REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MURDER CRIMINAL CASE NO. 2 OF 2018

REPUBLIC... PROSECUTOR

V E R S U S

CHARLES NJAGI KANGERI.......................... 1ST APPELLANT

ANTHONY GITHINJI KANGERI................... 2ND APPELLANT

JUDGMENT

1. The two appellants were charged before the Senior Principal Magistrate court at Gichugu in criminal case No. 295 of 2016 with the following charges:-

a) Grievous harm contrary to **Section 234 of the Penal Code**.

b) Assault causing actual bodily harm contrary to **Section 251 of the Penal Code**.

2. They denied the charges and after a full trial, they were convicted and sentenced to imprisonment for Five (5) years on each count with an order that the sentence was to run concurrently.

3. The appellants were dissatisfied with both the conviction and sentence and filed this appeal in a joint petition of appeal.

4. The grounds from their Petition of Appeal dated 23rd January 2018 are that the trial Magistrate erred in law and fact;

a. By failing to find and hold that the prosecution failed to prove a prima facie case against the appellants.

b. By failing to find and hold that the prosecution's evidence on record was contradicting (sic).

c. By failing to find and hold that the prosecution did not establish the mens rea of the appellants which is an essential ingredient to prove the guilty mind against the appellants.

d. In shifting the burden of proof from the prosecution to the appellants.

e. By failing to treat and handle with caution the evidence given by the prosecution witnesses who had an active and acrimonious land dispute with the appellants.

f. By failing to evaluate the strong and credible defence put forward by the appellants

g. By convicting and sentencing the appellants.

5. The appellants prayed that:-

a) The conviction be quashed.

b) The sentence be set aside.

6. The state opposed the appeal and filed submissions. Directions were taken that the appeal be canvassed by way of written submissions and be at liberty to highlight the submissions in open court.

7. The brief facts of this case are that the appellants are brothers while the complainant in the 1st count Jane Muthoni Ndege is their Sister-in-law (i.e a wife of their younger brother) who is the complainant on the 2nd count while the 2nd complainant Moses Njeru Kangeri is their brother. They have a protracted dispute arising from the sharing of the land (estate) of their deceased father.

8. On 28/2/2016 at about 6.00 Pm the accused assaulted their brother Moses Njeru Kangeri (PW-1-) and his wife Jane Muthoni Ndege (PW-2-). It all started when PW-1- went home riding on motor cycle only to find that the 1st appellant had blocked the main entrance. As PW-1- walked away the two accused followed him in company of Phillis who is the wife of 1st accused and Jane the wife of 2nd accused. They ordered him to stop while they were armed with stones which they threw at him. PW-1- ran away and managed to get to his home compound where he lived with their mother. The two accused followed him there and started attacking him while armed with pangas and sticks. The 1st appellant raised a panga to cut PW-1- but he raised his hand and in the process he (PW-1-) was cut on the two middle fingers on the right hand. PW-1- was also cut on the right hand thumb, head and face. As the 2nd complainant came out of the house, she met the 1st appellant who told her that they were also looking for her. The 1st appellant raised a panga and cut her on the right hand while 2nd appellant also hit her on the shoulder with a panga and she fell down. The appellants then left. The matter was reported to the police. The 1st complainant was assisted and was escorted to hospital at Mount Kenya Hospital and later at Kikuyu hospital where she was admitted for one week and later discharged. The 2nd complainant was also treated. Later a P.3 Form was filled by Kariuki Washington Mwedia a Clinical Officer at Kimbimbi Sub-County Hospital. He found that the 1st complainant had sustained a deep cut wound on the palm which extended to the wrist – proximal on the left hand. The tendon and made ran, a nerve which helps one to sense touch was affected. The degree of injury was grievous harm. He produced a P3 form **Exhibit -4-.**

9. A P3 form was also filled for the 2nd complainant by Catherine Ireri (PW-4-) a Clinical Officer at Kerugoya Dispensary. She found that 2nd complainant had sustained cut wounds on the right thumb, middle finger and the scalp. The degree of injury was harm, P3 form is exhibit-2-.

10. The appellants disappeared and were arrested later at Kerugoya Court where they had come for the case involving the land dispute.

11. The appellants gave their defence and denied that they assaulted the complainants.

12. The parties filed submissions. The appellants addressed the grounds of appeal which they had listed in the petition. The counsel for the appellants addressed the 1st, 2nd & 3rd grounds together.

13. The Appellants submitted that the prosecution did no establish a prima facie case and that if the burden of proof is not discharged by the prosecution, then the benefit of doubt should be accorded to the accused persons. They relied on the case of ***Ramanlal Trambaklal Bhatt vs Republic (1957) E.A 332***, ***Phillip Muiruri Ndaragua vs Republic 2016 eKLR*****.**

14. They submitted that there was contradicting testimony in that PW1 testified that the appellants were armed with stones and not pangas and sticks. They also testified that the assertions of his mother were different from PW1 and PW2's testimonies.

15. The appellant submitted that the possibility of other people in the compound was never considered by the magistrate, as raised in the testimony of pw6. They submitted that men rea was not established. They relied on the case of ***Francis Kimani Karanja versus Republic 2016 eKLR.***

16. They submitted that there was acrimonious land dispute between them and the complainants. They also submitted that their alibi defence was not dislodged by the prosecution, reliance had on the case of ***Kiarie versus Republic (1984) KLR 739.***

17. The prosecution submitted that the key elements of the offence of grievous harm, was proved. That the complainants suffered grievous harm, and harm respectively that was caused by the appellants. That the appellants had mens rea in causing grievous harm to the complainants.

18. The prosecution submitted that the appellants were identified by PW1, PW2 and PW6 as they were close relatives. The attack happened at around 5:30 pm thus the circumstances of the identification was favourable.

19. On the issue of mens rea the prosecution submitted that it can be deduced from the weapons used if it is a dangerous one. That in this case a **'panga'** can be deemed as such. They also submitted that the land dispute between them was the reason for the attack. The evidence was not controverted. They prayed for the dismissal of the appeal.

20. This is a 1st appeal and therefore this court has a duty to re-evaluate the evidence which was tendered before the trial magistrate and come up with its own finding. The only limitation being that I have to leave room for the fact that unlike the trial Magistrate I did not have an opportunity to see the witnesses when they testified and asses their demeanor. See the case of **Okeno –v- R (1972) E.A 32.** The Court of Appeal has affirmed this duty in **Kinyanjui –v- Republic (2004) eKLR** where the court stated that the duty of the 1st appellate court include looking at the evidence afresh, re-examine and evaluate it then give an independent conclusion while bearing in mind that it did not have the opportunity to see the demeanor of the witnesses. The second duty is to consider the grounds of appeal in reaching its judgment.

Analysis of the Evidence

PW-1- was Moses Ngari Kangethe, the complainant on the second count. His testimony was that on the material day 28/2/2016 on a Sunday at around 5.30 Pm he was on the way home when he found 2nd appellant, his wife Phyllis, the 1st appellant and his wife Beatrice and their sister Jane Wawira. They were having a discussion. PW-1- passed them. Phillis asked PW-1- "***You person who do you think you are in***

Kangeri's family?" PW-1- moved on but Phillis ordered him to stop. PW-1- stopped and on looking behind he saw 1st and 2nd appellants, their sister Jane were rushing towards him while armed with stones which they started throwing at him. PW-1- ran upto his house where he lived with his mother.

21. PW-1- met his wife (PW-2-) and his mother (PW-6-) outside the house. PW-1- went inside the house then came outside. He suddenly heard the mother (PW-6-) shouting that the two appellants were coming while armed. PW-1- picked a stick but before he could do anything, the appellants attacked him. PW-1- sustained injuries on his two middle fingers of the right hand, right thumb, head, face and shoulders. PW-1- testified that his wife (PW-2-) was also cut on the hand. The two then escaped. PW-1- then took his wife to hospital. PW-1- was treated at Kerugoya hospital and later at Kenandi. Later a P.3 form was filled and was produced in court as exhibit -2-. PW-1- further testified that they have an ongoing case at Kerugoya court which is a land dispute. He further testified that it was not the 1st incident as 2nd accused had previously attacked his father. He further stated that there is bad blood between him and the appellants and they don't live in harmony. He further testified that the appellants escaped from home after the incident.

22. PW-2- Jane Muthoni Ndegi testified that PW-1- is her husband while the appellants are her brothers-in-law. She testified that on the material day she was at home at around 6Pm when her husband came home and met her with her mother-in-law. PW-1- entered the house and she followed him. While inside the house she heard her mother –in-law saying that people had come with pangas and pieces of wood. She rushed to the table room to close the main door. By then her husband was outside. She started screaming as she closed the main door. At that time her husband was outside and she saw the appellants beating and cutting her husband. On noticing that her husband was bleeding on his hand and face she decided to go out and rescue him.

23. Once outside she met Githinji (2nd appellant) who told her that they wanted her. She raised her hand to rescue herself and she was cut on the hand. She was seriously injured and had to hold the hand to prevent it from falling. She fell down. Her husband tied her hand and called her brothers in law. Peter and Sammy. They came and took her to Mount Kenya Hospital Kerugoya. She was given first aid then transferred to P.C.E.A Kikuyu hospital where she was admitted for one month. She was treated and the hand which was broken at the wrist and all veins cut was joined with a metallic object in the theatre. She testified that the hand did not heal as she cannot hold anything. She identified the treatment notes and the P3 form. It was her evidence that the 2nd appellant is the one who cut her with a panga and 1st appellant hit her with a stick knocking her down.

24. PW-3- Kariuki Washington Mwendia testified that he is a Clinical Officer working with Kirinyaga County based at Kimbimbi Sub-County. He filled the P3 form for Jane Muthoni Ndege (PW-2-). According to him PW-2- alleged to have been assaulted by people who were well known to her on 28/2/2016 at around 1800 Hours. She alleged to have been assaulted with a panga. The tendon was repaired at Kikuyu P.C.E.A hospital where she had been admitted. She had a cut wound on the palm upto the proximal that is from palm to wrist on the left hand. X-ray done at Kikuyu P.C.E.A hospitals showed that she sustained fracture on the radius bone. The tendon and made ran, a never which helps one to sense the touch was affected. She was put on something like plaster. The probable type of weapon used was a sharp object. The degree of injury was grievous harm because the nerves were affected and she cannot do anything with the hand. She sustained permanent disfigurement of the left hand. The P3 form was produced as exhibit-4-.

25. PW-4- Catherine Ireri was a Clinical Officer who filled the P3 form for Moses Njiru (PW-1-) she testified that PW-1- had a cut on the right thumb, the middle finger and the scalp. The degree of injury was assessed as harm. The P2 form was produced as Exhibit -2-

26. Millicent Muthoni Kangeri (PW-5-) is the mother of the appellants, and PW-1- she is the mother-in-law to PW-2-. According to her, on the material day she was sitting outside her house when the two appellants appeared soon after PW-1- came home. The 2nd appellant had a panga and a stick while 1st appellant was armed with a panga. She sensed that the two had come to attack Moses (PW-1-) as they had vowed that they would beat him. She started screaming telling Moses that 2nd appellant had come with a panga. She entered her house and locked herself inside. She peeped through the window and could hear screams from the house of Moses. She then heard PW-2- say that she had been cut by Githinji. PW-1- then told her to open and she saw PW-2- had been cut on the hand. Moses and PW-2- left to go to hospital. She told the court that the estate of her husband was shared equally. She bought land for 1st appellant and he used it for two years then went back to where the father had told him not to cultivate. She stated that was the main issue causing the dispute.

27. PW-6- No. 81735 Sgt David Opiyo of Kianyaga Police station and previously based at Kimunye Police Patrol Base testified that on 28/2/2016 while at the Police Patrol Base he received a call from one Moses Kangeri at about 6.30 Pm who was reporting that he had been attacked by his two brothers and that his wife had been injured. He reported that he was on his way to Mount Kenya Hospital where he was taking his wife. He visited the scene that same evening and found one Samson armed with a panga. The 1st appellant reported at the Police Post accompanied by his wife and 2nd appellant that there was disturbance at their home. He arrested 1st appellant and placed him in the cell for his protection. He released him the next morning. Moses reported at the Post the next morning and he had injuries on the right hand fingers and chest. He issued him with a P3 form.

28. On 2/3/16 he went to Kikuyu P.C.E.A hospital where PW-2- was admitted. He recorded her statement. The two appellants disappeared and he later learnt that 2nd appellant was at Kagio while 1st appellant was at Mwea. He went to those places to try and arrest the two but his effort was futile. The two were later arrested at Kerugoya when they came for a court case. On Investigations he found that the appellants and Moses had a land dispute with one alleging that he was given a smaller portion.

29. The appellants gave their defence on oath and denied assaulting the complainants. They also called three witnesses in their defence. The appellants alleged that they were framed by their mother and PW-1- over the long standing land dispute where they claim that PW-1- was given a bigger portion of land. They also alleged that the 2nd appellant was not given a share of his father's estate. The appellants and their defence witnesses allege that they heard screams from their mother's compound but did not know what was happening. The appellants and DW-5- (their sisters) maintained that they had not been to their mother's compound for a long period of over Ten years. They also alleged that their brother Samuel was destroying crops, issuing threats and throwing arrows at them.

30. After considering the evidence the trial Magistrate found that the charges were proved beyond any reasonable doubts.

31. I have considered the evidence tendered before the trial Magistrate analysed it and evaluated it as is required of me as a 1st appellate court. I will at this point consider the grounds of appeal. The appellants submits that the trial Magistrate erred by failing to find that a prima facie case was not established against the appellants. It is the contention by the appellants that no independent witness was called and that the evidence was fabricated.

32. The test of a prima facie case has for over a long period been settled in the case of **Ramanlal Trambaklal Bhatt –v- Republic (1957) E.A 322.** It was stated that a prima facie case is one on which a reasonable tribunal, properly directing its mind to the law and the evidence, could convict if no explanation is offered by the defence. The court is supposed to make a finding based on the law and evidence after the case for the prosecution is closed. In the so doing the trial Magistrate is not supposed to give reasons for that finding to avoid a situation where he/she maybe accused of bias by appearing as if he/she has made up its mind before hearing and considering the defence of the accused.

33. What the court has to consider is whether the prosecution has discharged its burned to prove the charge against the accused to an extent that if they opt to keep quiet and offer no defence, the court would nevertheless convict them. This is what was stated in **Bhatt –v- Republic (Supra).**

> ***"The onus is on the prosecution to prove its case beyond reasonable doubts and a prima facie case is not made out if, at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction."***

34. The court must therefore weigh all the ingredients of the charge and the facts which point to the guilt of the accused then consider whether or not there are reasonable doubts. The approach at the close of the prosecution case is for the court to determine whether there is sufficient evidence upon which it can convict in the absence of any explanation offered by the defence. This must not be construed to mean that the accused has a burden to prove his innocence, the prosecution bears the burden to prove his guilt beyond any reasonable doubts. The accused has the right to be presumed innocent until proved guilty, **Article 50(2)(a) of the Constitution**.

35. It is the contention by the appellants that the prosecution evidence was riddled with inconsistencies which raised serious doubts. It has been settled in binding decisions by the Court of Appeal that not all inconsistencies and contradictions will lead to an acquittal. The inconsistencies must be so grave as to lead to a conclusion that the witnesses are not truthful. The court will ignore minor contradictions which do not cast doubts in the prosecution case. It is well settled that the prosecution must present a watertight case that meets the threshold of beyond reasonable doubt in order to obtain a conviction. Where there are inconsistencies, contradictions and discrepancies are shown to exist in the evidence of the prosecution they must be resolved in favour of the accused.

36. The Court of Appeal in the case of **Richard Munene –v- R Cr. Appeal No. 74/2016 (2018) eKLR** the court stated:-

> ***"It is a settled principle of law however that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessary creates doubts in the mind of the trial court that an accused person will be entitled to benefit from it."***

37. The learned counsel for the appellants submits that the evidence of PW-1- was not true in the light of the evidence by the defence witnesses. It is also submitted that there were contradictions on the evidence of PW-1-, the treatment notes and the P3 form. I have considered the submissions. In **Okeno –v- R(1972) E.A 32** it was held that an appellate court will leave room for the fact that it had no opportunity to see the witnesses when they testified. It is the trial court which has that privilege of seeing the witnesses when testifying and assess their demeanour. An appellate court will not normally interfere with the finding of fact on the demeanour and credibility of witnesses unless it is based on no evidence. The trial magistrate at Page 82 line 15-17 of the record stated as follows:-

> ***"I am convinced by the evidence of the complainant PW1, 2 and PW-4- that PW-1- was assaulted and suffered actual bodily harm on 28/2/2016 at about 6.00 Pm."***

38. The P3 form shows that the date and time of the alleged offence was 28/2/2016 and has captured the injuries which PW-1- had claimed to have sustained in his testimony. The treatment notes **Exhibit -1-** shows that the Clinical Officer had noted tenderness on the shoulders. I do not find any material contradictions or inconsistencies in the evidence of PW-1-, 2, 3 & 4. The minor discrepancies which arose during cross-examination cannot be said to have cast doubts in the testimony of the witnesses. On the contention that on 28/4/16 the complainant was at Mount Kenya Hospital receiving treatment, this is misleading as no evidence was tendered to that effect. She was at ACK Mount Kenya Hospital on 28/2/16 as per referral notes from Kikuyu Hospital. **Exhibit -5-.** She was discharged from Kikuyu Hospital on 29/3/2016.

39. The trial Magistrate found that the complainants were assaulted on the material day and 1st complainant sustained grievous harm while 2nd complainant suffered bodily harm. This was corroborated by medical evidence. The finding by the trial Magistrate was therefore based on the evidence tendered by the witnesses.

40. The appellants raised the issue that the prosecution did not call any independent witnesses. It is trite that no particular number of witnesses is required to prove a case. **Section 143 of the Evidence Act (Cap 80 Laws of Kenya)** provides that:-

"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

41. The Court of Appeal in **Richard Munene –v- R(supra)** has stated that:-

"We repeat what in our view is elementary principle of Criminal Law that although the prosecution must avail all witnesses necessary to establish the truth and whose evidence appear essential to the just decision of the case, no particular number of witnesses is required for the proof of any fact and that the prosecution is not obliged to call a superfluity of witnesses." *See Section 143 of the Evidence Act and Bukenya and Others –v- Uganda (1972) E.A 549.*

42. It was the testimony of the prosecution witnesses that when the incident took place, it is only PW-1-, 2 & 5 who were present at the scene. The appellants in their defence introduced new evidence which was not put to the prosecution witnesses. I find that the witnesses called by the prosecution were sufficient and adduced relevant and material evidence which the court relied on to convict. There was no deliberate attempt by the prosecution to conceal any evidence from the court. The ground is without merits.

43. It is my finding that based on the evidence which was tendered before the trial Magistrate, he was right to find that the prosecution had made out a prima facie case to warrant the appellants to be put on their defence. The appellants gave a defence and called witnesses.

44. The appellant abandoned ground No. 4 of the appeal where they had alleged that the trial Magistrate shifted the burden of prove on them with regard to ground No. 5, the evidence was laid bare before the trial magistrate that there was animosity between PW1, 2,5 and the appellants arising from the land dispute. Where a witness harbors a grudge against an accused person there is a possibility that such a witness may implicate him falsely and there is need to treat that evidence with caution. In this case the trial Magistrate considered this issue and properly addressed it, see page 83 of the record from line -7-. The trial Magistrate came to the conclusion that it is the complainants who were being attacked and that PW-1- was seemingly favoured as he held the largest share of the estate. That the complainants could not have framed the accused because of the land issue, since it is the appellants (siblings) who harboured a grudge against PW-1-. Based on the evidence, the trial Magistrate properly addressed his mind to the issue of the grudge and arrived at the proper finding. Indeed the issue of there being a land dispute constitutes the meansrea for the commission of the offence. Mensrea denotes the pre-meditation by an accused person to deliberately commit an offence. This came out in the evidence of PW-1- who testified that he was first attacked with stones by the appellants for passing through a path which they blocked and the followed him to his house and attacked him. The manner in which they were armed and the injuries inflicted leave no doubts that the appellant had an intention to cause grievous harm. The appellants were armed with a panga which is dangerous weapon when used to inflict injuries. There is no reason to doubt that the reason for the attack was the long standing land dispute. It is a vain and lame defence that PW-1- could cause grievous injury to his wife so that he could have the appellants arrested and charged. The trial Magistrate observed the demeanour of the complainant, PW-2- found that it is the appellants who injured her. The finding by the trial Magistrate was supported by the evidence. Criminal liability attaches on the appellants. The ground must therefore fail.

45. The appellant allege that the trial Magistrate erred by dismissing the defence as a mere denial. There is no dispute that the appellants and the complainants were close relatives. The appellants were properly identified as the assailants. PWI, 2 & 3 gave a well corroborated evidence which was also corroborated by PW-5-. There is undisputed evidence that the appellants disappeared only to be arrested at the court when they came for dispute. This reinforces the finding by the trial Magistrate that the defence was a mere denial. There was bad blood between the siblings which led the appellants to attack the complainants. The finding by the trial Magistrate is based on evidence. Bearing in mind that the trial Magistrate had the opportunity to see the witnesses and assess their demeanour I come to the conclusion that he properly came to the conclusion that the charges were proved against the appellants beyond any reasonable doubts with cogent evidence. The defence of alibi was an afterthought which was not put to the witnesses when they testified, it was raised too late in the day but was nevertheless considered and rejected based on the direct evidence tendered by the prosecution witnesses. The appellants were placed at the scene of crime by witnesses who knew them very well. The trial Magistrate cannot therefore be faulted for rejecting their defence.

46. On sentencing it is submitted that the trial Magistrate erred by sentencing the appellants to Five years imprisonment on the charge of assault causing actual bodily harm and grievous harm. It is trite that an appellate court will not interfere with the discretion of the trial Magistrate in sentencing an accused person unless the trial court erred in principle.

47. Sentencing remains pre-eminently within the discretion of the sentencing court. In the case of **Ogolla –v- Owuor –v- Republic (1954) E. A. C. A 270** the court stated:-

"The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors" *The court further stated that ------------ I would add a 3rd criterion namely –* ***"that the sentence is manifestly excessive in view of the circumstances of the case."***

48. The Court of Appeal in **Shadrack Kipkoech Kogo –v- R Eldoret Criminal Appeal No. 253 of 2003** quoted in **Simon Kipkurui Kimori –v- R (2019) eKLR** stated:-

"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be inferred" *see also* ***Sayeka –v- R (1989) KLR 306".***

49. The Court of Appeal in **Bernard Kimani Gacheru –v- Republic (2002) eKLR** stated:-

"On appeal the appellate court will not easily interfere with sentence unless that sentence is manifestly excessive in the circumstances of the case or that the trial court overlooked some material factor or took into account some wrong material or acted on a wrong principle."

50. In this case the appellants were charged with grievous harm contrary to **Section 234 of the Penal Code** which provides:-

> ***" Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.***

51. The appellants were sentenced to five years imprisonment. The sentence was not manifestly excessive nor harsh considering the injuries sustained by the complainant on the 1st count.

52. On the 2nd count, the appellant were charged with assault causing actual bodily harm contrary to **Section 251 of the Penal Code.** The Section provides:-

> ***"Any person who unlawfully, and with intent to do any harm to another, puts any explosive substance in any place whatever, is guilty of a felony and is liable to imprisonment for fourteen years."***

53. The trial Magistrate erred in principle by passing the same sentence on grievous harm and assault causing actual bodily harm. The second complainant had not sustained severe injuries. The trial Magistrate imposed the maximum sentence for assault. I find that the trial Magistrate failed to consider relevant factors when imposing the sentence on second count and also erred in principle by failing to consider that the offence of grievous harm was more serious than the offence of assault and show the distinction while sentencing. In the circumstances I will interfere with the discretion of the trial Magistrate in sentencing. The appellants were first offenders and the court noted that they were remorseful. There were reports by the probation officers which recommended a none custodial sentence. The trial Magistrate stated that the sentencing policy guidelines does not recommend none custodial sentence for felonies.

54. The trial court retains the discretion depending on the circumstances of the case. The appellants have been in prison since 12/1/2018. Since a none custodial sentence was recommended, I order that based on the Probations Officers report and the circumstances of this case I order that the reminder of the sentence be served on probation.

55. On the 2nd Count 1 consider the sentence already served to be sufficient and on that count they will be set at liberty.

56. On conviction, I find that the appeal is without merits and is dismissed.

Dated at Kerugoya this 15th day of September 2020.

L. W. GITARI

JUDGE