REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Criminal Appeal 115 of 2008

YONA KOMORA DIRIVO.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

JUDGMENT

Yona Komora Dirivo (the appellant) was convicted on a charge of grievous harm contrary to section 234 of the Penal Code and sentenced to six years imprisonment.

He pleaded guilty to the charge and the appeal is on sentence only.

The particulars of the charge were that on the 17th day of March 2008 at about 6.00pm at Mikunduni Village, Tana River District, the appellant unlawfully did grievous harm to Benjamin Komora.

The facts were that on the said date at 6.00pm, the complainant while at his home in the company of the appellant conversing advised the appellant not to attend school the following day as appellant had planned for them to go fishing in River Tana. The appellant is the father to the complainant. The complainant told appellant he would not to fishing as that would interfere with his studies. Appellant got infuriated and tied complainant's legs using a rope, then begun beating him all over the body using a club until the complainant lost four teeth. Complainant screamed and was rescued by his uncle Musa Bachira Dirivo who took him elsewhere to sleep. A report was then made to Hola Police Station and complainant was taken for treatment – the duly filled P3 form showed that complainant suffered grievous harm.

Appellant confirmed that the facts were correct.

The prosecutor informed the trial court that appellant was not a first offender as he had been previously convicted in CRC No. 37 of 2005 for the offence of creating disturbance in a manner likely to cause a breach of peace and sentenced to six months imprisonment. Appellant's mitigation was that he was the sole bread winner for the family. He appealed against the sentence on grounds that:

(1) So it was excessive and unfair.

(2) He has five children who all depend on him.

(3) His father died, and his mother depends on him.

(4) After his conviction, his wife ran away, leaving the children with is mother who is too old.

Appellant had filed written submissions which he opted to withdraw and made oral submissions in court. He told this court that the lady who used to assist him died and the children are now under the care of his old mother and have even dropped out of school and became street urchins.

He explained that he loves the child whom he disciplined and that he acted out of anger. He seeks forgiveness and states that with the prevailing famine even getting food to eat is a hurdle for the children and promises never to repeat such a thing.

The appeal is opposed and Mr. Naulikha on behalf of the State pointed out that appellant was not a first offender and that he ought to have exercised restraint.

Under section 234 of the Penal Code the offence known as grievous harm carries with it a maximum sentence of life imprisonment.

Appellant sought to be forgiven for his act of so grievously injuring his son, apparently for declining to his instructions – there is no suggestion that there had been repeated acts of disobedience by the injured child, but it is even the manner in which the whole purported "punishment" was carried out – not only was it painful but also traumatic being tied up with ropes by his own father, then beaten using a club until he lost four (4) teeth – that cannot be an act of love- it is cruel and was certainly intended to inflict maximum pain and terrorize the child into utter fear and all because of saying he would not accompany his father to go fishing in River Tana because it would interfere with his school. Appellant's action exceeded the scope of chastisement and certainly assumed the level of abuse of the complainant's rights. If that is an expression of love then I dread to think what he would do to one whom he hates.

This court is now being asked by the appellant to consider the interest of the family unit (that the mother of the children is no longer with them and that there are other children), that the children are now under the care of their old grandmother and with the prevailing famine, may be meeting hurdles even in finding food, and that the children have dropped out of school. Should these be factors to warrant a reprieve in the light of the injuries inflicted on the complainant and the circumstances surrounding? Let me borrow here from my brother Hon. Justice JB Ojwang in the case of **Rose Pandiri Anyona v R Criminal Appeal No. 138 of 2006** where the appellant (a mother) was convicted and sentenced to three years imprisonment for assaulting her daughter. In that case the daughter had been given Ksh 500/- to go and pay for grinding maize at the mill. The complainant failed to return the change having used it to buy sweets for herself. The mother was so un….by her conduct, that she heated a blade of a knife in fire then applied the hot iron on the girl's thighs. On appeal against the sentence, this is what my brother Ojwang J said:

"***The first line of safety for an ordinary citizen of this country is the family unit, which gives emotional and basic social protection and fulfillment, which establishes a sustaining moral framework, which quite often gives the most practical economic arrangements for the sustenance of the several individuals within the family. These co-ordinated relationships constitute the family into a social – organic entity where mutual inter dependence prevails and sustains the dynamic of progress for all the members of the family …That being the case, dispensing of penalties in a criminal case, where the family unit lies at the centre of the incident leading to the laying of the charge, should consistently be guided by a judicial commitment to stabilize the family and whenever it is met, the judicial officer imposing penalties should endeavor to create a second chance for reconciliation within the family. This is not desirable only in principle, it is essential for practical reasons, touching on the best interests of all the members of the family, and indeed, in some cases, the best interests of the child who may have been the victim as well.***

I have quoted these very weighty considerations verbatim and in full because the kind of situation herein is a special kind, this is a father-child situation the father was angry at what he considered to be disobedience, the child had merely expressed (rightly so) his wish not to go to the river and given the reasons – the father's reaction was excessive use of force and bearing in mind he is not a first offender.

That must be punished, but all the other issues, the other children, the sustaining of the family unit, primary recirculation must also be considered. In consequence therefore, six years is not harsh and it is not in the interest of the child or even for justice to be seen to be done, to interfere with the sentence. I decline to interfere with the sentence which is hereby confirmed. The appeal is rejected.

Delivered and dated this **23rd** day of **July 2009** at Malindi.

Appellant present in person.

Mr.Ogoti for State.

H. A. Omondi

JUDGE