



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL APPEAL NO.28 OF 2017**

**HAKIKA KAHINDI SAYU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction in criminal case No. 381 of 2016 of the Hon. L.N. Juma SRM's Court at Kilifi)*

**Coram: Hon. Justice R. Nyakundi**

**Appellant in person**

**Ms. Sombo for State**

**JUDGMENT**

**Issues-standard of proof in criminal cases- maim, Section 231(a) of the Penal Code-sentencing and mitigation-peculiarity of circumstances of each case.**

**Background**

1. The Appellant appeared before the Magistrate Court on the 17<sup>th</sup> October 2016 on a charge of maim defined in **Section 231 (a) of the Penal Code Cap 63**, Laws of Kenya. The particulars of the offence as per charge sheet are that the Appellant willfully and unlawfully maim the complainant on the 13<sup>th</sup> day of May 2016 at around 8.00am at Mweza village within Kilifi County. After a contested trial the applicant was convicted and sentenced to serve six years imprisonment. The conviction and sentence were entered on 29<sup>th</sup> September, 2017. He timeously lodged his appeal against both conviction and sentence on 11<sup>th</sup> of October 2017.

**Grounds of Appeal**

2. The appeal is predicated upon three grounds of appeal encapsulated in the Petition of Appeal. It is the Appellant's contestation that the Learned Magistrate erred in law and in fact by convicting him on the basis of evidence that does not support the offence of assault, in failing to consider that the prosecution case was not proved to the required of proof beyond reasonable doubt and lastly, that the learned Magistrate did not consider his defense.

**Prosecution Case at Trial**

3. The prosecution called a total of five witnesses in support of its gravamen. PW1, the complainant alleged that while she was on her way to work on the material date, the accused attacked her with a panga. It is indicated that he cut her on the head four times and also on the left hand. It was the members of the public who rescued her and ferried her to Kilifi District Hospital. The Appellant is well known to the complainant. Further, she told the court that she was attacked in the presence of her work mates (**Kache Kalume Kazungu** and **Jumwa Kahindi**) who were called as witnesses by the prosecution.

4. **Kache Kalume Kazungu** and **Jumwa Kahindi**, PW2 and PW3 respectively, testified that they were at the crime scene on the material date. They basically corroborated the evidence of PW1. They gave an account of what transpired on the material date, which is identical to the evidence tendered by PW1.

5. **PW4, Dr Moorein Abdulwahid Moorein** who examined the complainant subsequent to the attack. His findings were that she was in fair general condition. Her left arm was in an arm sling, she was in calm demeanor. On examining her head and neck, she had four cuts on the scalp that required stitching. Her right forearm had a cut 8 cm long and another cut was noted on the left wrist causing permanent wrist

drawn. **The age of injuries was four months.** The doctor made an inference an inference that the weapon used was a sharp object and treatment given was stitching. The degree of injuries was main. The Doctor filled and signed the P3 form which was produced in court as P Exh-3 as well as X-ray report and outpatient card, marked as Exhibit 2 and 4 respectively.

6. The matter was investigated by **Police Constable Peter Odhiambo** from Bamba Police Station who gave testified as **PW5** before the trial court. Just like **PW2** and **PW3**, he corroborated **PW1's** testimony and I shall not labour summarize the same once more. In addition, **PW5** testified that when the complainant recuperated, she went to with witnesses to the police station and recorded written statements. The Appellant was therefore arrested and later brought to court.

### **The Defence Case**

7. Upon consideration the evidence by the prosecution, the Learned Trial Magistrate made a finding that the prosecution established a prima facie case against the Appellant and subsequently placed him on his defence. This was pursuant to Section 211 of the Criminal Procedure Code and the same was explained to me. The Appellant neither gave sworn nor unsworn testimony. He elected to remain silent and neither did he call any witnesses.

### **Submissions on Appeal**

8. The Appellant filed submissions dated 29<sup>th</sup> October, 2018 in support of the aforementioned grounds of appeal. He anchored his contention on sentencing and mitigation. He asked this court to consider the mitigating circumstances that he has advanced. He indicated that he is a first offender, he has family responsibilities and he is remorseful and he humbly prays that the court do dispense the least severe form of punishment. He cited Article 50(2)(p) of the Constitution of Kenya.

9. To further buttress his position, he indicated that no legal research has proved that offenders cannot reform and the goal of primary goal of subjecting criminals to the penitentiary system to reform and rehabilitate them. He asked the court to consider the period already served from the date of conviction to be enough for rehabilitation. He placed reliance on the case of **Said Athman & 2 Others Vs Republic Criminal Appeal No. 61 of 2012**, Malindi High Court to support his contention.

10. The Appellant asserts that it is on the basis of the foregoing decision that he has brought this appeal. He feels that he deserves a benefit of doubt and believes that this court is seized with jurisdiction to grant the same. According to the Appellant, he also deserves to benefit from the jurisprudential development of the law which has benefited other offenders who presented mitigation that is similar to his. He cited article 27 of the Constitution to advance the position that everyone is equal before the law, he has the right to equal protection and benefit of the law.

11. In addition, it is contended that declining his prayers would amount to unjustifiable discrimination and failure of justice. He prays that the court do reduce the sentence and consider subject him to probation and work under community service order.

12. The State filed submission dated 26<sup>th</sup> March, 2018 in opposition of the instant appeal. Learned Counsel, **Ms. Mary Otulo** sought to demonstrated that the prosecution proved its case beyond reasonable doubt during trial. She cited the case **John Oketh Abongo vs Republic (2000) eKLR** in support of her contention. On sentencing and mitigation, Learned Counsel brought to the attention of this court that the Honorable Trial Court considered the Appellant's defence and noted that he was not remorseful. She referred this court to page 28 of the proceedings at line 5 where the same is alluded.

13. Learned Counsel also cited Section 231 of the Penal Code which provides for the offence of maiming. She further cited Section 26(3)(1) which states that a fine shall not substitute a term of imprisonment where a minimum sentence is provided. It was stated therefore that the law provides mandatory minimum sentences, the court is bound by such provisions and it cannot impose a sentence lower than the one prescribed. It was therefore submitted that both the conviction of the Appellant by the trial court was safe.

### **Issues for Determination**

14. Having considered the evidence on record, the grounds of appeal as couched in the petition of appeal, the submission both in support and opposition of the appeal, I take the view that the issues for determination are as follows:

*a) Whether the prosecution proved the offence of maim beyond reasonable doubt.*

*b) Whether the Appellant's mitigation considered so as to interfere with the sentence imposed by the trial court.*

### **The Law**

15. Section 231 of the Penal Code provides for the offence of maiming. It stipulates as follows:

**Acts intended to cause grievous harm or to prevent arrest**

**Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person—**

*a) unlawfully wounds or does any grievous harm to any person by any means whatever; or*

- b) unlawfully attempts in any manner to strike any person with any kind of projectile or with a spear, sword, knife or other dangerous or offensive weapon; or*
- c) unlawfully causes any explosive substance to explode; or*
- d) (d) sends or delivers any explosive substance or other dangerous or noxious thing to any person; or*
- e) causes any such substance or thing to be taken or received by any person; or*
- f) puts any corrosive fluid or any destructive or explosive substance in any place; or*
- g) unlawfully casts or throws any such fluid or substance at or upon any person, or otherwise applies any such fluid or substance to the person of any person, is guilty of a felony and is liable to imprisonment for life.*

#### **Findings, Analysis and determination**

16. This being the first appeal, the appeal is entitled to a fresh close reconsideration and I shall scrutinize, re-evaluate and analyze the evidence on record and arrive at an independent conclusion. In so doing, this Court will either uphold or reverse the findings of the Learned Trial Magistrate. In doing so, this Court shall bear in mind the fact that it had no benefit of seeing and hearing the witnesses testify during the trial. This entails that any issues raised in this appeal touching on the demeanor of witnesses must rest on the considered opinion of the Learned Trial Magistrate who had the singular privilege of hearing and seeing the witnesses. (**Okeno vs. Republic (1972) EA 32**).

17. On the first limb, the burden of proving the offence of maiming beyond reasonable doubt resides with the prosecution. To sustain conviction in an offence of maiming, the state must prove that the Appellant unlawfully wounded or caused grievous harm to the complainant or the victim by any means whatsoever. It must be further proved that the Appellant had an intention to maim, disfigure or disable the victim or to cause grievous harm or to resist or prevent lawful arrest or detention.

18. In view of the foregoing, the interpretation to these terms is encapsulated in terms of 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. Last but not least, ‘**maim**’ means destruction or permanent disabling of any external or internal organ or membrane or sense.

19. The prosecution alleged that on the 13<sup>th</sup> of May, 2016, the complainant was attacked by the Appellant. He used a panga to cut her head four times and once on her left hand. These facts were corroborated by the evidence of PW2 and PW3 who are both eye witnesses to the attack. The question to ponder is whether what the prosecution placed before the trial court did prove that the harm amounted to maim. I refer to the testimony of **PW4**, the doctor who examined and treated the complainant. He classified the degree of injury to be maim. The Doctor indicated that upon examination of the complainant, she had four cuts on scalp that required stitching and her forearm had a cut of 8 cm long. Another cut was also noted on her left wrist from the left side which caused a permanent wrist draw. Exhibit 3 and 4 is the P3 form and the X-ray which was tendered as part of the prosecution evidence.

20. The circumstances and the sequence of events that culminated in wounding of the complainant show that the Appellant intended to cause grievous harm. Human body is by its nature fragile. I take note of the vulnerable organ (the head) that the Appellant stabbed knowing that death or grievous harm could ensue. He had adequate knowledge that a knife is a lethal weapon. The Appellant’s conduct was undoubtedly aggressive. In the premises, I find that the prosecution proved its case beyond reasonable doubt.

21. The Appellant had initially challenged both conviction and sentence meted by the trial court on three grounds I have highlighted earlier. However, it seems that he abandoned that position and hinged his contention on the basis that this court ought to consider his genuine mitigation and interfere with the sentence passed by the Learned magistrate.

22. It is trite law that each case has its own peculiar circumstances. The Appellant placed reliance on the case of **Said Athman & 2 Others Vs Republic Criminal Appeal No. 61 of 2012**, Malindi High Court to advance the contention that he deserves to benefit from the jurisprudential development of the law which has benefited other offenders. In said case, the appellants were charged with case which involved narcotic drugs (heroin) with street value of Kshs. 400/=. The trial court sentenced the Appellants to a total of 10 years imprisonment without the option of a fine. On appeal **Justice Chitembwe** set aside the sentence and replaced it with the period which the appellants had already served (five years) on the basis that the sentence was quite harsh given the value of the drugs.

23. The circumstances of the instant case are quite different from those in the foregoing case which the Appellant herein has relied on. The instant matter involves an attack on the complainant which caused grievous harm. The Appellant has given mitigation that he is a first offender, he has a family in which he is the sole bread winner and that he has already been rehabilitated during the time he has so far served. In view of the fact that the accused was accorded an opportunity to either offer an explanation as to why he attacked the complainant when he was placed on his defence or to provide mitigation prior to his sentencing. On both occasions the Appellant squandered this opportunity or right by electing to remain silent.

24. Further, the offence of maim attracts a minimum sentence of life imprisonment. The Hon. Trial Magistrate was quite lenient in sentencing the Appellant to six years imprisonment. The Hon. Trial magistrate also noted in his Judgement that the Appellant was not remorseful for the acts he committed which speaks to his demeanor during the trial proceedings. In the premises, I’m not able to find merit in the instant appeal. I hereby dismiss the same for want of merit.

25. It is so considered.

**DATED, DELIVERED AND SIGNED IN OPEN COURT AT MALINDI THIS 15<sup>TH</sup> JULY 2019.**

**R. NYAKUNDI**

**JUDGE**