REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CRIMINAL APPEAL NO. 93 OF 2018

JOSHUA MUTINDA WAMBUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being an Appeal from Original Conviction and Sentence in Criminal Case No. 381 of 2018 By Hon. S.K. Ngii-SRM

J U D G E M E N T

1. **Joshua Mutinda Wambua**, the Appellant herein, was charged and convicted of the offense of grievous harm contrary to ***Section 234 of the Penal Code vide Mutomo Senior Principal Magistrate's Court Criminal Case Number 381 of 2018.***

2. The particulars of the offense were that on 19th April 2018, at around 9 am at Vote sub-location Kyatune Location, Mutomo, within Kitui County, he unlawfully did grievous harm to Joseph Kitila Musya.

3. The record from the Lower Court shows that the Appellant initially admitted to the charge as read but when the facts were read out, he denied the same and the matter went into full trial upon which he was found guilty by the trial court convicted and sentenced to serve 20 years' imprisonment.

4. He felt aggrieved and preferred this appeal raising five grounds but before I consider the appeal, I will consider the summary of the evidence presented before the trial court.

5. The Complainant (PW1) testified that he found the Appellant grazing his cows on his crops at his farm and when he inquired why he was damaging his crops, the Appellant attacked him with a panga chopping off his index finger and injuring the ring finger. The severed finger was produced as P. Ex 3 by investigating officer (PW3) who also tendered blood-stained trouser and short trouser as P. Ex. 4 and 5 respectively.

6. The evidence of the Complainant was corroborated by PW2, Isabella Nyambura, a wife to the Complainant, who added that the Appellant threatened to kill both of them accusing them of witchcraft claiming that they (Complainant and his wife) were responsible for the death of his sister.

7. The medical evidence tendered by Ruth Mutinda (PW4) a clinical Officer at Mutomo Hospital corroborated the evidence tendered by Complainant, PW2, and PW3 that the Complainant had been injured and had his left finger chopped off.

8. When placed on his defense, the Appellant conceded that he had chopped off the index finger of the Complainant using a panga but defended himself saying that he was trying to fend off an attack by the Complainant. He was supported by DW2 who testified that he found the Complainant holding a stick and that the Appellant responded by cutting off the Complainant's finger.

9. The trial court evaluated the evidence and found that the evidence tendered by the prosecution had proven beyond doubt that the Appellant had assaulted the Complainant and caused him grievous bodily harm. The court then as observed convicted and sentenced him to serve 20 years' imprisonment.

10. The Appellant being dissatisfied filed this appeal and raised the following 5 grounds namely: -

(i) That the trial magistrate erred in law when he dismissed his defense that he was guarding himself against the attacker.

(ii) That the trial magistrate erred by depending on single evidence which is the Complainant's evidence without any other eye witness against his evidence which he clearly states that the complainant attacked him in his home place 1.5 Kilometers away from his residence and that he cut himself when he hit the panga that he was carrying while herding cattle.

(iii) That the constitutional rights of having all the necessary material in preparedness to answer the accusations were denied when the trial magistrate failed to furnish the Appellant with police statements as well as witness proceedings even after he sent family members to have them brought to him.

(iv) That the trial magistrate erred by depending on hearsay evidence.

(v) That the trial magistrate erred by depending on hearsay evidence.

(vi) That the trial magistrate erred by convicting him that he didn't cross-examine the witness since he could not recall what took place. He prayed to be furnished with proceedings as well as getting a chance to be before the court during the hearing and verdict of his Appeal.

11. In his written submissions, the Appellant essentially admits that he assaulted the Appellant but contends that the circumstances leading to the commission of the offense were due to an altercation between him and the Appellant. He submits that the Complainant had falsely accused him of allowing his cattle to trespass into his farm to destroy crops. He claims that the assault was not premeditated as there was no history of bad blood between them.

12. He has asked this court to interfere with the conviction and sentence and relies on the case of ***Ogolla S/O Owuor versus Republic (1954) EACA 270*** where the court set a precedent of situations when an Appellate court can interfere with sentence meted out. The court held that the court can only interfere when it is shown that the trial court considered irrelevant facts while passing the sentence and that the sentence itself was excessive as to amount to an error in principle.

13. The Appellant has also cited the following decisions to support his appeal.

(i) ***Ramnlal Tiambaklal Bhatt versus Republic (1957) EA.***

(ii) ***Geoffrey Njuguna Gacara versus Republic [2009] eKLR***. In that case, the Appellate Court, while taking into account that the Appellant was drunk when he committed the offense, reduced the sentence imposed stating that it was not clear why the trial court failed to take into account the level of drunkenness of the Appellant.

(iii) ***Gabriel Wanjohi Macharia versus Republic [2015] eKLR*** where the High Court reduced the sentence meted out on the Appellant owing to his state of mind (mental illness), which had not been taken into consideration by the trial court.

14. The Respondent through the Office of the Director of Public Prosecution has opposed this appeal through written submissions dated 14th July 2021. The Respondent submits that, the only issue in this appeal is the sentence and that the sentence meted out was not excessive but appropriate in the circumstance. It contends that the trial used exercised its discretion and meted out the 20 years' imprisonment. it urges this court not to interfere with that discretion and has relied on the decision of ***Macharia versus Republic (2003) EA 559***.

15. This court has considered this appeal and the response made by the state. The Appellant was charged with the offense of causing grievous harm Contrary to ***Section 234 of the Penal Code***.

The provisions of ***Section 4 of the Penal Code*** define grievous harm as: -

''any harm which amounts to a main or dangerous harm, or seriously or permanently injuries health, or which is likely so to injure health, or which extends to permanent disfigurement, or any permanent or serious injury to any external organ, membrane or sense.' Further, the same section defines maim as 'the destruction or permanent disabling of any external or internal organ, member or sense.'

16. From the definition provided under the Penal Code, it is not in dispute that the nature of injuries sustained by the Complainant meets the threshold of what is defined as grievous harm. The P3 form produced before court described the depth of the injuries as;

Deep cut wound of the left ring finger with complete disarticulation of left 5th phalanx. The Left 4th phalanx is fractured.

PW4, Clinical Officer, Ruth Mutinda, while reiterating what was captured on the P3 form, informed the court that the Complainant's small finger (the left 5th phalanx) had been chopped off and the ring finger (the left [phalanx) had deep cut with a fracture. There is no doubt therefore that injuries suffered by Complainant were grave.

The Complainant suffered permanent injuries inflicted by the Appellant which left him permanently deformed.

Section 234 of the Penal Code provides for the sentence that an offense of grievous harm attracts as follows;

''Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.''

17. From the evidence tendered, there is no contest that the Appellant inflicted those de-capacitating injuries on the Complainant. The Appellant himself admitted the fact but claimed that he was defending himself.

In an offense of assault or grievous harm, the defense of self-defense is unavailable to an accused person. Besides that, the Appellant did not prove that he was attacked before he inflicted the injuries to the Complainant. The trial court evaluated the evidence well and arrived at the right conclusion that the evidence tendered had proved beyond doubt that the Appellant was guilty of the offense. The Appellant had initially also pleaded guilty to the offense before changing his mind after the facts were read to him. There is no doubt, therefore, that the conviction of the Appellant was well-founded and the same is upheld for those reasons.

18. On sentence, the general principle in law is that the Appellate Court should only intervene where the subordinate court disregarded a material fact or considered an irrelevant factor or that the sentence is manifestly harsh or excessive as they constitute an error of principle. The court of Appeal in ***Macharia versus Republic (2003) EA 599*** put it clearly when it observed as follows: -

> ***''The court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant hey might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by the trial judge unless it was evident that the judge acted upon some wrong principles or overlooked some material factors.''***

19. The trial court when meting out the sentence against the Appellant herein considered the seriousness of the injuries sustained by the Complainant. The trial court also considered the rule of law, personal safety, and security of each person guaranteed by the law. The Appellant had accused the Complainant of witchcraft which accusations I find to be quite prevalent in this area. This court takes judicial notice of the fact that the same accusations which most of the time are false accusations can lead to either serious injuries or even murder. It is, therefore, something not to be taken lightly. It should be made clear to all and sundry in this county and beyond that in this country, there is a rule of law and one cannot take the law into his own hands for any reason. They should report any matter to the police and let the law take its course.

20. Having said that, the trial court considered the mitigation of the Appellant and factored in his remorsefulness and the fact that he was a first offender. The offense committed, however, was grievous harm. According to the judiciary sentencing Policy Guidelines, a court is required to take into account the aggravating circumstances for example include serious physical and psychological effects on the victim and the type of weapon used to injure the victim. In this instance, the physical effects of the injuries inflicted on the Complainant were clear. He brought the severed finger to the court during the trial which was later tendered in evidence. He suffered permanent injuries and normal use of his left hand. The weapon used (a panga) was crude and dangerous.

21. This court is however minded to consider the fact that the purposes of sentencing the accused person. Should not be just positive, or for purposes of retribution but deterrence, rehabilitation, restorative justice, and community protection. This court finds the Appellants offer to compensate the victim, a good gesture showing remorsefulness and need for reconciliation. It is on that ground, that while I am minded to uphold the conviction, the sentence of 20 years imprisonment is hereby reduced to 10 years, and in addition, under ***Section 175 (1) of Criminal Procedure Code,*** the Appellant shall pay compensation of Kshs. 50,000 to the Complainant. In default of the said compensation, the Appellant will serve extra five years in prison which cumulatively will be 15 years' imprisonment.

DATED, SIGNED, AND DELIVERED AT KITUI THIS 7TH DAY OF OCTOBER 2021.

HON. JUSTICE R.K. LIMO

JUDGE