REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Criminal Appeal 133 of 2007

ALBERT NYABOGA……APPELLANT

-VERSUS-

REPUBLIC……..RESPONDENT

JUDGMENT

From original conviction and sentence by the Senior Resident Magistrate's Court at Ogembo Criminal case no. 657of 2005 by J.Kwena (SRM)

Albert Nyaboga, ***"the appellant"*** was charged before the Senior Resident Magistrate's Court at Ogembo with one count of grievious harm contrary to section 234 of the **Penal Code.** It was alleged in the particulars that the appellant on 17th November, 2005 at Kenyenya sub-location in Gucha District within Nyanza Province unlawfully did grievous harm to **Mary Moraa Njaga**. The appellant pleaded not guilty to the charge and was subsequently tried.

The prosecution case was that on the 17TH Novmber, 2005 at about 8 p.m the complainant, **Mary Moraa Njaga** who was then 8 months pregnant was in her house in Kenyenya village in the company of her 18 year old daughter, **Rose Sinitiano**. She had left her door ajar as it was hot and humid. She suddenly saw 2 people standing at the door. As she was close to the door and the lantern was burning in the house she was able to recognize the appellant among them. He was her neighbuor and they shared a common fence. His home was about 100 metres from hers and had known him since she got married in the village. The appellant had covered his head with a lesso and wore a cap. The duo then knocked the lantern thereby putting off the light. Thereafter they proceeded to unleash violence on the complainant by cutting her up with a panga. She was hit on the left arm, neck, face and right jaw. She screamed and ran out of the house. The two attackers also took off towards the kitchen and passed through the fence. In the process the appellant dropped the lesso and cap. Pursuant to the screams neighoburs led by one, **Albert,** came to the rescue of the complainant and took her to Tabaka Hospital where she was admitted for 4 months. From hospital she proceeded to Ogembo police station where she was issued with a P3 form. The same was filled by **Joseph Mokua Nyangau,** a clinical officer at Gucha District Hospital. He classified the injuries sustained by the complainant as grievous harm. A day after the complainant's assault aforesaid, **James Mbambe,** a village elder was approached by the mother of the appellant, **Mary Nyabogo** who

claimed that the lesso and cap found in the complainant's compound and apparently dropped by the complainant's assailants as they ran off were hers. The village elder escorted her to the complainant's home and called the area assistant chief, **Nemwel Onchwati**. At the scene, the crowd threatened to lynch the appellant and his mother aforesaid. The assistant chief rescued the two and took them to Ogembo police station where the appellant was re-arrested by **P.C. Benard Sila** and subsequently charged.

Put on his defence, the appellant elected to give a sworn statement of defence. Essentiality he denied participating in the crime. That on the day in question he was at home when he heard screams emanating from the complainant's house. In the morning of the following day he was surprised when **James Mbambe** came and called him out of the house, took him to the complainant's house and later handed him over to the police. He knew nothing about the offence.

The learned magistrate having carefully analysed and evaluated the evidence tendered by both the prosecution and the defence, found for the prosecution. She found the appellant guilty as charged, convicted him and thereafter sentenced him to serve 5 years imprisonment.

Aggrieved by the conviction and sentence, the appellant preferred this appeal. In his petition of appeal filed in this court on 17th September, 2007, the appellant impugned the decision of the learned magistrate on grounds that the prosecution had not proved its case beyond reasonable doubt as required, crucial and important witnesses were not called, failure to call for a probation report regarding the appellant's previous antecedents and finally that the custodial sentence of 5 years was overly harsh and excessive in the circumstances.

When the appeal came up for hearing, the appellant surprisingly opted to abandon the appeal on conviction. Instead he chose to pursue the appeal on sentence only. His wish was duly granted by the court. In support of the appeal on sentence, the appellant submitted that the sentence imposed was harsh and excessive. To his mind, the learned magistrate should have sentenced him to a prison term of about 30 months.

In response, **Mr. Gitonga,** learned state counsel submitted in opposing the appeal on sentence that the sentence imposed was legal but too lenient. The complainant was about 8 months pregnant at the time. The attack was violent and uncalled for. The sentence imposed should not therefore be intervened with.

Under section 354(3) of the **Criminal Procedure code**, this court as a first appellate court has jurisdiction to interfere with a sentence passed by the lower court. The principles upon which this court will so act were clearly pronounced in the case of **Ogalo s/o Owuora .V.Republic (1954) 21 EACA 270** and reinforced in a subsequent case, to with; **Nilsson .V.Republic (1971) EA 493**. The appeal court will only interfere, with a sentence of the court below where and when it is evident that the court has:-

(i) Acted upon some wrong principles or

(ii) Overlooked some material factor(s), or

(iii) Failed to take into account material factor(s)

(iv) The sentence imposed is manifestly harsh and excessive

Having regard to the circumstances of the case.

Indeed in the case of Nilsson (supra) the court delivered itself thus:-

> ***"……The principle, upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. 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 will not ordinarily interfere with the discretion exercised by the trial judge unless, as was said in James .V.Republic (1950) 18 EACA 147, it is evident that the judge has acted upon some wrong principle or overlooked some material factor, to this we would also add a third contention namely, that the sentence is manifestly excessive in view of the circumstances……"***

Applying the above injunctions to the circumstances of this case, I have no doubt at all that the sentence imposed herein was legal. However I must hasten to add that considering the injuries sustained by the complainant that included a fracture of the left forearm and that she was 8 months pregnant then, the sentence of 5 years imprisonment is too lenient to contemplate. The appellant should be the last person to lament about the sentence. Afterall, the maximum sentence permissible for the offence is life imprisonment. The appellant should count himself lucky that he caught off lightly. Nothing on record suggests that in arriving at the sentence aforesaid the learned magistrate acted on wrong principle, overlooked some material factors or failed to take into account material factors. As already stated the sentence imposed cannot be said by any stretch of imagination to have been manifestly harsh and excessive. It should never be forgotten that in determining an appropriate sentence to be imposed, the trial court is exercising some discretion. Ofcourse such discretion must be exercised judicially and not capriciously. I do not discern in the sentencing notes of the learned magistrate any abuse of discretion.

Having given the matter full considerations, I am satisfied that the sentence imposed does not require intervention by way of review. Accordingly the appeal on sentence is dismissed.

Dated, signed and delivered at Kisii this 24th March, 20110.

ASIKE MAKHANDIA

JUDGE