No.176

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.209 OF 2012

NYAMOHANGA PAUL GATI ……. APPELLANT

VERSUS

STATE ……..……...…… RESPONDENT

(Being and appeal from the conviction and sentence of the Resident Magistrate's Court at Kehancha, Hon. Temba A. Sitati, R.M made on 28th August, 2012 in RM CR. Case No. 537 of 2011)

JUDGMENT

1. The appellant herein, **Nyamohanga Paul Gati** was charged with the offence of assault causing actual bodily harm contrary to **section 251** of the Penal Code. The particulars of the charges were that on the 4th November 2011 at Nyabasi North location in Kuria East district within Migori County, he unlawfully assaulted Francis Chagoche Matinde thereby occasioning him actual bodily harm by cutting him using a panga on the head and on both hands. The appellant pleaded not guilty to the charge and trial ensued. The prosecution called four witnesses. PW1 was **Francis Matinde Chaguche** the complainant. He told the court that on the 4th day of November 2011 at 6p.m. he was at Kegonga town visiting one mama Muruga to collect Kshs.3,000.00 that he had loaned her. On arrival at the said mama Murunga's home, he found her daughter –in-law one, Maria and a relative by the name of Boke. Mama Murunga was not around and as such, he decided to wait for her. Eventually, mama Murunga came at around 6.45p.m. Mama Murunga told him that she had already given her son, one Mokami Moti the money to deliver to him. He told mama Murunga that he had not received any money. Mokami was then called on phone and he came to his mother's residence riding his motor cycle. Suddenly, one Paulo Gati (the appellant) alighted from the motor cycle and came to the house carrying a sword. He insulted him (PW1) in Kuria language calling him an uncircumcised boy and then slashed him on the forehead. Efforts to shield himself proved futile as the appellant slashed him again on the arm. By then, it was about 8p.m. and there was a wicker lamp on so he was able to see the appellant clearly. Meanwhile, mama Murunga and Boke screamed and left the house leaving him with the appellant. He grabbed the appellant and wrestled with him out of the house and in the process; the appellant slashed him again on the forehead, left arm and hand.He tried to seek mama Murunga's help but she declined to intervene. The appellant still persisted in his attack by trying to stab him on the chest but he was able to hold him off. PW1 then tripped, pushed the appellant and took cover in darkness. He lay in the bush for 2 hours in great pain.When he regained consciousness after 2 hours, he crawled and dragged himself to Kegonga district hospital where he was admitted. He produced treatment notes and discharge summary. He was in-patient No.369/2011. These were all marked as P. Exhibit 1. After spending the night at Kegonga hospital, he was

discharged at 11a.m. the following day and headed straight to the police station where he was given a P.3form. He was also issued with a warrant of arrest though accused was arrested on a later date. During the attack, the appellant also took his Nokia Phone 6300, wallet containing kshs.5450.00, ID card, voter's card, ATM cards and ahat. He told the court that he had no differences with the accused apart from the fact that accused claimed he had gone to seduce his wife Boke.

2. PW2 was Administration Police officer **No.2007108930, Amuya Kwintai** from the DC's office at Kegonga. He told the court that on 5thNovember 2011 he was on duty when PW1served him with a warrant of arrest emanating from Ntimaru police station commanding them to arrest the appellant. Thereafter, his colleague APC Felix Ogeju, PW1 and himself proceeded to Nyakehomo village in a bid to arrest the appellant whom they found together with his wife and children having supper. They allowed him to finish his supper after which they arrested him.
3. PW3 was **No.89364 Police Constable Cheserek Too** attached to Ntimaru Police Station. He told the court that on 5th November 2011 at 10.30a.m. he was at the station when the appellant came with his mother-in-law Miruka and a man named Mokami and reported that the previous evening while at Kegonga with his brother-in-law Mokami, Mokami told him that he had received a phone call that the appellant's wife was having sexual intercourse with a certain man and that they were planning to escape. The appellant told him that he tooka motorcycle to the house where the said sexual intercourse was said to be taking place and found PW1 having sexual intercourse with his wife. The appellant told him that he was armed with a panga that he used to slashPW1 on the head andon both hands as he was very much provoked. PW3 proceeded to record appellant's statement as he narrated it to him. The appellant told him that PW1 fled. The appellant tried to request him to go to the home concerned for inquiries but he declined. He then released appellant on understanding that they would visit the home later. Afterwards at around 4p.m. PW1 reported to the station and narrated the story of his attack to him. The following day, he visited mama Miruka's home to carry out further inquiries. From his observations, the home had one entrance that served also as an exit. He requested to be shown the bed said to have been used by PW1 and was shown a small room with one bed, one 2 inch mattress and one blanket. There was no blood stain in the small room but he noticed blood stains in the sitting area and some blood covered with a stone outside the house. In addition, he stated in his evidence in chief that the appellant's mother in-law and brother in-law indicated that the alleged sexual encounter never took place but refused to elaborate. He formed the opinion that the appellant had committed an offence and charged him after recording witness statements. He then issued a P3 form for the purpose of medical examination.In concluding his evidence in chief, he produced a sketch plan of the home pointing out various spots and locations of the scene.
4. PW4 was **Lawrence Maruti** a clinical officer at Kisii level 5 hospital. He confirmed completing a P3 form for PW1 on 6th November, 2011 when PW1 came to the hospital under police escort. He confirmed that PW1 had 2 cut wounds across his forehead which were bandaged and dressed, he had a third cut to the right side of the head which was stitched and dressed and the fifth right small finger had also been cut stitched and dressed. His right palm was also cut, the cut was across the palm touching the small finger, his right arm near elbow was also cut and stitched. He concluded that the injuries were caused by a sharp object and were 2 days old. He relied on treatment book that was completed and prepared for him by his colleague C.O. Chacha with whom he had worked with for one year. He was therefore familiar with his writing and noted that PW1 had many cut wounds on his face and upper limbs. The treatment notes were marked P. Exhibit 1 and P3 form P. Exhibit 2.
5. That marked the end of the prosecution's case. After reviewing the evidence then on record, the trial court ruled that the prosecution had established a prima facie case to put the appellant on his defence. The appellant gave unsworn statement and called 2 witnesses. In his unsworn statement, the appellant stated that on 4th November 2011 after a day's work, he engaged his brother in-law, Mokami to take him home at around 8p.m. and while on the way, Mokami (his brother in-law) received a phone call which he (Mokami)put on a loudspeaker. The caller said that there was a man with his (Mokami) sister (the appellant's wife) and that they were both planning to escape. As they approached the homestead (where the caller was), the appellant got off and used a shortcut as Mokami went up to the main gate. He proceeded straight to a house in the said homestead and went to the bedroom and with his phone's light on, he found his wife having sexual intercourse

with a man.Enraged, he produced a panga from the bedside, they started wrestling with the man as the wife escaped out of the room. As they wrestled with the man, they both got cut on the head before they tumbled out of the house and the man ran off into darkness. He then took himself to Kegonga AP Camp to report but was told to come later as the officers whom he could report to were not available. On going back home, he discovered that kshs. 50,000.00was missing. Early the next morning, he visited his wife's parents home and found his mother in-law who had brought her daughter back home after she had sought refuge at her neighbors home. His wife admitted to taking Kshs.50,000.00 earlier in the day and given it to PW1 who was going for a degree course. She told him that the man tricked her that he would get educated and marry her. On 5thNovember, 2011 which was a Saturday, he took his wife and mother in-law to Ntimaru police station to report the crime by the man. After reporting, the police asked for kshs 2,000 before they could take action and when he declined to give the amount he went away. In the evening, between 7.30-8.00p.m. a largecontingent of police came in the company of PW1 and arrested him. As they made their way to Ntimaru police station they beat him and he got bruised and injured.

6. DW1 was Muruga Paulina who was the appellant's mother in-law. She told the court that on 4thNovember 2011 she had gone to Mwanza, Tanzania and came back to her home late in the evening. Before she got home, she received a call from her son Mokami who told her that there was an event taking place at home. On arrival, she found her daughter's child crying after being dumped by her mother. She sought for her daughter who told her that she had run away from her matrimonial home as her husband had found her with a man having sexual intercourse and that the man was a teacher and he had promised to take her to Isebania for purposes of marriage. She confirmed that she did not witness the assault incident.She corroborated the appellant's testimony that when they reported the matter to Ntimaru police station the appellant was asked for money.On re-examination she stated that the money in question was kshs.500 which the police wanted.
7. DW2 was Johnes Mokami Makende. He was the appellant's brother in law. He corroborated appellant's testimony that on 4th November 2011 he was carrying his brother –in-law home when his wife Miriam told him that his sister Rael was with a man in the house planning to elope.On getting to his house, he was brushed aside by Rael as he neared the door, he saw 2 men in physical struggle, the appellant and PW1 were wrestling. When he tried to join in, the man, PW1 fled and he tried to look for his sister to no avail. On the following day after going to the police station and returning home, he went back to the house to look for money which he had placed under the mattress amounting to about Kshs.88,000.00 which were the proceeds from the sale of a plot that DW1 and himself had sold to take their sibling Magonga to college. He questioned his sister Rael who said she saw the man take away the said sum of Kshs.88,000. They then recorded their statements with the police who demanded cash before acting on the report but he did not give the police any money. Later, the appellant was arrested by the police. He was also arrested after3 days.
8. DW3 was RaelBoke, the appellant's wife. She admitted to the fact that PW1 was her lover and that he came on 4th about 8a.m. and they had agreed he passes by her home to collect cash. She proceeded to give him money as he went to school and agreed later to meet at her parents' home to conceal her movements and avoid suspicions from her husband. She got to her parents home at around 3p.m. Her sister in-law Miriam (DW2's wife) came to the house at 6p.m. as she was to escort her to Sirare where they had planned to meet with PW1. She proceeded to have sexual intercourse with PW1 after which she left briefly and on return she found him counting money as she had given him kshs.50,000. They then had sexual intercourse again. They then heard a motor cycle approaching the home and she intimated to him that it may be DW2 but PW1 brushed the thought aside. She then got up and as she gropedin darkness, a man entered the room, he had a torch and she recognized him as her husband the appellant. Sensing trouble, she sped off, sought cover in a neighbour's home and later DW1 came and quarreled with her for her behavior. Afterwards, DW2 demanded the money he had placed under the mattress. She told him that she had not taken it but explained that she saw PW1counting money. She had also seen PW1 taking something from under the mattress. She confirmed that the money she gave him was in a white plastic bag while the one he took was in a black plastic bag. DW2 then called the appellant at about 9.50-10.00pm and reported to him that his cash was missing. In the morning, DW2, the appellant and herself reported to Ntimaru police station and went back home.The police demanded for a bribe of kshs.2,000.00 but since they had no money they ignored appellant's complaints.

9. After evaluating the above evidence, the trial court found the charge against the appellant to have been proved, convicted him of the same and sentenced him to serve 5 years imprisonment.The appellant being dissatisfied with the above conviction and sentence preferred an appeal to this court. In his petition of appeal filed in court on 11th September 2012, the appellant has appealed against the above conviction and sentence on grounds inter alia that the trial magistrate took advantage of his ignorance and gave him a harsh sentence with no option and that he was requesting this honourable court to intervene since he was still a young man who has a family that depend on him as he was the sole bread winner.When the matter came before me for hearing on 17th October 2013 the appellant appeared in person while Mr. Shabola appeared for the State. The appellant submitted categorically that he did not wish to challenge his conviction but wanted to restrict his appeal to the sentence that was meted out against him. He submitted further that he had no intention of causing harm to the accused. He prayed for leniency claiming that he had found PW1 with his wife and acted at the heat of the moment. He also submitted that he was a first offender. In addition, he submitted that he had children who depended on him and that they have now dropped out of school. He prayed that he be acquitted and if that is not possible, the sentence should be reduced so that he can go back to his children who now have no mother or father since his wife who had a relationship with PW1 had fled to Tanzania.
10. The appeal was opposed by Mr. Shabola, the learned state counsel. He submitted that he did not oppose the review of the sentence. He however drew the court's attention to the fact that the complainant (PW1) developed paralysis in his arm as a result of the attack by the appellant.
11. This being a first appeal, I have a duty as a first appellate court to reconsider and re-evaluate the evidence on record afresh. In this duty I am guided by the decisions in such cases as, **Pandya vs. Republic (1957) EA 336, Okeno vs. Republic (1972)E.A 32** and **Abdul Hameed Saif vs. Ali Mohammed Shulan (1955) E.A.C.A 270.** In evaluating the evidence afresh, however, I am mindful of the fact that unlike the trial court, I have neither seen nor heard the witnesses so as to benefit from observing their demeanor. From the petition and submissions by the appellant and the counsel for the state it appears that the appellant is only challenging the sentence that was imposed against him. The charge against the appellant in the lower court was assault causing actual bodily harm contrary to **section 251** of the penal code. Though the appellant does not refute the fact that he assaulted the complainant (PW1), he alleges that he caught the complainant red handed having sexual intercourse with his wife DW3. The complainant who was the first witness to testify in the lower court narrated how he went to appellant's mother in-law (DW1) to get some money he had loaned her. DW1 then told her that she had given her son DW2 the money in the course of the day but since DW2 had not delivered the money to him, they decided to talk to him on phone after which he told them he was on his way home. As the complainant waited for DW2, he heard DW2's motorbike arriving in the compound but was suddenly bombarded by insults from the appellant afterwhich appellant proceeded to assault him. He managed to escape and hid in the bush after which he dragged himself to hospital and spent then night there before being released the following day. Upon his release, he made a report to the police station, was issued an arrest warrant which he served on PW2 and later on in the course of the day he led the police to appellant's homestead and he was arrested.
12. The complainant sustained injuries from the appellants attack to the extent that his right hand is now paralyzed. He produced treatment notes and DW4's testimony also corroborated details of the injuries he sustained. While the appellant does not deny that he was the one who attacked the complainant, he alleged that he was provoked by the fact that his sister in-law told him that DW3 and the complaint were having sexual intercourse. He caught them in the act and acting at the heat of the moment took a sword and slashed the complainant.The evidence of PW3 now becomes crucial as he stated that he was first approached by the appellant accompanied by DW1and DW2. The appellant claimed that he had assaulted the complainant after catching him red handed having sexual intercourse with his wife,DW3.However, when PW3 who was the investigating officer went to investigate the matter at the scene of the crime, he noticed that there was no blood in the room where the alleged sexual intercourse took place but noticed blood stains in the living room and outside the house covered with a stone. From the defence evidence, apart from the fact that the complainant was alleged to have sexual relations with DW3, he was also alleged to have stolen the appellants cash in the sum of Kshs.50,000.00 and DW2's cash amounting to kshs.80,000.00. The defence evidence to me is not truthful because, the fact that DW2 and appellant had such amounts

of money was not proved and also the investigating officer did not believe their story that complainant was having sexual intercourse with DW3 because no blood stain was found in the alleged room where appellant started attacking the complainant. In contrast, the evidence of the complainant is consistent and believable as he stated that he was initially attacked in the living room by the appellant and they wrestled their way out of the house which logically explains why there was blood in the living room and outside. As the trial magistrate observed, the real motive of appellant's attacking the complainant still remains unclear.

13. After analyzing the above evidence, the trial court convicted the appellant and sentenced him to 5 years imprisonment. According to the section 251 of the Penal Code, the sentence for assault causing actual bodily harm is 5 years imprisonment.The appellant has now pleaded with this court for reduction in his sentence. He has even submitted a photograph of his children who seem to be lacking care and protection in his absence. Sentence is an exercise of discretion of the trial court. The trial court must treat each case individually given the circumstances prevailing on each case. In my view, factors to be considered in sentencing include, but are not limited to, the nature of the offence, the prevalence of the offence, the penalty imposed by the law and of course the mitigation the accused offers. In the case of **Shaddrack Kipkoech Kogo vs. Republic Criminal Appeal No 253** of **2003**(unreported), the 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 awrong 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 also laid down in the case of **Omuse vs. Republic (2009) KLR, 2(d**) where Hon. O'kubasu, Waki and Onyango Otieno JJA after reviewing decided cases said;

"In **Macharia vs. Republic (2003)EA 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 Ogolas/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 exercise by a trial judge, unless as was said in James vs. Republic (1950) 18 EACA 147, it is evidence that the Judge acted upon some wrong principles or overlaid 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 Republic vs. Sherxhawsky (1912) CCA 28KLR 263. Further, the law is that sentence imposed on an accused person must be commensurate to the moral blame worthiness 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 vs. Republic (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:**

a. **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 sentences, increase or reduce the sentence or alter the nature of the sentence''.**

There is no doubt that the offence with which the appellant was charged and convicted was serious as it attracts imprisonment of up to for 5 years. The counsel for the state has also brought to the attention of this court the fact that the complainant has suffered paralysis on his arm as a result of the injuries that

were inflicted upon him by the appellant. That notwithstanding, the appellant was a first offender and was remorseful. He admitted having assaulted the complainant though the motive has not been clearly established. These are factors which the trial court should have taken into account while sentencing the appellant.

14. Due to the foregoing, it is my finding that the sentence imposed upon the appellant was excessive. The appellant's appeal succeeds on sentence only. I hereby set aside the sentence of 5 years that was imposed against the appellant and substitute the same with a sentence of 1 year imprisonment. Since the sentence imposed by this court has been served in full, the appellant shall set free forthwith unless he is otherwise lawfully held.

Delivered, Dated and Signed at KISII this 18th day of December 2013

S.OKONG'O

JUDGE

In the presence of:

Appellant present in person

Mr. Shabola for the State

Mobisa Court Clerk

S.OKONG'O

JUDGE