REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 51 OF 2017

(From Original Conviction and Sentence in Criminal Case No. 696 of 2017 of Chief Magistrate's Court at Kakamega)

NICK AMITA IKOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. BS Khapoya, Senior Resident Magistrate, of grievous harm contrary to Section 234 of the Penal Code, Cap 63, Laws of Kenya, and was sentenced to life imprisonment. The particulars of the charge against the appellant were that on 20th day of December 2016 at Kambiri Village Ivakale Sub-Location, Kakamega East District in Kakamega County he did grievous harm to Anastacia Likhanya.

2. He had pleaded not guilty to the charges on the day of arraignment, but he later changed his plea to guilty, and was convicted and sentenced to life imprisonment.

3. The appellant was dissatisfied with the conviction and sentence appealed to this court and raised several grounds of appeal-

a) That the trial court had erred in recording his plea of guilty without warning him of the consequences;

b) That the trial court erred in failing to inform him of his fundamental rights as stated in Article 50 of the Constitution; and

c) That the trial court erred in not opting for a full trial and of excluding the possibility that the appellant might have been misled by an unrealistic plea bargain by the prosecution.

4. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of *Okeno vs. Republic* (1972) EA 32 has consistently been cited in criminal appeals on this issue. In its pertinent part, the decision is to the effect that:-

"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

5. The appeal was canvassed on 11th October, 2018. The appellant relied on written submissions that he had placed before me. Mr. Juma, Prosecution Counsel, opposed the appeal and relied on the record of the trial court.

6. I have read through the record. The appellant was arraigned in court on 8th March 2017. The charge was read to him in Kiswahili and he pleaded not guilty, and was admitted to bail. The matter was given a routine mention date for 22nd March 2017. It was mentioned on 22nd March 2017 and 23rd March 2017. On 23rd March 2017, the appellant indicated to the court that he wished to change his plea. The matter was put off to 27th March 2017 for the investigation file to be availed, ostensibly for the purpose of the facts being read to the appellant. On 27th March 2017, the matter was put off again for an undocumented reason. On 10th April 2017, the appellant again told the court he wished to change plea, and the matter was fixed for mention on 12th April 2017 for that purpose. Come 12th April 2017, the charge was read again to the appellant, he pleaded guilty to it and a plea of guilty was entered. The reading of the facts was deferred to 26th April 2017. They were read on 2nd May 2017, and the appellant stated that the facts as read were correct, and he was convicted on his own plead of guilt, and was

sentenced to life imprisonment.

7. From the above recital of the record, I am not convinced that the appellant was prejudiced in any way. The record reflects that it was him who first raised the issue of change of plea. It never came from the state. There is nothing on record to show that there was any plea bargain between him and the prosecution. The matter came up several times after he raised the matter of change of plea. He stuck to the position that he wanted to change plea. I see no error or failure or omission on the part of the trial court. There was no obligation on the part of the trial court to inform him of the consequences as at the stage of change of plea the facts of the case had not yet been placed before the court. It would appear that the appeal is an afterthought, more so after the appellant was sentenced. It appears that he did not expect that he would receive a severe sentence.

8. The offence of causing grievous harm is provided for in section 234 of the Penal Code, and attracts a maximum penalty of life imprisonment. The interpretation given to grievous harm is in section 4 of the Penal Code. 'Harm' is defined as any bodily hurt or disease or disorder whether temporary or permanent. 'Grievous harm' is defined as harm which amounts to maim or dangerous harm, or which seriously or permanently injures health or is likely to so injure health. It also refers to permanent disfigurement or any permanent serious injury to any external or internal organ, membrane or sense. 'Dangerous harm' is said to refer to endangering life, while 'maim' means destruction or permanent disabling of any external or internal organ or membrane or sense.

9. According to the P3 Form put in evidence, the complainant sustained a deep cut would on her forehead, an injury to her left eye with a deep cut wound, a deep cut wound to her mouth at left upper lip, and a fracture of the upper left limb. The injuries were no doubt severe. They necessitated hospitalization for several days. The cut wounds and the fracture no doubt caused permanent disfigurement and were dangerous to life. The injuries sustained by the complainant brought the offence within the definition of grievous harm. The offence charged and in respect of which the appellant was convicted no doubt fell within the offence envisaged under section 234 of the Penal Code.

10. The appellant is perhaps unhappy with the sentence of life imprisonment. Well, it is the maximum prescribed under section 234. The trial court had discretion to impose it. What I may perhaps consider is whether the trial court properly exercised its discretion in imposing the maximum. To assess proper exercise of the discretion, the court has to look at the injuries sustained by the victim and the circumstances of the offence. The injuries suffered by the complainant were gravely severe. Indeed, they were life-threatening or dangerous to life or caused permanent disfigurement. The deep cut wounds no doubt left the complainant with scars that would never disappear. The fracture no doubt weakened the bones of the sixty-five year old victim, even if the fracture united sufficiently. Crucially, the circumstances of the commission of the offence would suggest that the appellant had no excuse whatsoever for attacking the complainant so viciously. He was the aggressor. He started by peeping at her through a window, and when he realized that he had been spotted he attacked her, perhaps with intent to kill her in order to silence her. Clearly, a person who invades other people's privacy, and attacks them so mercilessly when caught in the act of so invading privacy, deserves no mercy. I do not think that the trial court exercised its discretion in sentencing wrongly.

11. Having considered all the issues raised in the appeal, I am of the considered view that the conviction of the appellant in Kakamega CMCCRC No. 696 of 2017 was safe. I shall accordingly disallow the appeal, uphold the conviction of the appellant of the offence of causing grievous harm contrary to Section 234 of the Penal Code and confirm the sentence imposed on him of life imprisonment.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 31st DAY OF January, 2019

W. MUSYOKA

JUDGE

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 7th DAY OF February 2019

J. NJAGI

JUDGE