REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL REVISION CASE NO. E005 OF 2021

REPUBLIC.....PROSECUTOR/APPLICANT

VERSUS

ENOCK ONYANGO AMUNO....CONVICT/RESPONDENT

(Application for sentence revision arising from the Judgment and sentence passed in Siaya PM's Court Criminal Case No. 390 of 2020 on 2nd March, 2021 by Hon. J. Ongondo, Senior Principal Magistrate)

JUDGMENT

INTRODUCTION

1. The Respondent herein **ENOCK ONYANGO AMUNO** is the convict of the offence of grievous harm contrary to section 234 of the Penal Code, in Siaya PM Criminal Case No. 390 of 2020. Particulars of the offence are that on the 28th day of July 2020 at **South West Alego** in Siaya Sub County within Siaya County, he unlawfully assaulted one **Fredrick Owuor Odhiambo** with a panga occasioning him grievous harm. The convict pleaded not guilty to the charge and the prosecution called five witnesses who established a prima facie case against him. Placed on his defence, the convict gave unsworn testimony and called one witness, his brother, who all testified in denial that the convict ever assaulted the complainant.

2. In his judgment delivered on 3rd February, 2021, Hon. J. Ong'ondo Senior Principal Magistrate found the Respondent guilty of the offence of grievous harm as charged and convicted him accordingly. The trial magistrate then ordered for a presentencing report which was filed upon which the Respondent was sentenced to serve two years imprisonment on 2nd March 2021.

3. As the prosecution has no right of appeal against sentence, they filed an application dated 15th March 2021 before this court invoking section 362 of the Criminal Procedure Code, seeking for revision and or enhancement of sentence imposed on the convict. According to the application dated 15th March 2021 and filed on 17th march 2021, signed by Mr. Laban Ngetich, Prosecution Counsel on behalf of the Office of Director of Public Prosecutions-

a. The trial magistrate meted out sentence that was manifestly lenient given that section 234 of the Penal Code prescribes life imprisonment for that kind of offence;

b. that the trial magistrate in pronouncing sentence failed to take into account the complainant/victim of the offence had been rendered permanently disabled by the chopping off of his right hand which he primarily used to work with;

c. that the trial magistrate was not guided by the evidence on record and the legal principles applicable in the matter before it in meting out sentence;

d. that while sentencing is both a matter of law and judicial discretion, that discretion ought to be guided by evidence and sound legal principles;

e. the trial court was not guided by the Judiciary sentencing guidelines which are in place to guide courts in factoring principles underpinning the sentencing policy which are:

i. proportionality of the sentence to the offending behaviour;

ii. uniformity of sentence-similar offences should attract similar penalty/sanctions

iii. deterrence-a deterrent sentence to discourage or eliminate a vice in the community or society;

iv. retribution- appropriate sentence to act as a punishment for wrong done to help the victim see the injustice that has been served;

v. Transparency-consideration taken as to what sanction the law provides.

f. That the sentence meted out did not serve any retribution whatsoever considering that the victim of the offence feels greatly aggrieved by the decision and dissatisfied with it hence the application.

4. The applicant urges the court to invoke section 362 of the Criminal Code and the Constitutional Provisions to call for and examine the record of the proceedings before the trial courts in respect of this matter for the purpose of satisfying itself the correctness, legality and propriety of the sentence passed and enhance it accordingly.

5. When the application came up before me for directions on 23/3/2021 under I made the following orders:

a. That the registry to serve the convict and the OPP with the application for sentence revision for interpartes consideration;

b. That production Order do issue for the convict Enock Onyango Amuno to respond to the application orally

c. That the complainant too be served by the ODPP to be present in court

d. That the application be heard interpartes on 29th March 2021

6. Parties were accordingly served with the above directions.

SUBMISSIONS

7. Submitting in favour of the application for revision of sentence, Mr. Kakoi Principal Prosecution Counsel relied on the reasons contained in the application for revision of sentence as stated above. Mr. Okanda advocate for the victim complainant also made oral submissions to the effect that the trial court meted out sentence which was inordinately lenient considering the debilitating injuries sustained by the victim who lost his right hand and as he is right handed. That the trial court failed to consider sentencing guidelines namely, proportionality of sentence to the nature of injury sustained, the fact that the victim is a fresh graduate of Survey whose right hand was chopped off which has greatly affected him. He relied on the case of **Moses Owiti Rajuola v R [2018]e KLR para 57** where this court held that it must weigh the interests of the victim and the accused person. Mr. Okanda submitted that the victim walked away from the trial court empty handed and dejected of the judicial system and that justice was not served yet he deserves justice. He urged this court to revises and enhance sentence.

8. In response to the application and submissions by the Prosecutor and victim's counsel, the convict asked for time to engage an advocate and file submissions which the court granted. He submitted that the trial court had considered his mitigation and that he had sought for probation nary sentence. He stated that the complainant was his cousin. In his written submissions filed in court on 1/4/2021, the convict submitted that the application for sentence revision is an afterthought. That the complainant is looking for ways of breaking the convict's family; that he never asked for compensation and that efforts to bargain were futile. That he regrets committing the offence and is concerned about his young family of 2 children aged 5 and 2 years and a wife. That he was the sole breadwinner as his wife is a housewife. He relied on Article 27(1)(2)(4) of the Constitution and stated that he is a law abiding citizen and that serving prison term is not that easy. That he has been suffering from chronic disease yet prison cannot provide him with medication that he requires for chronic obstructor pulmonary disease of which he used to attend clinics at home but not in prison hence he has difficulties breathing at night due to congestion in prison. He attached a Hawinga hospital note dated 31/3/2021 stating that he has the stated problem. He also claims that there is no social distancing in prison hence the risk of Corona virus infection hence the court should not allow revision of sentence imposed on him.

9. In a rejoinder, Mr. Okanda for the victim submitted that the convict is a dishonest person who denied committing the offence and now as an afterthought he brings about the claim that he suffers from some chronic disease yet he never raised the issue before the trial court at the time of sentencing. Further, that how did he get the medical document yet he is in prison and the document is from a clinic which is not within Prison. In his view, the convict was a dishonest and not remorseful considering the injuries sustained by the victim.

ANALYSIS AND DETERMINATION

10. Having considered the application for revision of sentence, the grounds thereof and the submissions by both the prosecutor, the victim's counsel and the convict, I have also perused the proceedings, judgment and sentence by the trial magistrate. The application is no doubt brought under Section 362 and 364 of the Criminal Procedure Code. Section 362 of the CPC provides:

"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."

11. The section donates the power to this court to review proceedings before the sub-ordinate court and satisfy itself as to the correctness, legality or propriety of any finding sentence or order as to the regularity of any proceedings of any such court. This power is also donated to

this court by Article 165 (6) and (7) of the Constitution which provides:

> **"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.**
>
> **(7)For the purpose of clause (6), the High Court may call for the record of any proceedings before any subordinate court or [person, body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."**

12. The Constitution at Article 50 (2)(p) guarantees the accused person the right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

13. It is now settled that sentencing is in the discretion of the trial court**.** In **Wanjema v. R (1971) EA 494 it was stated–**

> **"An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into consideration some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case."**

14. In **Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated:

> **"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"**

15. Similarly in **Bernard Kimani Gacheru vs. Republic [2002] eKLR THE Court of Appeal restated that:**

> **"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."**

16. Although the above cases refer to matters of interference with sentence on appeal, the principles are the same as far as revision of sentence is concerned. This can be seen from the power given to the High Court on revision in S**ection 364 of the Criminal procedure Code** where it is provided as follows:

> **"Powers of High Court on revision**
>
> **(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—**
>
> **(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;**
>
> **(b)……"**

17. Having analyzed the law on sentencing, the issue for determination in this matter is whether this court should revise the two years' imprisonment term imposed on the Respondent convict by the trial court.

18. From the provisions of section 364 of the Criminal Procedure Code, an applicant can move this court to revise the sentence which they consider too lenient, illegal or irregular based on the offence charged and the sentence provided where the trial ended in a conviction. In **Director of Public Prosecution- v- Peter Mcharo Kombo & Another [2018] Eklr,** it was stated:-

> **"The trial subject of the intended appeal ended in a conviction and the DPP is only aggrieved by the sentence imposed thereof which is considered too lenient for the offences in the charge. There being no "acquittal, order of refusal or order of dismissal", there is no right of appeal for the DPP. The convicted person may, of course, appeal the decision under section 347 of the Criminal Procedure Code.**
>
> **….With respect, the Respondents are unwittingly right in referring to the remedy of review being available rather than an appeal."**

19. The court is supposed to satisfy itself on the correctness, legality or propriety of any finding, sentence or order. In exercising revision

jurisdiction, the court is however not supposed to deal with matters which should otherwise be dealt with on appeal. Section 364(5) of the Criminal Procedure Code provides:-

> **"(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."**

20. The application for revision of sentence is properly before this court because the prosecution has no right of appeal where there is a conviction as was in this case.

21. The convict was accorded an opportunity to be heard as required under section 364 (2) of the Criminal Procedure Code which provides"

> **"(2). No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.**
>
> **Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned."**

22. The said section at sub section (3) provides that:

> **"Where the sentence dealt with under this section has been passed by a subordinate court, the high Court shall not inflict a greater punishment for the offence which in the opinion of the High Court, the accused has committed than might have been inflicted by the court which imposed the sentence."**

23. The Respondent/ convict herein was upon conviction for grievous harm, liable to imprisonment for life. This does not mean that he had to be imprisoned for life. In **Daniel Kyato Mwewa V. Republic [2009] eKLR,** the Court of Appeal held that unless a contrary intention is shown, where an Accused Person is convicted and is "**Liable to Imprisonment for Life**," it connotes the maximum Penalty and not the Mandatory Penalty that can be meted out. In addition, it was held that a Court can impose a fine in place of a custodial sentence by virtue of **Section 26 (3) of the Penal Code**.

24. In the case of **Republic –vs- James Kiarie Mutungei [2017] eKLR** Nyakundi J held thus:

> **"The rationale of the High Court as a revisionary authority can be initiated by an aggrieved party, or suo moto made by the court itself, call for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, or propriety, correctness of the order in question. The scope of revision therefore is more restrictive in comparison with the appellate jurisdiction which requires the high court to rehear the case and evaluate the evidence in totality by the lower court to come with a decision on the merits..."**

25. The Supreme Court in the **Francis Muruatetu & another v Republic [2017]e KLR** case made it clear that sentencing was in the discretion of the trial court and therefore the question of sentence being mandatory did not arise, having regard to the mitigating factors and circumstances under which the offence was committed. The apex court stated, *inter alia*, as follows:

> "**[71] As a consequence of this decision, paragraph 6.4-6.7 of the guidelines [Sentencing Policy Guidelines] are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:**
>
> **(a) age of the offender;**
>
> **(b) being a first offender;**
>
> **(c) whether the offender pleaded guilty;**
>
> **(d) character and record of the offender;**
>
> **(e) commission of the offence in response to gender-based violence;**
>
> **(f) remorsefulness of the offender;**
>
> **(g) the possibility of reform and social re-adaptation of the offender;**
>
> **(h) any other factor that the Court considers relevant."**

(Emphasis added)

26. However, whereas the court has a wide discretion in view of the determination of the Supreme Court on the question of sentence, the said discretion cannot be used by the Court of law in a fanciful and whimsical manner. Very strong reasons on consideration of relevant facts have to form the fulcrum for lenient use of the said discretion as was stated by **BENJAMIN N. CARDOZO** in ***The Nature of the Judicial Process* – Yale University Press 1921 Ed page 144** that:

> **"The judge even where he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to drawn his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life'. . ."**

27. Having set out the legal principles herein, the question is, what would constitute an adequate, appropriate and just sentence in the circumstances of this case? In the case of **STATE OF MADHYA PRADESH v MEHTAAB CR. APPEAL NO. 290 OF 2015**, the Supreme Court of India held:

> **"It is the duty of the court to award just sentence to a convict against whom charge is proved. While every mitigating or aggravating circumstances may be given due weight, mechanical reduction of sentence to the period already undergone cannot be appreciated. Sentence has to be fair not only to the accused but also to the victim and society. It is also the duty of the court to duly consider the aspect of rehabilitating the victim."**

28. In deciding an adequate sentence, the court ought to take into account the nature of the offence, the circumstances of the commission, the age and character of the offender, the injury to the individual or to the society as stated by the Supreme in the Francis Muruatetu case (supra), the consequences of the crime on the victim and the members of his family so as to make the crime and the punishment equal or equivalent.

29. The objectives of sentencing as stated in paragraph **4.1** of the **Judiciary Sentencing Policy Guidelines** can be summarized as follows:

> **a. To prevent the occurrence of crime;**
>
> **b. To punish the transgressor and the criminal;**
>
> c. **To rehabilitate the transgressor and the criminal;**
>
> d. **To compensate the victim;**
>
> **e. To deter the offender from committing any criminal acts in the future as well as other people from committing similar offences and**
>
> **f. To protect the community condemnation of the convict.**

8. The Supreme Court of India in the case of **ANTONY PAREIRA v STATE OF MAHARASHTRA (2 AIR 2012 SC 3802)** stated:

> **"70. Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles; twin objective of the sentencing policy is deterrence and correction. <u>What sentence would meet the end of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.</u>**
>
> **71. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence . . ."**

9. In **SANTA SINGH v STATE OF PUNJAB [1978], 4 SCC 190** Justice P.N. BHAGWATI stated:

> **"Proper sentence is the amalgam of many factors such as the nature of the offence, <u>the circumstances--extenuating or aggravation of the offence.</u> The prior criminal record;, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, society and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to a normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence."**

30. See also Wakiaga J in **Republic v Titus Ngamau Musila [2018] eKLR.**

31. I now turn to the case before this court. The trial court proceedings reveal that the Respondent/ convict was a cousin to the victim. Their families had an outstanding boundary disputes which had not been resolved. The convict is a first offender and is said to be calm. He has a wife and two children who live in Nairobi. The victim, according to the medical report produced as an exhibit, suffered debilitating injury of loss of his right hand at the wrist joint. He had graduated as a diploma holder in Land survey which was his dream and passion and because the work involves use of his two hands and he is right handed, he sees no hope of working as a land surveyor.

32. The convict is said to have been cutting a tree on a boundary shared by the two families when the victim went to inquire as to why the convict was cutting the tree. A quarrel ensued and the convict who had a panga used it to slap the victim's brother Arthur on the back then the victim went to separate the two that is when the convict aimed at the victim's neck three times. The victim ducked on all the three occasions and when he raised his hand to block the panga from cutting his neck as there was a tree that blocked him from moving further, the convict found the victim's hand and cut it from the wrist joint area. The hand had to be amputated because it had been severed 75%, according to PW8 the Clinical Officer.

33. The victim attended these proceedings and the court was able to see him with a chopped off right hand. The convict denied committing the offence all through the trial until he was found guilty. In mitigation, he urged the court to have mercy on him saying he was remorseful and has children aged between 5 and 2 years old. He prayed for a non-custodial sentence.

34. There is no evidence that the victim was armed or was a danger to the life and limb of the convict herein who had a panga with him. A panga is a lethal weapon. It was intended to be used to cut the tree and not the person who was not armed at all. The fact of the victim going to where the convict was, was not to initiate a fight but to question the convict why he was cutting trees which the victim believed belonged to his family's land.

35. In the judgment, the trial magistrate tended to fault the victim for going to where the convict was. This is what the unpaginated judgment says in the ***Analysis and determination***:

> **"The accused had gone to select trees to cut in order to make his mother a dishes rack. He absolutely had no intention to injure the PW1 ashe did were it not for the complainant who confronted him, asking him why he was cutting the trees. It was admitted for the prosecution by PW-P.C Zablon Nyaga that the tree accused had cut was among the trees standing on a common boundary between the parcels owned by the complainant and accused's parents respectively.**
>
> **It was the complainant who in the company of his brother Arthur confronted the accused. Accused was alone until his brothers came later. The accused' intention when he set to go to the farm was to cut a tree and not the complainant. If the complainant had not followed him to where he was cutting a tree on a common boundary, the accused would not have inflicted those injuries on the complainant and there won't have been any confrontation."**

36. No doubt the above assessment by the trial magistrate influenced him in his sentencing of the convict. The trial magistrate relied on the cases of **Ezekiel Barongo vs Republic**,**CRA NO.104 of 2019 –Kisii High Court** where the complainant only lost a tooth and was sentenced to serve 2 years imprisonment and on appeal, the High Court affirmed the sentence saying it was lenient; and **Irene Chepkemoi v R , CRA NO.18 of 2020 Kericho High Court** where Asenath Ongeri J reduced the offence of grievous harm to assault causing actual bodily harm and released the convict to the term served in prison.

37. I have read the authorities relied on by the Trial Magistrate. The above said two authorities have no injuries similar to the ones suffered by the victim in this case and the circumstances under which those offences were committed are totally different. In the **Irene Chepkemoi** decision, it is obvious that the offence was reduced to assault because the complainant, according to the learned Judge, could not tell whether or not she had suffered a fracture of the hand. Following the assault. In the earlier decision of **Ezekiel Barongo**, loss of one tooth cannot be equated to loss of a hand. Furthermore, in both cases, the appeals were by the convicts who also challenged the two year prison terms imposed on them. The prosecution did not apply for enhancement of the said sentences.

38. This court would not ordinarily interfere with the discretion of a trial court in matters sentencing unless it is demonstrated that the trial court acted on some wrong principle or overlooked some material factors or issued a sentence that was manifestly and inordinately low, where such sentence is being challenged by the prosecution**. (See Macharia vs. Republic [2003] EA 559**). In addition, this court has in the past decisions meted out lenient sentences having regard to circumstances under which the offences were committed and mitigations.

39. However, am persuaded that the trial court in the instant case acted on wrong principles in sentencing and overlooked material factors in sentencing the convict. The reasons for my findings are that the circumstances in the ***Barongo*** case which he relied on were totally different in that the appellant was rescuing a lady who was being fought by the victim and in the process he punched the victim on his mouth, fracturing his one tooth which was extracted.

40. In addition, in the Irene **Chepkemoi** case, Asenath Ongeri J reduced the charge of grievous harm to assault because the victim stated that she could not tell if she had a fracture of the hand as assessed by the Clinical Officer. The appellant had been sentenced to two years imprisonment. Again the circumstances under which that offence of assault was committed and the extent of the injuries cannot be equated to the injury suffered by the victim in this case which was loss of the right hand from the wrist joint.

41. In my humble view, the trial court did not take into account the aggravated nature of the offence against the victim of the offence. the trial court record shows that throughout the engagement between the convict and the victim who are cousins, there was no evidence that the victim was ever armed with any weapon or that he posed any serious threat to the life and limb of the convict who was armed with a panga for cutting of trees but which he used to cut the complainant.

42. The convict cut the hand of the victim when according to evidence on record, the latter raised it to prevent the convict from cutting the victim's neck in a three times attempt. Was this necessary considering the fact that the victim was his cousin and was not armed and neither

was his brother armed? Could the convict not have merely pushed the complainant and even thrown away the panga from the site?

43. Taking into account the principle in **Republic v Guilfoyle [1973] 2 ALLER 844**, I find that the prosecution has raised a compelling reason to warrant revision the sentence that appears too lenient considering similar sentences passed in respect of similar offences. It is imperative that justice must not only be done but be seen to be done in an even and regular fashion in respect of similar offences.

44. It is worth noting that this court has held before that depending on the circumstances of each case and mitigation by the convict, sentencing is in the discretion of the trial court. However, that discretion should not be whimsical. Where there are aggravating circumstances as was in this case where the victim was not armed and simply sought to establish why the convict was cutting the tree, the convict cannot claim to have been justified in cutting off the victim's hand. The sentence imposed was in my view inordinately lenient to the extreme.

45. In **Peter Kalunge M'mukira v Republic [2013] eKLR** the Appellant was convicted of causing grievous harm contrary to section 234 of the Penal Code. After a full trial the court found him guilty of the offence and sentenced him to 15 years imprisonment. He appealed. Dismissing the appeal, Lesiit J upheld the 15 years imprisonment and stated:

> **"I have considered this appeal. I have perused the proceedings of the lower court. Regarding the motive of the attack it is clear from the record that the issue was not land but the fact that the Appellant was annoyed that the complainant had reported him to the police after the Appellant stole his cow. I noted that the motive for this attack was to silence the complainant so that he does not pursue the case he reported to the police. <u>The Appellant was found guilty of chopping off the complainant's hand at the wrist joint.</u> From the testimony of the complainant and eye witnesses that amputation was as a result of the accused cutting the complainant on the hand three times. It is clear from the circumstances that the reason for the attack was not provocation that the Appellant submitted before me but it was in execution of a premeditated attack to cause grievous harm to the complainant.**
>
> **…….Given the circumstances of the case I am satisfied that the imprisonment of 15 years imprisonment is neither excessive nor harsh. I therefore find no merit in this appeal and dismiss it accordingly."**

46. In **Ali Gababa Dabasa v Republic [2015] eKLR,** Kiarie Waweru Kiarie J allowed an appeal against maximum **life imprisonment** where the appellant severed the hand of the victim from the wrist and substituted the sentence to ***fifteen years imprisonment.*** The learned Judge stated as follows and I concur:

> "**Section 234 of the Penal Code provides as follows:**
>
> > **"Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."**
> >
> > **<u>The complainant's hand was completely severed at the wrist. The record is scanty as to the cause of such a brutal act, except that it was done after the Appellant went to the home of the complainant.</u>**
> >
> > **The Appellant indicated to this court that he is 23 years old. He indeed looks young. He is a first offender. These two facts ought to have persuaded the trial court not to mete out the maximum sentence.**
> >
> > **After considering that the complainant lost his hand and that the Appellant is a first offender and that he is only 23 years, I set aside the life sentence meted out by the trial court and substitute it with 15 years' imprisonment to run from when he was sentenced by the trial court."**

47. In the above case, the appellant had pleaded guilty to the charge of grievous harm and had been convicted on his own plea of guilty which the court found to have been unequivocal.

48. In this case, the convict denied committing the offence although he conceded that the panga which he had is the one which severed the victim's right hand from the wrist. The convict is 33 years old as per the presentence report and has a wife and two children. He is a first offender.

49. In his submissions, he claimed that he suffers from a chronic disease for which he has been receiving treatment. He attached a treatment chit from Hawinga Health Centre dated 31/3/2021 which claims that he is an old case of **chronic obstructive pulmonary disease** and is on follow up but attended the clinic last on 15/10/2019 and was doing well with medicines. The said chit places his age at 35 years, not 33 as per the presentence report. Surprisingly, as correctly pointed out by the victim's counsel Mr. Okanda, the convict did not raise any issue of ill health during the trial and in his mitigations before he was sentenced.

50. The presentence report too does not mention any ill-health on the part of the convict meaning the report is made up and an afterthought, intended to escape appropriate sentence. I find that belated plea not being supported as the victim does not even tell the court how he procured the aid document while he is in prison custody. Its authenticity is doubtful. I reject it.

51. The convict is concerned about his family which depends on him. He claims that he tried reconciliation to no avail but there is nothing on record to show that he tried to reconcile with the victim who is his cousin and the attempt was dismissed. Nonetheless, the victim who is aged 28 years has lost a hand forever. He is a young graduate of survey whose livelihood is dependent on his right hand or both hands. This

was no accident at all. The victim is forever challenged in feeding himself, writing, bathing, lifting items and adjusting without the right hand. He has suffered stigma from his friends and associates. As a land surveyor graduate, which work depends on use of both hands and drawing, he has been rendered unable to practice his profession.

52. **"Grievous harm"** is defined under **Section 2** of the **Penal Code** to mean:

> **"Any harm which amounts to maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense."**

53. The victim sustained injuries that permanently disfigure him and deprive him of livelihood in line with his profession, considering issues of unemployment in this country. Circumstances of the offence call for deterrent sentence and the victim deserves justice too. Two years imprisonment in such circumstances and injury was a slap on the wrist.

54. In the end, and relying on the persuasive decisions of Ali Gababa Dabasa v Republic (supra) and Peter Kalunge M'mukira v R (supra), I find that the application for sentence revision is merited. I allow it. I set aside the sentence of 2 years imprisonment imposed on the Respondent Enock Onyango Amuno and substitute it with a prison term of fifteen (15) years imprisonment to be calculated from the date when the respondent's bond was cancelled on 23rd November, 2020 by the trial court.

55. In accordance with the provisions of section 367 of the Criminal Procedure Code, I hereby direct the Deputy Registrar of this court to extract and Certify this decision and serve the same forthwith upon the trial Magistrate who shall make orders that are conformable to the certified decision of this court herein and amend the record of sentence as revised by this court on the Respondent/convict, Enock Onyango Amuno. The trial court shall in addition, upon receipt of this Judgment and Certified Order, amend and sign the warrant of commitment for a sentence of imprisonment (CRIMINAL 102)(IMP) dated 2nd March, 2021 to reflect the fifteen (15) years prison term to be calculated from 23rd November 2020.

56. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 7TH DAY OF APRIL, 2021

R.E.ABURILI

JUDGE

In the presence of:

Mr. Ngetich prosecution Counsel

Mr. Okanda Counsel for the victim

The Victim Fredrick Odhiambo Owuor

Enock Onyango Amuno the Respondent Convict in person

CA: Mboya