



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM BEFORE; HON. JUSTICE R. MWONGO, J.

CRIMINAL APPEAL NO. 15 OF 2018

(Being an appeal against the judgment of Hon E. Kimilu (PM) delivered on 13th September, 2018 in Naivasha CMCR 1938 of 2016)

DAVID MIHINGO MATIBA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant David Mihingo Matiba, was charged and convicted in the lower court with the offence of causing grievous harm contrary to **Section 234** of the **Penal Code**.

2. He has appealed against the lower court's sentence on the filed amended grounds summarized as follows:

i) That the sentence meted of 20 years imprisonment was excessive, harsh and unjust and did not consider his mitigation or that he was a first offender and had a young family and was an orphan.

ii) That the trial court did not consider that he had been in remand custody for two years.

iii) That he has since been rehabilitated and had taken up tailoring.

He seeks a non-custodial sentence.

3. Thus, the only issue for determination concerns the sentence, its propriety and length.

4. Briefly, the facts were that on 9th September 2015 at Ngondi Village, did grievous harm to Joyce Njeri Wanjiku (PW1). The evidence according to the complainant was that the Accused and the complainant were husband and wife. They had lived together for two years and were experiencing challenges in their marriage. David had invited Joyce. She went with her cousins Julia Muthoni and Joyce Njeri to his house. After a while David threw out Joyce's belongings from his house and carried their baby girl. He also chased away Joyce's cousins.

5. David demanded Joyce's mobile which she gave him. He then cut her left leg with a panga, then swiftly cut her right leg too. She fell down. He wiped the panga on the grass. She cried out in distress and two people a man and a lad, came running to the scene. Joyce then lost consciousness. Meanwhile Joyce's cousins ran to call Joyce's grandmother.

6. When Joyce came to consciousness, she was at Naivasha District Hospital. She was transferred to Nairobi Women's Hospital in Nakuru, where metal plates were fixed in her legs. These plates were removed at Naivasha District in May 2016. She identified documents PMFI – 5, being a referral note, discharge and summary, treatment card, another discharge summary and P3 Form.

7. On 25th December, 2016 David came to Joyce's home, and she sent an SMS message to an officer at Kongoni Police Station. Shortly thereafter David was arrested at the home and taken to Kongoni Police Station.

8. In cross-examination, Joyce said that David was not drunk when he attacked her; that he disappeared for one year that he never visited Joyce in hospital; that it was David's brother who took Joyce to hospital.

9. PW2, Corporal Isaac Mwanja, testified as the officer who arrested the Appellant. He stated that he was at Kongoni Ngondi Patrol Base on

9th September 2015 when Joseph Gatonye reported that a lady named Joyce had been cut on both legs by her husband. PW2 advised that the victim be taken to hospital and thereafter they came for a P3 Form.

10. Thereafter, PW2 followed the reporter and found a crowd of more than 50 people along the road. The victim had been taken to hospital but the suspect had escaped. PW2 went to Joyce's house and found that it was merely one kilometer away from her husband's homestead. He carried out investigations and discovered that the accused had moved to Nakuru.

11. PW2 confirmed that he issued Joyce with a P3; that when Joyce told him that the accused had called her for reconciliation, he encouraged her to tell him to come home so they could arrest him. When the accused came to Joyce's house. She called PW2 who notified the Area Chief and Sergeant Muchiri. They then arrested the accused at Joyce's house.

12. In cross examination, PW2 confirmed that the accused disappeared until December 2016; and that he, PW2, had tracked the accused on mobile phone.

13. PW3, Jane Wambui Njoroge, a Clinical Officer who attended court on behalf of Tabitha Ndungu with whom she worked for five years. Tabitha filled the P3 Form and was familiar with the writing and signature of Tabitha. She produced the P3 Form as Exhibit 5 without objection by the accused. She highlighted the injuries suffered by Joyce as indicated in the medical reports and discharge summaries.

14. Evidence was also given by PW4, the Investigating Officer who highlighted the investigations he conducted. He pointed that one of the witnesses, Ann Wairimu, had not been traced for bonding to attend court; and after the court issued summons she was traced.

15. Ann Wairimu gave evidence on PW5. She was an eye witness of the attack on Joyce by David. She was amongst those who took Joyce to hospital, and also reported the incident to Ngondi Police Post.

16. The State opposes the appeal. The DPP submits that: the prosecution proved the case beyond reasonable doubt; that the sentence imposed by the trial court considered all the relevant sentencing factors including the mitigation of the accused.

17. Further, the DPP pointed out that **Section 231** of the **Penal Code** does not provide for mandatory sentence. Instead, the statute gives the court discretion to mete any sentence up to a maximum of the life imprisonment.

18. I have carefully considered the facts of this case as set out in the record, the law and the documents availed. The appeal, I note only challenges the sentence, which is what I will deal with.

19. The Appellant was charged under **Section 234** of the **Penal Code** for causing grievous harm. The Section reads as follows: -

“234 Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.”
(Emphasis added)

20. Thus it is clear that the penalty for causing grievous harm is that the offender is liable to imprisonment for life. In **MK v Republic Criminal Appeal No. 248 of 2014 (CA) [2016] eKLR** the Court of Appeal discussed the word “is liable” in **Section 20 (1)** of the **Sexual Offences Act** as follows:

“19 What does “shall be liable” mean in law. The Court of Appeal for East Africa in the case of Opoya v Uganda [1967] EA 752 had an opportunity to clarify and explain the words “shall be liable on conviction to suffer death”. The court held that in construction of penal laws, the words “shall be liable on conviction to suffer death” provide a maximum sentence only; and the courts have discretion to impose sentences of death or imprisonment.” (Emphasis added)

21. I refer to this authority only to highlight the fact that the sentencing provision in the Penal Code, gave the trial magistrate discretion to impose any sentence up to a maximum of life imprisonment.

Disposition

22. In the present case, the trial magistrate meted a 20 years' imprisonment sentence. In so doing, the trial magistrate stated: she had considered the nature of the offence, the accused's mitigation and the cruelty of the mourner in which the offence was committed. She stated:

“It is my finding that accused should be sentenced to a custodial sentence to be a lesson to men who are abusing women. Accused is sentenced to serve twenty (20) years imprisonment.”

23. Clearly, the trial magistrate exercised her discretion, and also considered the accused's mitigation which was to the effect:

“I am ailing and I have just undergone an operation. I have been in remand for one (1) year 8 months.”

I see no basis to impugn the exercise of the trial magistrate's discretion on the basis of the evidence and representations made.

24. The only point which is not clear from the sentence meted, was whether the period of one (1) year and eight (8) months that the accused

was held in remand was taken into account in the sentence. **Section 333 (2)** of the **Criminal Procedure Code** provides:

“Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody. (Emphasis added)

25. In the present case, the accused was in remand custody for 1 year and 8 months. The sentence meted does not indicate that the remand custody was taken into account and such period should be taken into account. In all other respects, I see no reason to interfere with the sentence meted by the trial court.

26. Accordingly, it is ordered that the sentence of the accused is deemed to have commenced from the date when he was placed in remand custody. Except for this alteration, the judgment of the lower court is affirmed.

27. Orders accordingly.

Dated and Delivered at Naivasha this 8th Day of October, 2020

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ms Maingi for the State
2. David Mihingo Matiba - Appellant in person in Naivasha Maximum Prison
3. Court Assistant - Quinter Ogutu