



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL NO. 5 OF 2009

BETWEEN

SOLOMON MUKAVOTO:::1ST APPELLANT
ISIAH WAKHUNGU:::2ND APPELLANT
PATRICK MBOI:::3RD APPELLANT

AND

REPUBLIC:::RESPONDENT

(Being an appeal from the decision of the Resident Magistrate Hon. I. Maisiba dated 8th January, 2009 in Eldoret Chief Magistrate’s Court Criminal Case No. 2126 of 2007)

JUDGMENT

The appellants **Solomon Mukavoto** (1st appellant), **Isaiah Wakhungu** (2nd Appellant) and **Patrick Mboi** (3rd appellant) were charged in the Chief Magistrate’s Court at Eldoret with grievous harm contrary to Section 234 of the Penal Code.

It was alleged that the appellants, on 12th January, 2007, at Malova Likhuyani Village in Lugari District within Western Province, unlawfully did grievous harm to **Aggrey Mukhwana Simiyu** (hereinafter “the complainant”). The appellants appeared before **W.N. Njage** Principal Magistrate, and pleaded not guilty. They were however tried by **Mr. Maisiba**, Resident Magistrate.

The Learned Resident Magistrate after hearing, the testimonies of the prosecution’s five witnesses heard the unsworn defences of the appellants herein and came to the conclusions founded on a summary of the evidence as set out here below. The complainant, a resident of Soy, on 12th November, 2007, at about 7:30pm was heading home from Likuyani when he met the appellants whom he knew well. The appellants asked him to accompany them to buy a cigarette and indeed proceeded to buy a cigarette for him. The complainant then started going home but the appellants followed him getting up with him after 50 metres. The 3rd appellant struck him on the left side of his head and the other appellants then joined the attack leaving him unconscious. When he came to at 3a.m. he found himself outside his house. He realised that he also heard injuries on his private parts. He was taken to Likuyani Health Centre by **Stephen Mulongo Simiyu**(PW2) and then reported to Kojo Police Station before proceeding to Moi Teaching and Referral Hospital where he was admitted for two weeks. An X-ray taken at the hospital indicated that he had ruptured one testicle which was subsequently removed.

Victoria Mukwana (PW3), the complainant’s wife gave evidence that on the material night at

about 3 a.m, she received a distress call from the complainant who was in great pain. The complainant informed her that he had been attacked by the appellants. The complainant had been injured on the left side of his head and his private parts were swollen. Together with PW2 they took him to Likuyani Health Centre which referred him to Moi Teaching and Referral Hospital.

Dr. Paul Rono (PW5) gave evidence that he examined the complainant on 14th February, 2011 and observed the following injuries; swollen face; swollen mouth; swollen testis and bruises on the left leg. He further testified that at the hospital the complainant's left testis was removed. He filled and signed a P3 on 14th February, 2007 in respect of those injuries and assessed the degree of injury the complainant had had as grievous harm.

In the interim the appellants were arrested by Administration Police Officers including **APC Joseph Koskei Toroitich** (PW3). They were then handed over to **PC Michael Jowi** of Kojo Patrol Base who charged them with the offence already stated.

In their unsworn testimonies, the appellants denied committing the offence.

On the basis of the above evidence the Learned Resident Magistrate found that the offence of grievous harm had been proved as required in law and convicted them as already stated. In convicting the appellants the Learned Resident Magistrate found that the evidence of the complainant had not been discredited and that the appellants had merely denied committing the offence. After regarding the appellants' mitigation he sentenced them to life imprisonment.

In their supplementary petitions of appeals the appellants only challenge the sentence handed down by the Learned Resident Magistrate. They contend that the sentence of life imprisonment is unconstitutional.

On the occasion of hearing, **Mr. Okoth** who represented the appellants submitted on that single ground of appeal. Counsel argued that Under Article 50(2) (d) of the constitution, the appellants were entitled to the benefit of a less severe sentence.

Mr. Oluoch Learned Senior Deputy Prosecution Counsel opposed the appeal and submitted that given the injuries sustained by the complainant the sentence of life imprisonment was deserved.

Having gone over the record of the Learned Resident Magistrate, I have come to the conclusion that the prosecution adduced evidence which proved the charge of doing grievous harm beyond reasonable doubt. If the appellant had challenged their conviction I would have had no difficulty in dismissing the same.

With regard to sentence, I can only interfere with the discretion of the Learned Resident Magistrate if it appears that the Learned Magistrate acted on wrong principles in assessing the sentence or that he imposed a sentence which is manifestly excessive. The offence of doing grievous harm carries life imprisonment. The appellants therefore received the maximum sentence permitted by the law. The maximum sentence should be meted out to the worst offender. Are the appellants such offenders? I do not think so. The record shows that they prayed for leniency. Yet the Learned Resident Magistrate does not appear to have given any regard for their pleas. The prosecution, when asked to make a statement relevant to sentence, stated that the appellants had no previous records of convictions. Those circumstances clearly removed the appellants from the category of worst offenders.

In those circumstances, I am entitled to interfere. The offence was no doubt serious but taking into account all the above circumstances, the sentence of life imprisonment was in my view manifestly excessive. Accordingly, I allow the appeal against sentence, set aside the sentence of life imprisonment and substitute therefore a sentence of six (6) years imprisonment with effect from 8th January, 2009 which was the date of conviction.

DATED AND DELIVERED AT ELDORET

THIS 4TH DAY OF AUGUST, 2011

F. AZANGALALA
JUDGE

Read in the presence of:-
Ms. Nyamwega H/B for Ms. Lagat for the Appellant and
Mr. Kabaka for the State.

F. AZANGALALA
JUDGE
4TH AUGUST, 2010