REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 169 OF 2011

WILLIAM KIPTUM RAIMOI .... APPELLANT

VERSUS

REPUBLIC ….. RESPONDENT

(Being an appeal against conviction and sentence of the Resident Magistrate's Court at Eldama Ravine, delivered by Hon. M. Kasera (Senior Resident Magistrate) on 29th July, 2011 in Criminal Case No. 55 of 2011)

JUDGMENT

The Appellant was initially charged with assault causing actual bodily harm Contrary to Section 251 of the Penal Code. Particualrs of the same were that on the 14th day of January, 2011, at Oinapsas Village in Koibatek District within Baringo County unlawfully assaulted Gilbert Kipkemei Toroitich, occasioning him actual bodily harm.

He pleaded not guilty to the charge on 17/1/2011 and hearing was fixed for 21/2/2011. On this date, the prosecution applied to substitute the charge to one of Grevious Harm Contrary to Section 234 of the Penal Code. He argued that after the P.3 form was filled, the Medical Officer had assessed the degree of injury as maim.

The Court allowed the request by the prosecutor. The charge read that the Appellant was charged with Grevious Harm Contrary to Section 234 of the Penal Code. Particulars of the charge were that on the 14th day of January, 2011 at Oinapsos Village in Koibatek District within Baringo County, unlawfully did grevious harm to Gilbert Kipkemoi Toroitich.

The Appellant pleaded guilty. The facts were read to him which he said were not correct. A plea of not guilty was entered. Prosecution called five witnesses. The Appellant was put on his defence and he gave a sworn statement of defence. Judgment was delivered on 29th July, 2011. He was found guilty, convicted and sentenced to pay a fine of Kshs 60,000/=, in default, serve four years imprisonment.

He appealed to this Court only against the sentence. Under the grounds of appeal filed in court on 24th August, 2011, he has prayed for leniency citing the following reasons:-

1. That he was most remorseful and deeply regret the incidence.

2. That he is a first offender.

3. That extreme anger on provocation rendered him insane and committed the offence at a moment of “passion” hence was not in lucid state of mind.

4. That he is a relative of the complainant who is his nephew.

5. That for the duration of his stay in remand and subsequent imprisonment, he has learned the importance and value of humility.

6. That he has a family that wholly depends on him for subsistence who stand to suffer irreparably because of his long incarceration.

7. That he is an old man aged 64 years and his continued stay in prison is imparting negatively on his health.

The appeal was canvassed before me on 6th June, 2013. He urged Court to reduce the sentence arguing that he was diabetic and required special diet that cannot be availed at the prison. He said he was old, aged 71 years and was remorseful.

The prosecuting counsel, Mr. Mulati opposed the appeal. He submitted that the sentence imposed by the trial Court was reasonable and should not be varied.

Section 234 of the Penal Code provides that **"any person who unlawfully, and does grievious harm to another is guilty of a felony and is liable to imprisonment for life.**"

Thus, the law only sets the minimum sentence that the Court should impose. In so doing, the Court must look at the circumstances and the facts of each case when sentencing. Specifically, sentence is the discretion of the Court, but such discretion must be exercised in light of all facts of the case tendered before the Court.

In the case of **SHADDRACK KIPKOECH KOGO -VS- REPUBLIC – CRIMINAL APPEAL NO. 253 OF 2003 (unreported) – Court of Appeal sitting at Eldoret, Omollo, O'Kubasu and Onyango Otieno, JJA said**:-

" Sentence is essentially an exercise of discretion of 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 failed to take into account a relevant factor or that a wrong principle was applied or short of those the sentence itself is so harsh and excessive that an error in principle must be inferred."

The Principles to be applied in sentencing were well laid down in the case of **OMUSE =VRS= REPUBLIC (2009), KLR, 214,** when Hon. O'Kubasu, Waki and Onyango Otieno, JJA, when relying on decided cases said;

In **MACHARIA =VRS= R. (2003), E.A. 559** this Court stated:-

"The Principle upon which this Court will act in exercising its jurisdiction to review or alter a sentence imposed by the Court have been firmly settled as far back as 1954, in the case of OGOLA S/O OWUOR (1954) EACA, 270 wherein the predecessor of this Court stated:-

"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 would not ordinarily interfere with the discretion exercised by a trial Judge, unless as was said in JAMES -VRS- R (1950) 18 EACA 147, it is evidence that the Judge acted upon some wrong principles 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 R-V- S SHERXHAWSKY (1912) CCA 28 TLR 263. Further, the Law is that 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 entirety before settling for any given sentence. See

AMBANI -VRS- R. (1990) KLR 161."

Moreover, an appellate Court is empowered by section 254 (3) (b) of the Criminal Procedure Code to alter the sentence when the appeal is only against the sentence. It provides thus:-

"254 (3) The Court may then, if it considers that there is insufficient ground for interfering, dismiss the appeal or may -

(b) In an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence."

The facts of the case disclose that the Appellant and the Complainant are related, the latter being the nephew to the former, there was long outstanding disquiet between the families of the two parties. The Appellant claimed that the family of the Complainant had severally allowed their livestock (goats) to graze on his farm. He had sent warnings to the family of the Complainant but his call that it desists from this act was not heeded to. On the material date, a similar scenario arose. A confrontation followed as a consequence thereof. The appellant therefore acted under extreme provocation. It is also factual that elders had been called to resolve this dispute but the matter came to Court before reconciliation was done.

The Appellant expresses a lot of remorse. It looks he is not likely to carry this grudge on even after serving the sentence. The Appellant and the complainant are related and it is important that the Court promotes reconciliation. Whereas, I find the sentence imposed as being fair, it is also important that I consider that the Appellant having sought forgiveness does not leave the prison a bitter man but one who is ready and willing to embrace the reconciliation that had commenced.

He is also an elderly man. He has learnt his lesson for the period he has served and he now knows that the law will take its cause if he takes it in his own hands.

Having regard to all these factors, I reduce the sentence to two and half years to be tabulated from the date of conviction.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 25th day of July, 2013.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Appellant present in person

Mr. Wainaina for the State/Respondent