



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

[Coram: Azangalala, J]

CRIMINAL APPEAL NO. 185 OF 2010

BETWEEN

SAMWEL KIRWA BARNO:.....APPELLANT

AND

REPUBLIC:.....RESPONDENT

[Being an appeal from the decision of Hon. D. K. Kemei, Principal Magistrate dated 29th November, 2010 in Eldoret Chief Magistrate's Court Criminal Case Number 5776 of 2010]

JUDGMENT

Samuel Kirwa Barno, the appellant, was charged in the Chief Magistrate's Court at Eldoret with the offence of Grievous Harm contrary to section 234 of the Penal Code. It was alleged that the appellant, on the 9th November, 2010, at Segero Village within Eldoret West District of the Rift Valley Province, unlawfully did Grievous Harm to **Samuel Biwott**. The appellant appeared before **D.K. Kemei**, then a Principal Magistrate, and pleaded guilty to the charge. The prosecution then stated the facts of the case and the appellant was invited to admit, dispute or explain the facts upon which he informed the Learned Principal Magistrate that the facts were correct. The Learned Principal Magistrate then convicted the appellant on his own plea of guilty. He then received the prosecutor's statement on sentence and the appellant's mitigation and sentenced the appellant to serve seven (7) years imprisonment.

The appellant was not satisfied and has come to this court by way of appeal.

When the appeal came up before me for hearing on 17th November, 2011 counsel for the appellant **Mr. Omboto** abandoned the appeal against conviction and urged the appeal against sentence. **Mr. Chirchir** the Learned Senior State Counsel, who represented the respondent state, supported the appellant's conviction but submitted that the sentence imposed upon the appellant, was manifestly excessive in the circumstances.

I have considered the record and re-evaluated the proceedings before the Learned Principal Magistrate. The prosecution, in the facts which were narrated before the Learned Principal Magistrate, stated, *inter alia*, that the appellant alleged that the complainant had been going out with his

wife. Counsel for the appellant has drawn the attention of the court to that fact and submitted that the appellant was under extreme provocation when he stabbed the complainant. In those circumstances, counsel argued that the sentence imposed upon the appellant was manifestly excessive. Having reconsidered and re-evaluated the proceedings, I have come to the conclusion that the Learned Principal Magistrate may not have sufficiently appreciated the personal circumstances of the appellant and the events leading to the commission of the offence. Evidence of adultery seems to have been accepted by the prosecution. The complainant may not have been found in flagrant delicto but the knowledge of the commission of adultery by the complainant with his wife was, to the appellant in his station in life, a provocation and should have but was not considered.

In the premises I agree with both counsel that the sentence of seven years imprisonment imposed upon the appellant was excessive. The appellant was in any event a first offender. He has been in custody for slightly over one (1) year now. In my view he has learnt his lesson and further imprisonment will serve no purpose. I accordingly allow the appeal against sentence. The same is set aside and is substituted with a sentence of imprisonment for the period already served. The appellant should be set free forthwith unless he is otherwise lawfully held.

It is so ordered.

**DATED AND DELIVERED AT ELDORET
THIS 7TH DAY OF DECEMBER, 2011**

**F. AZANGALALA
JUDGE**

**Read in the presence of:-
Mr. Omboto for the appellant
And Mr. Kabaka for the State**

**F. AZANGALALA
JUDGE**

7TH DECEMBER, 2011