



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 37 OF 2018

ABDUL OKELLO NYONGESA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal case No. 117 of 2017 of the Principal Magistrate's Court

at Ndiwa by Hon. Mary A.Ochieng– Senior Resident Magistrate)

JUDGMENT

1. Abdul Okello Nyongesa, the appellant, was convicted of the offence of grievous harm contrary to section 234 of the Penal code.
2. The particulars of the offence were that on 9th December, 2016 at Pala Koguta location, Ndiwa Sub County of Homa Bay County, jointly with another, unlawfully did grievous harm to Sharon Anyango Jonyo.
3. He was sentenced to serve seven years imprisonment. He has appealed against both conviction and the sentence.
4. The appellant was in person. He raised the following grounds of appeal:
 - a) That the learned trial magistrate erred in law and in fact by convicting him on insufficient evidence.
 - b) That the learned trial magistrate erred in law and in fact by convicting him without adequate evidence of identification.
5. The state opposed the appeal through Mr. Ochengo Justus, the learned counsel.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. Sharon Anyango (PW1) testified that the appellant was known to her prior to the incident that gave rise to this case. She testified that when the appellant and his companion entered into her premises, she told her workers not to serve them for it was 10.30 p.m., time to close the bar. The duo were known to her. When she switched off the music, the two approached the counter where she was while each was wielding a machete. The two entered into the counter area and started to attack her. At this juncture her two workers ran out. The appellant and his colleague viciously attacked her with the machetes.
8. The evidence of Jane Awuor Juma was that when the appellant entered the bar at 10.30 p.m., the complainant who was the business proprietor told her to ask the duo to leave for they were closing. The duo approached the counter after the complainant had switched off the music. The two entered and pounced on the complainant with the machetes they had. She ran out to look for assistance.
9. This was an issue of recognition. The circumstances were favourable for positive recognition. There was therefore no mistaken identity.
10. Upon my perusal of the evidence on record, I find that there was sufficient evidence upon which the conviction was founded.
11. After the learned trial magistrate had convicted the appellant, she sentenced him to seven years imprisonment. 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.

12. It is trite law of practice that an appellate court can only interfere with the sentence meted out by the trial court upon satisfaction of some circumstances as were spelled out in the case of **Nilsson vs. Republic [1970] E.A. 599,601** as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly 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 a trial Judge unless as was said in James v Rex (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 criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewcity (1912) C.CA 28 T.LR 364.

13. I have evaluated the evidence on record and concluded that in the circumstances of the offence, the sentence by the learned trial magistrate cannot be said to be harsh or excessive. I have no reason to interfere with it. The appeal is accordingly dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 6TH DAY OF OCTOBER, 2021

KIARIE WAWERU KIARIE

JUDGE