



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL 23 OF 2011**

HENRY NYABUTO MUTURU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Criminal case No. 2526/2010)

by Hon. A.B Mongare SRM, Nyahururu dated 19th January, 2011)

JUDGMENT

The appellant herein, Henry Nyabuto Muturi, was charged and convicted of the offence of causing grievous harm contrary to **Section 234** of the **Penal Code** and sentenced to life imprisonment.

Aggrieved by both the conviction and sentence the appellant preferred an appeal to this court on four (4) grounds which can be reduced to three (3), as follows:

1. that the learned trial magistrate failed to consider that the appellant was a first offender and consequently passed a very harsh sentence;
2. that the learned trial magistrate did not consider the appellant's mitigation in passing the sentence;
3. that the learned trial magistrate erred in law and in fact by failing to appreciate that the appellant injured the complainant while defending himself.

Learned counsel for the respondent in opposing the appeal submitted that there were eyewitnesses who saw the appellant running from the scene of the crime armed with a blood-stained panga; that the complainant gave a vivid and believable account of the assault; that the injuries were very serious; and that the sentence imposed is the only one provided for in the circumstances and is proper.

This being a first appeal, it is the duty of this court to consider and re-evaluate the evidence presented before the lower court in order to arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses.

It was the prosecution case that as PW1, Anna Kemuma Muturu, was walking to the quarry from her home, she met her step daughter in-law, Rhoda Moraa. She greeted her but the latter refused to return her greetings and instead picked up a quarrel with her. As the two were quarrelling the appellant, who is her step son in-law came to where they were, pulled out a panga and cut her in several places occasioning her serious injuries. The complainant was helped by her children, Hellen Kemuma and Peter Ombati, who reported the matter to the police and took her to hospital. After this attack the appellant disappeared and only resurfaced after nine (9) years.

P.W.2, Ombati Bundi Muturu, and P.W.3, Frolence Kwamboka, who were near the scene of the crime heard screams from the direction of the attack and as they approached the scene, they saw the complainant and noticed that her hands had been chopped off. They also saw the appellant running away from the scene of the crime carrying a panga stained with blood. The complainant told them that it was the appellant who had hurt her.

Dr. Peter Nginyo, examined and treated complainant at the Rift Valley Provincial General Hospital, Nakuru for loss of left arm, loss of right thumb and maimed eye caused by a sharp object (machete). He assessed those injuries as grievous harm.

In his defence, the appellant stated that on the material day he went to work and returned home at around 2 p.m. His father told him that there had a fight between his sister, Kemunto and the complainant and that they had gone to the Provincial General Hospital, Nakuru, raising a defence of *alibi*.

Upon evaluation of this evidence, I find as a fact that the complainant suffered very serious injuries to the hands. The broad question that fell for the determination of the court below and which is indeed the crux of this appeal is whether the appellant inflicted the injuries suffered by the complainant. The attack occurred in broad day light and the appellant was seen by P.W.2, his step brother and P.W.3 running away from the scene of the crime armed with blood stained panga. The appellant and the complainant are related and therefore the question of a mistaken identity does not arise. From the evidence of the complainant and the two (P.W.2 and P.W.3) independent witnesses, I find that the appellant inflicted the injuries on the complainant

The appellant has averred that the learned trial magistrate failed to find that it was in fact him who was being attacked by the complainant and that the complainant sustained the injuries as he (the appellant) defended himself. The issue of self defence was not raised during trial and that he cannot rely on the same at this stage, as it amounts to an after thought. At the trial, his defence was an *alibi*.

Regarding the sentence, despite the court having found the appellant to be a first offender and remorseful it nevertheless, imposed the maximum sentence for the offence.

Under **Section 234** of the **Penal Code** provides:

“Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life

(emphasis supplied)

The key word is “*is liable*.”

The Court of Appeal in **Daniel Kyalo Muema V. Republic**, Criminal Appeal No. 479 of 2007 quoted with approval the decision of its predecessor (the Court of Appeal of East Africa) in **Opoya V. Uganda** (1967) E.A 752 in which it observed:

“It seems to us beyond argument the words “shall be liable” to did not in their ordinary meaning require the imposition of the stated penalty but merely expresses the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see it fit to impose it”

The injuries occasioned on the appellant were fairly serious. Given that the appellant was a third party in the dispute between the complainant and Rhoda, hence the aggressor, there was need to pass a deterrent sentence. However, because the appellant was a first offender and remorseful, the sentence of life imprisonment was not appropriate in the circumstances.

The upshot of the foregoing is that I affirm the conviction but set aside the sentence of life imprisonment and substitute therewith a twenty years imprisonment. The sentence to run from the date of the judgment

of the lower court.

Dated , Signed and Delivered at Nakuru this 25th day of September, 2012.

**W. OUKO
JUDGE**