REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 13 OF 2018

JULIUS MUIMI WAMBUA.....................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(*Being an Appeal from Original Sentence in* ***Kyuso Principal Magistrate's Court Criminal Case No. 209 of 2015*** *by* ***Hon. M. Nasimiyu (SRM)*** *on* ***12/03/18)***

J U D G M E N T

1. **Julius Muimi Wambua,** the Appellant was arraigned before Court having been charged with the offence of **Grievous Harm** contrary to **Section 234** of the **Penal Code.** Particulars of the offence were that on the **30th** day of **June, 2017** at **Ndunguni Sub-Location, Ngomeni Location** in **Kyuso Sub-County** within **Kitui County** together with others not before Court, willfully and unlawfully assaulted **Rebecca Nyiva Omar** thereby occasioning her grievous harm.

2. Having been taken through full trial he was convicted and sentenced to serve **ten (10) years imprisonment.**

3. Aggrieved, the Appellant now mitigates on sentence. He urged the Court to reduce the sentence to a lesser period.

4. The State through learned State Counsel **Mr. Mutegi** opposed the Appeal. He urged that the sentence meted out was appropriate.

5. Principles upon which an Appellate Court will interfere with sentence of a trial Court were set out in the case of **Ogolla s/o Owour vs. Republic (1954) EA CA 270** where the Court stated as follows:

> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also In Omuse - v- R (Supra) while in the case of Shadrack Kipkoech Kogo –vs- R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:- " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factor or that a wrong principle was applied or that short of these, the sentence itself is so harsh and excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)."***

6. The sentence provided for the offence is upto **life imprisonment.** Factors to be considered in sentencing include the circumstances in which the offence was committed, whether the Accused was a first offender, what caused him to commit the offence and the gravity of the offence.

7. The Appellant was given an opportunity to mitigate. He pleaded for leniency. He explained that he was the eldest son. His mother is insane and his parents are separated and that he is the sole breadwinner.

8. In sentencing, the learned trial Magistrate took into consideration the gravity of the offence, the conduct of the Appellant who was merciless, the nature of injuries inflicted and the pain suffered by the Complainant.

9. There was no misdirection on the part of the trial Court but comparing with sentences passed by Courts today, in the circumstances ten (10) years imprisonment was harsh.

10. Therefore, I set aside the sentence meted out and substitute it with **five (5) years imprisonment** to be effective from the date of sentencing by the trial Court.

11. It is so ordered.

Dated, Signed and Delivered at Kitui this 10th day of July, 2019.

L. N. MUTENDE

JUDGE