



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 3 OF 2019

REPUBLICAPPELLANT

VERSUS

BARRACK ODHIAMBO OBAL.....1ST RESPONDENT

BENARD OTIENO OCHIENG.....2ND RESPONDENT

GORDON ONYANGO 3RD RESPONDENT

[Being an appeal from the Judgment of M.C. Nyigei (RM) delivered on 30th August 2018 in SPM's Court in Nyando Criminal Case No. 400 of 2015]

JUDGMENT

The appeal before me was preferred by the prosecution, and it is in relation to the sentences which the trial court imposed upon the Respondents, **BARRACK ODHIAMBO OBAL**, **BERNARD OTIENO OCHIENG** and **GORDON ONYANGO**.

1. The said Respondents were convicted for the offence of **Grievous Harm** Contrary to **Section 234** of the **Penal Code**. Thereafter, they were sentenced to perform **Community Service Order (CSO)** at the Ombaka Primary School, for a period of Nine (9) Months.
2. In the Petition of Appeal, the Appellant stated that the sentence was too lenient and was therefore against the interest of justice. The Appellant urged this Court to enhance the said sentence.
3. In their supplementary record of appeal, the Appellant made the point that the trial court had misdirected itself when it held that the Respondents had had a fight with the Complainant.
4. The Appellant's position was that the evidence adduced by the Prosecution disproved any assertions about a fight between the Complainant and the Respondents.
5. When canvassing the appeal, the Appellant first set out to persuade me that the conviction against the Respondents was safe and proper.
6. However, as there was no cross-appeal by the Respondents, to challenge their conviction, this court does not need to determine whether or not the conviction was safe and proper.
7. The only issue for determination is whether or not the sentence was so lenient that it constituted an injustice to the victim of grievous harm.
8. Pursuant to **Section 234** of the **Penal Code**, any person who unlawfully does grievous harm to another person is guilty of a felony and is liable to imprisonment for life.
9. In the light of that provision of law, the Appellant submitted that the sentence that the trial court imposed was not proportionate to nor commensurate with the gravity of the crime and the manner in which the crime was committed.
10. It is well settled that the principle of proportionality must be embraced by the court when handing down a sentence.

11. In order to attain the said principle of proportionality, the court would have to take into account factors such as;

a. Gravity of the offence;

b. Circumstances in which the offence was committed;

c. Aggravating factors;

d. Mitigating factors;

e. Appropriateness of sentence;

f. Public policy in relation to the nature of the offence;

g. Impact on the victim.

12. In this case the Respondents are three in number. They attacked the Complainant when he was on the farm belonging to the family of the Complainant.

13. The attack was so savage that the Complainant's hand was literally chopped off. In effect, the Complainant was maimed for life.

14. I therefore find that the nature of the offence; the circumstances in which it was committed and the manner it was executed, called for a deterrent punishment.

15. In mitigation, the Respondents pleaded for non-custodial sentence. They said that they were young people who still had a long life ahead of them.

16. The Respondents pleaded for an opportunity to reform whilst in an environment which allowed them to continue providing for their families.

17. The learned trial magistrate sought the assistance of the Probation Officers, so as to enable her make an informed decision. The trial court also directed the Probation Officers to provide a Victim Impact Assessment Report.

18. The Probation Officer, Mr. Johnson Oyuke recommended C.S.O. for each of the Respondents herein. However, it is also noted that the probation report emphasized the need for reconciliation and restitution.

19. Meanwhile, in the Report about the Complainant, the probation officer described the Complainant as having been a renowned farmer. Prior to the incident the victim reportedly earned about Kshs 150,000/= (net) annually, from his farms where he planted rice, tomatoes and sugarcane.

20. However, after he lost his left hand, following the attack by the Respondents, the Complainant lost his source of livelihood. The probation officer described him as "*traumatized and immobilized.*"

21. Although the Complainant had forgiven the offenders for their criminal action, he was adamant that they needed to;

"..... reach out for a reconciliation; cater for financial losses and bills he incurred, instead of (victim) hiring an advocate at big money, when they are aware they subjected him to a state of deprivation."

22. In the light of the Probation Report and Victim Impact Assessment Report, I find that the learned trial magistrate erred, when she focused only on the recommendation for non-custodial sentence. Accordingly, I do allow the appeal and set aside the sentence which was handed down by the trial court.

23. However, before imposing an appropriate sentence, I will give to the parties herein, an opportunity to address the court on the issue of what each of them construes as being appropriate sentence.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF JULY 2021

FRED A. OCHIENG

JUDGE