



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 28 OF 2019

JAMES NJERU KARIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence from the Original Mpeketoni Criminal Case No. 238 of 2017 delivered by Hon.R.G.Mundia – Senior Resident Magistrate on 24th June, 2019).

CORAM: Hon. Justice R. Nyakundi

Mr Mwangi for the state

Appellant in person

J U D G M E N T

The appellant was charged alongside for four others for the offence of Attempted Murder as defined in terms of Section 220(b) of the Penal Code. Alternatively, he was charged with Causing Grievous harm defined in terms of Section 234 of the Penal Code. After considering all the material placed before it, the trial court found the appellant guilty of the offence of causing grievous harm and proceeded to sentence him to effective twenty (20) years imprisonment.

Having been dissatisfied by the trial court's decision, the appellant instituted the instant appeal against both conviction and sentence. Despite having listed numerous grounds of appeal some of which are quite imprecise, the appellant appears to be complaining about the following issues:

- 1. That the learned trial magistrate did not consider his defence when determining the matter.***
- 2. That the sentence handed down to him is manifestly harsh and excessive.***

However, in the appellant's submissions filed in support of the appeal, he does not appear to be challenging conviction but rather casts a stone on the sentence meted out on him. This court cannot overemphasize the need for grounds of appeal to be always clear and precise. They should set out in detail the points upon which the appellant relies. They serve a purpose which is to advise the trial magistrate of the points challenged on appeal.

Be that as it may, the appellant challenges the sentence imposed on the basis of the decision in ***Francis Karioko Muruatetu & Another v Republic (2017)*** and that the sentence is unreasonably stiff. He further relies on Section 216 and 329 of the Criminal Procedure Code, Cap 74 of the Laws of Kenya, and stressed that mitigation is part of the trial process under Section 229 of the Act. The said Section provides that the court may before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. As rightly put by the appellant, mitigation is a congruent element of the trial process.

The appellant has, therefore, addressed the court on numerous factors of mitigation. He brought to the attention of the court the fact that he is remorseful, he is a first offender and he is the sole breadwinner for his family. He asked this court to stand guided by the mitigation principles encapsulated in the case of ***Muruatetu***. The appellant also raised a pertinent issue regarding approximately two years of pre-trial incarceration. He was not bonded before his conviction and sentence. Reliance was placed on the case of ***John Kathia M'itobi vs Republic (2018)*** where Justice Majanja stated that, "the petitioner remained in pre-trial custody for a period of two years from the time he was charged in 2004 up to the time he was convicted in 2006. In sentencing the appellant in that matter, Justice Majanja further stated that an accused is titled to take into account the period spent in pre-trial custody by dint of provisions to section 333(2) of the Criminal Procedure Code.

The State on the other hand opposed the appeal. Counsel, Mr. Joseph Kamanu, argued that the appeal is bereft of merit as the prosecution

discharged its burden of proof beyond reasonable doubt. He stressed that the appellant inflicted grave injuries upon the complainant which justify the conviction and lengthy sentence imposed on him. Mr. Kamanu cited a numerous authorities in support of his case. He cited the cases of *Rex v Donovan (1934) 2KB 498, R v Chan Fook (1994) 2 ALL ER 557* to define actual bodily harm. It was therefore argued that the court is bound to uphold both the conviction and sentence on the basis that the atrocious act visited upon the complainant's person shall forever have an indelible mark as his manhood was been taken away.

In determining an appeal, the court must fully understand its duty as the first appellate court as stated in the case of *Pandya vs. R (1957) EA 570* which is to, "subject evidence as a whole to a fresh and exhaustive examination and for this court to arrive at its own decision on the evidence, it must weigh evidence and draw its own conclusion and its own findings while making allowance for the trial court had the advantage of hearing and seeing the witnesses."

Analysis and Determination

In this appeal, the appellant is not challenging his conviction for the offence of causing grievous bodily harm to the complainant. His complain is largely rests on the sentence which he considers to be harsh and excessive. The onus rests with the appellant to place before the court, circumstances which may justify the court's interference on the sentence meted out by the learned trial magistrate. The state Counsel has given is version of the case and I have seen no misdirection on the part of the trial court as far as the appellant's conviction is concerned. I have considered all the documents placed before me and the sole issue for determination is whether or not the sentence meted out by the learned magistrate is harsh and excessive.

It is trite law that, decisions regarding sentences of the inferior courts are discretionary and can only be interfered with by a superior courts when they are of the view that the said courts have not exercised their discretion judiciously. An examination of the offence of causing grievous bodily harm lead me to the conclusion that a term of imprisonment is imposed particularly where the assault causes serious injury and or disfigurement. In that regard, particular attention is given to the doctor's reports as it is through their findings that a court can make an informed assessment of the severity and consequences of the assault on the complainant.

In the instant matter, the complainant sustained serious injuries and the medical report revealed that the injuries were serious and that there was a likelihood of permanent disability. The appellant was incapacitated by the injuries inflicted upon him that he even failed to testify in court. A Psychiatric Report compiled by Pw7, Dr. Mwangombe revealed that the complainant could not testify as he was suffering from post-traumatic stress disorder. Pw9, the doctor who tendered medical evidence testified that the complainant suffered injuries to head, fractured ribs, punctured lungs and most notably his penis was amputated. He was confined to bed and could only move by use of a wheel chair.

The only mitigatory factor in favor of the appellant is that he is a first offender. The principle of keeping first offenders from prison is not a be-all-and-all procedure. It is a guiding principle which should always be applied with caution. In appropriate cases, its effect would be on the severity of the sentence. The courts have it clear that where there is mindless and vicious assault, particularly with a dangerous weapon, even first offenders will be given severe effective sentences. A clear and loud message must be sent out there that perpetrators of such crimes will be adequately punished. The trial court in considering the appropriate sentence considered that the appellant was a first offender with family responsibilities. By amputating the appellant's penis, the appellant stole a very important organ of the complainant's life. He will not be able to enjoy some of the pleasures that life naturally offers leave alone procreation.

I therefore dismiss the appeal as I find no misdirection on the part of the trial magistrate. I hold the view that the sentence fitted the circumstances of the offence. On the question of pre-incarceration, the appellant's sentence shall run from the date of his arrest.

I accordingly dismiss the appeal entirely.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF OCTOBER, 2021.

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R. NYAKUNDI

JUDGE

In the presence of

1. MR. MWANGI FOR DPP

2. APPELLANT