REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 92 OF 2018

REUBEN KEMBOI SUGUT.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

(Being an appeal from the original conviction and sentence in Criminal Case No. 4207 of 2015 at the Chief Magistrate's Court, Eldoret (Hon. H. Barasa, PM) dated 2 March 2018)

JUDGMENT

[1] This appeal arises from the decision of the Principal Magistrate, **Hon. H. Barasa**, in **Eldoret Chief Magistrate's Criminal Case No. 4207 of 2015: Republic vs. Reuben Kemboi Sugut,** delivered on **27 February 2018**. The Appellant had been charged in that case with three counts, which he denied. In Count I, he was charged with Grievous Harm contrary to **Section 234** of the **Penal Code**, **Chapter 63** of the **Laws of Kenya**. The particulars were that on the **27 July 2015** at Chepsaita Sublocation, Chepsaita Location in Eldoret West District within Uasin Gishu County, he unlawfully did grievous harm to **John Kisorio.**

[2] In Count II, the Appellant was charged with assault causing actual bodily harm contrary to **Section 251** of the Penal Code. It was alleged that on **27 July 2015** at Chepsaita Sublocation, Chepsaita Location in Eldoret West District within Uasin Gishu County, he unlawfully assaulted **Fred Wanja** thereby causing him actual bodily harm. In last Count, the allegation was the on **31 July 2015** at Chepsaita Village in Eldoret West District within Uasin Gishu County, the Appellant was found dealing in 50 litres of Kangara without a licence.

[3] The Appellant denied the allegations against him and in proof thereof, the Prosecution called six witnesses. Their evidence, in summary, is that, following a report that illicit alcoholic drinks were being sold in certain houses in Milimani village, the 1st Complainant, **John Kisorio (PW1)**, who was the area assistant chief, had been sent by the area chief to the Village with a number of village elders. The village elders included the 2nd Complainant, **Fred Wanja (PW2);** and their mission to undertake a raid and apprehend the suspects. They proceeded to the village and effected some arrests. However, in the process they were confronted by a group of about 10 people, whose ringleader was the Appellant herein. They beat up and dispersed the law enforcement team and had the suspects released and the exhibits, which included 5 litres of changaa and 70 litres of busaa, destroyed. The 1st Complainant suffered a fractured leg as well as head injuries; while the 2nd Complainant sustained injuries on his chest, right hand and back.

[4] The matter was reported to the police and the injured were taken to hospital. The 1st Complainant was admitted at **Moi Teaching and Referral Hospital** for three days. Upon conclusion of the investigations, which included medical examination and completion of the Complainant's respective P3 Forms, the Appellant was arrested and charged as aforementioned. And at his trial in which he was represented by **Mr. Mwinamo, Advocate**, the Prosecution called **Roda Naliaka (PW3),** a village elder who was with **PW1** and **PW2** during the incident; as well as **Jane Lemakoko (PW4),** a Clinical Officer at Turbo Health Centre who examined and filled the P3 Form for **PW2. PW5** was **Dr. Paul Kipkorir Rono** of Moi Teaching and Referral Hospital. He told the lower court that he examined **PW1** and documented his findings in a P3 Form which he produced as the **Prosecution's Exhibit 1**. His finding was that **PW1** had sustained a fracture of the right ankle joint; and that he categorized the degree of injury as grievous harm. The last witness was the investigating officer, **Inspector Ochenge Samson (PW6).**

[5] The Appellant also adduced evidence in his defence, basically contending that at the time of the alleged incident he was at his place of work; and that he was then working as a watchman at Kapchebose Primary School, about 3 kilometres away from the scene of crime. He called two witnesses in support of his *alibi* defence.

[6] The Learned Trial Magistrate, having considered the entire body of evidence adduced in the matter before him, came to the conclusion that:

> **"There is no doubt that PW1 and PW2 were injured on the 27th July 2015. The prosecution produced P3 forms in respect of**

these two witnesses which showed that they were indeed injured. PW1's right ankle was fractured and the degree of injury was classified as grievous harm. PW2's injuries were classified as harm. They had gone to look for chang'aa and busaa brewers at Milimani area when they became the hunted by the people they had gone to arrest. The main issue for determination is whether the accused was the one who assaulted them. The accused basically raised a defence of alibi. Looking at the evidence of PW1, PW2 and PW3 however, it is clear that the accused was someone who was well known to them. PW1 was categorical that he talked to the accused in Nandi language as he assaulted him. PW3, a senior village elder also confirmed that the accused was known to her and she even talked to him on the material day. The evidence of alibi as tendered by the accused is in my view too weak to shake the evidence tendered by the prosecution. I am satisfied that the offences in count 1 and 2 were committed by the accused herein. All the ingredients of the offences have been established to the required standard. No sufficient evidence was however led to prove the offence in Count 3..."

[7] Accordingly, the lower court found the Appellant guilty of Counts I and II and convicted him thereof. He was, however, acquitted of Count III for lack of sufficient evidence. The sentencing hearing took place thereafter on **2 March 2018**; and, having considered what the Appellant had to say in mitigation, the Learned Trial Magistrate sentenced him to 3 years imprisonment in respect of Count I; and a fine of **Kshs. 20,000/=** in default six months imprisonment in respect of Count II.

[8] The Appellant felt aggrieved with his conviction and sentence and so, with the leave of the Court, he filed this appeal belatedly on **24 October 2018** on the following grounds:

[a] That he is an orphan and a first born in a family that is entirely dependent on him;

[b] That he is a first offender and therefore begs for leniency;

[c] That he is remorseful, reformed and rehabilitated hence he prayed for a chance to complete the remaining sentence on non-custodial basis;

[d] That he has undergone vocational training as part of the rehabilitation programme hence is more resourceful to the nation;

[e] That his children, brothers and sisters have dropped out of school because of lack of financial support.

In the premises, the Appellant prayed that his appeal be allowed, the conviction quashed and the sentence set aside.

[9] In his submissions in support of the appeal, the Appellant made it clear that:

"...having received the original copies of my court proceedings and perused through, I am contented with the judgment that was imposed, but however, beg leave to the honourable court to allow me to appeal for mitigation..."

[10] He then proceeded to submit that he is a first offender, an orphan and a first born in his family; on the basis of which he pleaded for leniency. He further submitted that, during his incarceration, he has undergone vocational training in metal work; and that he has accordingly reformed to the extent that, if released, he will be a role model in the society. He added that he is now closer to God and will henceforth disseminate the good news about Jesus Christ and will never attempt to involve himself in crime.

[11] Mr. Mulamula, Learned Counsel for the State, opposed the appeal contending that, if anything, the sentence of 3 years imprisonment imposed on the Appellant in respect of Count I was lenient; and that the Appellant has barely served his sentence. He urged the Court to note the viciousness with which the offences were committed and dismiss the appeal.

[12] The Appellant having abandoned the aspect about his conviction, this appeal is in respect of sentence only. It is trite law that an appellate court does not alter sentence unless certain factors, clearly spelt out in the case of ***Ogalo s/o Owuora vs. Republic [1954] 21 EACA 270,*** exist. In the stated case the court held:

"The principles upon which an appellate court will act in exercising its jurisdiction to review sentence are fairly established. The court does not alter a sentence on the mere ground than if the member of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in *James v Republic [1950] 18 EACA 147*, it is evident that the judge has acted upon some wrong principle or overlooked some material factor. To this we would also add a third criterion namely that he sentence is manifestly excessive in view of the circumstances of the case."

[13] Having perused the record of the lower court, it is manifest that the Learned Trial Magistrate took into account the relevant factors, including the circumstances in which the offences took place, and what the Appellant had to say in mitigation. It is instructive too that the offence of grievous harm carries up to life imprisonment. It cannot be said therefore that the trial court acted on some wrong principle, or that it overlooked some material factor; or even that the sentences passed against the Appellant are manifestly excessive. To the contrary, it is evident that the sentences imposed by the trial court were well thought out and reasonable in the circumstances of the case. I would accordingly confirm the same and dismiss the appeal in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF JUNE, 2019

OLGA SEWE

JUDGE