**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA**

**AT EMBU**

**CRIMINAL APPEAL NO. 5 OF 2020**

**JOSPHAT MURIUKI NGARU.....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

**(Appeal from the judgment of the Hon.W.Ngumi (PM) delivered on 31/01/2020**

**in**

**C.M.CR Case No.815 of 2020 at Siakago)**

**JUDGMENT**

1. The appellant, **Josphat Muriuki Ngaru** was charged with the offence of Grevious Harm contrary to Section 234 of the Penal Code; the particulars of the offence was that on the 20th July, 2016 at Muraru Village, Gachoka Sub-location in Mbeere Sub-County unlawfully did grievous harm to **Eston Ndathi Karuthanga**;

2. The appellant was convicted on his own plea of guilty and was sentenced to serve a term of twenty (20) years imprisonment;

3. Being aggrieved by the sentence, the appellant filed a Petition of Appeal on the 3/06/2020; hereunder is a summary of the grounds of appeal;

> (i) The learned Principal Magistrate erred both in law and fact by sentencing the appellant to a term of twenty (20) years which was excessive in the circumstances;
>
> (ii) The learned trial disregarded the appellant's medical evidence concerning his mental health when imposing the sentence;
>
> (iii) The sentence imposed was harsh, oppressive and excessive in the circumstances; the trial court disregarded the appellant's mitigation.

4. At the hearing of the appeal the appellant was unrepresented whereas Ms. Chimenjo appeared for the State; both parties relied on their written submissions which were filed and exchanged; hereunder is a brief summary of the submissions.

**APPELLANT'S SUBMISSIONS**

5. The appellant submitted that the appeal was just on the sentence as it was harsh and excessive; he is a first offender and therefore entitled to the least severe punishment as stipulated in Article 50(2)(p) of the Constitution; the trial court failed to consider the Supreme Court decision in the case of Muruatetu where it was held that mandatory sentences deny the court an opportunity to impose an appropriate sentence based on the mitigating factors;

6. The appellant urged the court to be lenient with him as he suffers from mental illness and vowed never to commit a similar offence due to the deterrence he experienced while in custody; he is now capable of managing his anger because he has recovered after treatment at Mathari Hospital;

7. The appellant urged the court to consider that the longer the period of incarceration, the more difficult it will take him to restart his life;

8. He prayed that the appeal be allowed and prayed that the sentence be set aside;

**RESPONDENT'S SUBMISSIONS**

9. The appeal was opposed; counsel cited the case of **Bernard Kimani Gacheru v Republic CA No.188 of 2000** where it was held that sentencing is a matter of discretion of the trial court and that an appellate court will only interfere which such discretion if the sentence is excessive in the circumstances of the case or the trial court overlooked a material factor, or took into consideration some wrong material or acted on a wrong principle;

10. The respondent also relied on **Alex Wamagu Waititu v Republic HCC Rev No.21 of 2019**where it was held as follows;-

> ***"This court is of the view that the custodial sentence that was meted out on the applicant took into consideration all relevant factors that should be taken by the trial court. The custodial sentence fitted the crime. The period that the applicant was in remand custody was taken into account. The application lacks merit. It is hereby dismissed."***

11. The aggravating circumstances of this case called for a punitive sentence; the attack was unprovoked; the minimum sentence for the offence of grievous harm is life imprisonment; the sentence of twenty years imprisonment imposed was in fact lenient in the circumstances of the case;

12. Counsel prayed that the appeal be dismissed.

**ISSUES FOR DETERMINATION**

13. As the appellant had pleaded guilty to the offence his appeal can only be on sentence therefore the only issue framed by this court for determination is whether the sentence was harsh and excessive in the circumstances;

**ANALYSIS**

14. The appellant stated that he was abandoning the ground of appeal on conviction and submitted that the instant appeal was only on sentence;

15. The court record reflects that the plea was taken in accordance with the law; the mental status of the appellant was ascertained vide the letter dated 8/11/2019 indicating that he was fit to take plea; the Charge and particulars were read out to him in a language he understood; and the plea as recorded is found to be unequivocal;

16. This court is satisfied that the trial court took into consideration the appellants mental status when taking the plea; therefore, the appellant's conviction for the offence is found to be safe;

17. The sentence meted by the trial court was a term of twenty (20) years imprisonment; and the appellant's contention was that the sentence imposed was harsh, oppressive and excessive;

18. The scope of this courts appellate power is to examine the court record so as to satisfy itself as to the propriety and legality of the sentence and that it has been made in accordance with the law; the applicable section in this instance is found at Section 234 of the Penal Code; which section reads as follows;

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

19. The maximum sentence provided by the above section is life imprisonment; the record reflects that the trial court invited the appellant to mitigation and took into consideration the fact that the appellant was a first offender and this had been confirmed by the prosecution; it is therefore evident that the trial court took into account the provisions of the law when passing sentence; the circumstances of the case and the degree of the injuries having been taken into consideration;

20. Nevertheless, it is this court's considered view that the trial court when imposing the sentence ought to have compared the facts of a relevant case law with the facts of this so as to support the reasonableness of its determination of the sentence meted out of twenty (20) years;

21. This court has taken the opportunity of comparing past cases with similar facts to the current case and also compared the sentences imposed; (See for example the Court of Appeal decision in **James Nyamweya v Republic [2009] eKLR**)

22. It can therefore be validly concluded that the sentence meted out for such an offence though legal was manifestly harsh and excessive and it therefore warrants interference by this court; Refer to the case of **Wanjema v Republic (1971) EA 493;**

23. For the forgoing reasons this court is satisfied that this ground of appeal has merit and it is hereby allowed;

**FINDINGS & DETERMINATION**

24. For those reasons stated above this court makes the following findings and determinations;

(i) The appeal on sentence is found to be meritorious;

(ii) The sentence imposed is found to be manifestly harsh and excessive in the circumstances;

(iii) The sentence imposed of twenty (20) years is hereby set aside and substituted with a term of fifteen (15) years imprisonment; the sentence to run from the date of arrest which is indicated on the Charge Sheet as being 23/07/2016.

Orders accordingly.

**Dated, Signed and Delivered Electronically at Nyeri this 15th day of October, 2020.**

**HON.A. MSHILA**

**JUDGE**