



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CR. APPLICATION NO. 31 OF 2020

JOSEPH ODHIAMBO AYOO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, **JOSEPH ODHIAMBO AYOO**, was convicted for the offence of **Grievous Harm** contrary to **Section 234** of the **Penal Code**. He was then sentenced to **SEVEN (7)** Years imprisonment.

1. By an application dated 12th August 2020, the Applicant asked this Court to undertake a Revision of the sentence. He asked the Court to either reduce the length of the custodial sentence or to substitute it with a non-custodial sentence.
2. The grounds cited by the Applicant, for the application were as follows;

“1. That the learned magistrate erred in law and fact by securing my conviction on the charge which goes against the weight of the evidence.

2. That the learned magistrate convicted me without according me a fair trial.

3. That the learned magistrate convicted me without considering my defence.

4. That I pray that I may be furnished with trial proceedings in order to raise more grounds of appeal.”

3. Clearly, the grounds upon which the application is founded, go into questioning the conviction of the application. Indeed, there is not a single ground, on the face of the said application, which addresses the question of the sentence.

4. Nonetheless, in the written submissions, the Applicant stated that his aim was to seek either a reduction of the 7 years custodial sentence, or to have it substituted with a non-custodial sentence.

5. The Applicant told this Court that the incident in question, was not intentional. His contention was that the incident was accidental, whilst he was trying to defend himself from his “*uncontrollable Uncle*”, who was jealously desired the land which had been given to the Applicant’s mother, by her father.

6. The Applicant said that he was a total orphan. He had been taken care of by his maternal grandmother. He said that his said grandmother was still alive.

7. Nonetheless, in an endeavor to ensure that the Applicant did not inherit the parcel of land which had been given to his mother, the uncle visited him.

8. According to the Applicant, the uncle was armed with a panga, and he intended to kill the Applicant. However, the Applicant defended himself against the attack; and it was in that process that the panga cut the uncle’s finger.

9. The Applicant said that he had been trying to grab the said panga from his uncle, when it accidentally cut the uncle’s finger.

10. He also told the Court that the whole incident took place inside his grandmother's house, when the grandmother was around.
11. At the time of the incident, which was at 2300 hours, the Applicant was inside the grandmother's house, as that is where he used to sleep.
12. However, the grandmother allegedly refused to record a statement, because she feared for her own safety. Instead, the grandmother allegedly advised the Applicant to run away, in the middle of the night, because the uncle was becoming too aggressive and uncontrollable.
13. The Applicant ran away, for his own safety, as advised by his grandmother.
14. The Applicant told this Court that he feels very remorseful and he therefore asked for forgiveness from both the Court and his Uncle.
15. In the circumstances, the Applicant asked this Court to take into account his mitigation, and to reduce the sentence.
16. The Respondent opposed the application.
17. First, Ms Odumba, learned State Counsel pointed out that the offence for which the Applicant was convicted, carried a maximum sentence of Life Imprisonment. In the circumstances, the Respondent submitted that the sentence of 7 Years imprisonment was minimal and lenient, and ought not to be reviewed.
18. As pointed out by the Respondent, the High Court derives its mandate to carry out the revision of any finding, sentence or order made by any subordinate court, from **Section 362** of the **Criminal Procedure Code**.
19. When exercising the said mandate, the High Court is enjoined to evaluate the record of the criminal proceedings, for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order as was made by the subordinate court.
20. In this case, the Applicant has not pointed out anything to demonstrate that the sentence he was challenging was incorrect, illegal or improper.
21. From the record of the proceedings, it is noted that when the Applicant was put to his defence, he denied any knowledge about what he was accused of doing. He told the trial court that he was arrested at a place where he was consuming Waragi. He said that at the time of his arrest, his colleagues ran away, and some women parted with money. However, as he did not have any money, the police arrested him.
22. I also note that when he was cross-examining the prosecution witnesses, the Applicant never alluded to the matters which he has now presented before the High Court. In effect, the story that he has now presented to this Court was never put before the learned trial magistrate. In the event, matters which were never placed before the trial court cannot now be used as a basis for finding fault with the decision made by the said court.
23. When the Applicant suggests that the incident was accidental, this Court has no basis upon which it can determine the truth or otherwise of the statement.
24. If the version of events which is now being put forward by the Applicant was true, he ought to have made it available to the trial court.
25. In any event, by asserting that the incident was accidental, the Applicant appears to be challenging the conviction, yet the application before me is in relation to the revision of the sentence.
26. I note that after the trial Court had convicted the Applicant, it gave him an opportunity for mitigation.
27. The record of the proceedings shows that the Applicant prayed for a non-custodial sentence.
28. The learned trial magistrate took into account the fact that the Applicant was a first offender. However, he also took into account the gravity of the offence, when determining the appropriate sentence.
29. I have given consideration to the nature of the injuries inflicted upon the Complainant. His index finger, on the left hand was chopped off. He also had a cut on the left knee and the left elbow. In effect, the injuries suffered by the Complainant were serious.
30. And after the Applicant had inflicted the injuries, he ran away, and he was not arrested until after 2 months.
31. I find that the conduct of the Applicant is not reflective of a person who was remorseful, especially when it is taken into account that the person he injured was his own uncle.
32. Furthermore, he still tried to justify his actions by saying that he was defending himself against an uncle who was jealous, and who therefore wanted to kill him, so that he uncle would take over the land which his mother intended to give him. By seeking to justify his actions, the Applicant cannot be deemed to be remorseful.
33. In any event, I find that the sentence of 7 years imprisonment was fairly lenient, when it is borne in mind that under **Section 234** of the **Penal Code**, a person convicted for the offence of **Grievous Harm** is liable to a sentence of upto Life Imprisonment.

34. In the result, there is no merit in the application for revision, and the same is therefore dismissed.

[S1] DATED, SIGNED AND DELIVERED AT KISUMU

THIS 24TH DAY OF NOVEMBER 2021

FRED A. OCHIENG

JUDGE
