



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.95 OF 2013

JAMES WACHIRA WANGAI.....APPELLANT

VERSUS

REPUBLIC OF KENYA.....RESPONDENT

**[An Appeal from original conviction and sentence in Nyahururu C.M.CR.C.NO.2200 of 2011 by
Hon. P. O. Muholi Resident Magistrate, dated 5th June, 2013**

JUDGMENT

1. The appellant was charged with the offence of **Grievous Harm** contrary to **Section 234** of the **Penal Code**.
2. The particulars of the offence are that he unlawfully and intentionally did grievous harm to Cecilia Wanjiru on the 4th day of November, 2011.
3. The appellant was convicted and sentenced to a term of Thirteen (13) years by the Resident Magistrates Court, Nyahururu on the 5th June, 2013.
4. Being aggrieved by the decision, the Appellant preferred this appeal on both conviction and sentence and listed eight (8) grounds of appeal as set out hereunder:
 - i. **THAT the sentence was excessive and harsh**
 - ii. **THAT the appellant was not given free and enough chance and time to question the complainant and his witnesses.**
 - iii. **THAT the court refused to consider that the case was a domestic misunderstanding.**
 - iv. **THAT only the complainant and her daughter appeared in court and testified while the other witnesses refused to appear because they were not for prosecution but defence**
 - v. **THAT the trial magistrate closed the file without making a ruling and the appellant was not given a chance to defend himself**
 - vi. **THAT he urges the honourable court to reduce the sentence because the trial magistrate refused to be fair and did not allow the defence witnesses to testify**
 - vii. **THAT the evidence was of a single witness and no weapon was produced before court.**
 - viii. **THAT the appellant has suffered in remand for 19 months**
5. At the hearing of the appeal; the appellant was present in person and made oral submissions.
6. The respondent was represented by Prosecuting Counsel for the State, Mr. Omutelema who also made oral submissions
7. Upon hearing the oral submissions of both parties, this court finds the following **issues for**

determination:

i) were the appellant rights violated:

ii) whether the sentence imposed was legal.

8. The appellant contends that the complainant had initially wanted to withdraw the complaint but was forced by the trial magistrate to proceed.
9. The appellant further contends that he had defence witnesses who were to come and testify on his behalf but the trial magistrate concluded his case before the witnesses had testified.
10. He was therefore shocked by the trial magistrates action of closing the case before his witnesses had testified and therefore claims his right were thus violated.
11. The appellant urged the court to therefore quash the conviction and set aside the sentence.
12. The appeal was opposed by Counsel for the State who submitted that the record shows that the prosecution witnesses were only bonded to appear and were not forced to testify.
13. Counsel further submitted that the appellant was allowed to cross-examine the witnesses and the trial magistrate read the appellant his rights when he was found with a case to answer.
14. It was Counsel's submission that there was nothing to show on the court record that the appellant had witnesses to be called and that the magistrate overruled him and denied him his right.
15. Counsel submitted that the appellant in his defence had admitted to having assaulted the complainant.
16. Further that the incident had occurred in broad daylight and the evidence of P.W.1 was corroborated by that of P.W.2 and the injuries sustained were confirmed by the Doctor.
17. Counsel contended that the appellant was properly convicted and that due to the circumstance and the nature of the injuries, a stiff sentence was in order.
18. Counsel drew the court's attention to **Section 7(2) of the Criminal Procedure Code** and stated that the trial magistrate had limited jurisdiction and conceded that the sentence imposed was illegal and that this appellate court had well founded reasons to interfere with the sentence.

ISSUES FOR DETERMINATION:

19. This being the first appellate court, this court is duty bound to peruse the record and re-evaluate the evidence on record and arrive at its own independent conclusion. Refer to **Okeno V. Republic** (1972) EA 32.
20. Having perused the record, this court finds that mention of reconciliation is made by the court on the 13th September, 2012 when it was considering the issue of bail/bond.
21. The court stated as follows and this court quotes as hereunder:

“..... The report by the Probation Reports (sic) this is a family matter and the courts are mandated to promote reconciliation.....”

22. Nowhere does the court record show that the complainant intimated to the court that she wished to withdraw the complaint nor does the court record show that the complainant and other witnesses were forced to testify.
23. This court has had occasion to peruse the entire court record and notes that on two occasions, the court indulged the complainant and adjourned the case as she was unable to testify as her voice was not audible due to the injuries inflicted upon her.
24. This court finds from the court record that the appellant was granted the right to recall and re-examine the prosecution witnesses.
25. Upon being found with a case to answer, the court read out the appellant's rights, before proceeding further.
26. Nothing on the court record shows that the appellant indicated to the court that he had defence witnesses to call.
27. This court concurs with the submissions of the Counsel for the State that there is nothing on the court record that supports this allegation that the trial court denied the appellant his basic fundamental

- right.
28. This court finds that the ground of appeal that the rights were violated has no merit and the same is disallowed.
 29. After re-assessing the evidence on the court record, this court notes that the evidence of **P.W.1** on how she was attacked is corroborated by **P.W.2**.
 30. The evidence of **P.W.4**, the examining doctor, corroborates the evidence of P.W.1 on the injuries she sustained.
 31. The Doctor, (**P.W.4**) also tendered into court **PExb 1(a)** and **(b)** being the P3 Form in support of his testimony and confirmed the injuries to be grievous in nature.
 32. The appellant in his own evidence admits having attacked **P.W.1** with a panga and states that he was provoked having heard that **P.W.1** had referred to him as a homosexual.
 33. From the evidence adduced by the prosecution and from the appellant's admission, this court is satisfied and finds that the trial magistrate properly convicted the appellant on this evidence,
 34. The trial court proceeded to sentence the appellant to thirteen (13) years imprisonment.
 35. Counsel for the State concedes that the trial magistrate had limited jurisdiction and counsel invited the court to peruse the provisions of **Section 7(2)** of the **Criminal Procedure Code**.
 36. Counsel further submitted that this appellate court has well founded reasons to interfere with the sentence imposed as it was illegal.
 37. This court has perused the provisions of **Section 7(2)** of the **Criminal Procedure Code** and finds that the trial court had jurisdiction limited to sentencing of 7 years imprisonment.
 38. This court concurs with the submissions of counsel for the State that the nature of the offence calls for a stiffer sentence nevertheless the trial court should not have sentenced the appellant to a term exceeding seven (7) years.
 39. The appellant had urged the court to reduce his sentence and to grant him a non-custodial sentence or alternatively to consider that he was a remanded for a period of nineteen (19) months.
 40. This court had occasion to observe the demeanor of the appellant and found that he was still a very angry man and not remorseful or repentant of his actions, which he still believes were justified.
 41. With regard to the above, this court finds that a non-custodial sentence is not merited at this juncture.

FINDINGS

42. (i) This court finds and is satisfied that the appellant's basic fundamental rights to a fair trial were not violated.
- ii. This court further finds that the appellant was properly convicted by the trial magistrate on the strength of the evidence adduced.
- iii. This court finds that the sentence imposed of thirteen (13) years is illegal.

CONCLUSION:

- iv. The conviction is hereby upheld.
- v. The appeal is partially successful on the issue of sentence
- vi. The sentence imposed is hereby set aside and substituted with imprisonment to a term of seven (7) years with effect from 15th June, 2013

It is so ordered.

Dated, Signed and Delivered at Nakuru at 24th day of October, 2013

A. MSHILA

JUDGE