Magistrate has power to adjudicate upon such an offence (*also see Republic versus Adan Mamo Criminal Appeal No. 55 of 2004*)
9. In the Petition of Appeal it is stated that;-

***"The learned Trial Magistrate erred in law and in fact when she entered a conviction and a sentence under Section 234 of the Penal Code as read with Section 7(1) (b) of the Criminal Procedure Code together with the first schedule when she was not seized of jurisdiction thus making a judgment which is a nullity"***

10. Section 7(1) (b) of the Criminal Procedure Code stipulate;-

***"A subordinate court of the first class held by -***

***(b) A resident magistrate may pass any sentence authorized by law for an offence under section 278, 308 (1) or 322 of the Penal Code or under the Sexual Offences Act, 2006"***

But there is **section 7 (2)** of the **Criminal Procedure Code** which provides thus:-

***"Subject to subsection (1), a subordinate court of the first class may pass the following sentences in cases where they are authorized by law-***

- a. **Imprisonment for a term not exceeding seven years;**

***(b) A fine not exceeding twenty thousand shillings;***

***(c) (Repealed by 5 of 2003 s. 60.)***

11. The law authorizes the Resident Magistrate being a Court of First Class to hear the case of doing grievous harm. The penalty provided for the offence is upto life imprisonment where a magistrate trying such an offence is a Resident Magistrate he/she can only mete out a sentence upto seven **(7) imprisonment** as provided by the law.
12. In this case the sentence meted out was six (6) years imprisonment which was within the powers of the Resident Magistrate. In the circumstances, there was no misdirection whatsoever.
13. In ground 2 of the appeal it has been stated that the sentence meted out was excessive. I have previously stated that when a court metes out a sentence it must consider whether the accused is a first offender, whether there is evidence that he has the propensity to commit violent crimes in future and mitigating factors presented. This is a case where the appellant was standing with another by the roadside. The complainant on believing that they were up to no good asked what they were doing. The accused then picked a stone and hit him on the mouth, he then ran away. His act however left the complainant with loss of teeth. Being a first offender the sentence passed was harsh. Having upheld the conviction passed, I do set aside the sentence passed and substitute it with **three (3) years imprisonment**.

**DATED, SIGNED and DELIVERED at MACHAKOS this 19<sup>TH</sup> day of FEBRUARY 2014.**

**L.N. MUTENDE**

**JUDGE**