REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 76 OF 2018

SILAS KIREMA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Mr. J. Mwangi for the state

JUDGMENT

The appellant **Silas Kirema** pleaded guilty to the charge of grievous harm contrary to Section 234 of the Penal Code. The trial Magistrate in considering the facts convicted the appellant on his own plea of guilty and sentenced him to seven (7) years imprisonment. Being aggrieved with sentences he now appeals to this Court against sentence on grounds that the 7 years sentence is punishable and excessive and should be reviewed.

Background

From the record of the trial Court it shows that the appellant on 22.7.2018 at Laza Township without any provocation took a knife in his possession and stabbed the complainant targeting the stomach and as a result occasioned grievous harm. The members of the public assisted in taking the complainant to Hola Referral Hospital where he was treated and later discharged. The complainant degree of injury was duly assessed by **Dr. Bernard Ledama** who opinioned that the harm suffered was serious categorized as grievous harm. This classification is evident in the P3 Form produced as exhibit 1.

Determination

In this case, the question which the Court has to decide is whether the seven-year sentence imposed by the Learned trial Magistrate for an offence of grievous harm can be solely described as punitive or excessive to warrant interference by the appeal Court.

The Law

Although on the face of it the seven (7) year period of imprisonment appears punitive the jurisprudential background on this issue is somewhat different.

> ***"in the case of Shadrack Kipkoech v Criminal Appeal at Eldoret No. 253 of 2003. The Court held a "sentence is essentially an exercise of discretion by the trial Court and for this Court to interfere it must be shown that in passing sentence the sentencing Court took into account an irrelevant factor or that a wrong principle was applied or that share of these, the sentence itself is so excessive and therefore an error of principle must be interfered."*** **(See Sayeka vrs [1989} KLR 306).**

The Court of Appeal on **Benard Kimani v R {2002} eKLR** noted that apart from above principles the basis of sentence being harsh or manifestly excessive alone should not persuade on appellate Court to interfere with sentence.

> ***"Thus it is now settled Law, following several circumstances by this Court and by the High Court, that sentence is matter that rises in the discretion of the trial Court. Severally, sentence were dependent on the facts of each case. On appeal, the appeal Court will not easily interfere with sentence, unless that sentence is manifestly excessive in the circumstances of the case or that the trial Court over looked some material factor, or took into account some wrong reasons or acted on a wrong principle event if***

the appellant Court feels that the sentence is heavy and that the appellate Court might itself not have passed that sentence, these are alone are not sufficient grounds for interfering with the discretion of the trial Court on sentence unless, they are of the matters already states is shown to exists."

The appeal before this Court is on sentence. It is within this Court's jurisdiction to review the record appropriately and in so doing be mindful of the guiding principles in the above cited circumstances. It suffices to maintain that the record does not show why the appellant had to draw a knife in his possession and use it to target the vulnerable part of the complainant's body.

The appellant having pleaded guilty asserted as follows in mitigation.

"I am sorry I did the offence. I was also injured. I am sorry it was an error."

There is no indication that the appellant was acting in self defence provided for under Section 17 of the Penal Code. It is clear from our Criminal Law as expounded in **Robert Kinuthia Muigai v R {1982-88} KAR 611 and Roba Galma Wario v R {2015}** which held:

"the use of force is lawful when the force is used as a response to the armed attack which has taken place. The order cognizance is that the use of force for self-defense in response to imminent attack may be considered as lawful. There is no evidence from the appellant mitigation that whatever the conflict there was between the accused and the complainant it would not possibly be resolved by peaceful measures."

The issues raised by the appellant on sentence are fundamental since they concern exercise of discretion and other relevant factors before an appropriate sentence is passed. That discretions can only be interfered with if the appellant brings himself within the scope of the principles in **Shadrack Kogo case (supra).**

It is evident that the Learned trial Magistrate focused his attention on the violent nature of the offence and the near deadly force preferred by the appellant. On consideration of all these circumstances, the balance is tipped in favour of affirming the verdict on sentence of 7 (seven) years against the appellant. The appeal on sentence is therefore dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF NOVEMBER, 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. J. Mwangi for the state

2. Appellant in person