REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

(CORAM: MAJANJA J.)

CRIMINAL APPEAL NO. 11 OF 2016

BETWEEN

OSCAR LIBANGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. J. Ong'ondo, SRM delivered on 1st January, 2016 at the Chief Magistrates Court at Kakamega in Criminal Case No. 1200 of 2015)

JUDGMENT

1. The appellant, **OSCAR LIBANGA**, was charged and convicted of the offence of causing grievous harm contrary to **section 234** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. It was alleged that on 31st March 2013 at Mukulusu Village, Murhanda Location within Kakamega Central District of Kakamega County, he unlawfully did grievous harm to Benjamin Matafali Harun.

2. The evidence against the appellant is that on 31st March 2013, Benjamin Matafali (PW 1) was from Church at about 12.30pm when the appellant emerged from the forest and started cutting him with a panga. As he blocked the assault he got cut on the left arm and was injured on the right arm. The incident as witnessed by his son Erick Nyongesa (PW 2) who heard PW 1 screaming. He heard PW 1 shout that the appellant was killing him and when he arrived at the scene he saw the appellant ran into the forest. PW 2 noted that PW 1 was bleeding from the right arm and left arm.

3. PW 2 called his brother Moses Matafali (PW 3) and told him that the appellant had assaulted by PW 1. He proceeded to the scene and found PW 1 in pain and was bleeding while the appellant had escaped. Both PW 2 and PW 3 arranged to take PW 1 to hospital.

4. Patrick Mambili (PW 4), the clinical Officer from Kakamega County Hospital who examined PW 1, confirmed what PW 1 had chest injuries and that his left arm had been amputated and cut at the wrist area. He opined that the injury was caused by a sharp object and assessed the injury as grievous harm. PC Daniel Mungai (PW 5), the investigating officer testified that the incident was reported and he completed investigations and charged the appellant.

5. In his unsworn statement, the appellant stated that he had been assaulted earlier by PW 1's son and his leg cut causing him to be admitted in hospital for 18 days. He denied committing the offence as he was in Nairobi at the material time. Benard Mustosto (DW 2) confirmed that the appellant, his younger brother had been assaulted and was in hospital and he was of the view that the appellant was framed. The appellant's father, Kufana Mustosto (DW 3), testified that the appellant was assaulted on 11th February 2012 on his leg and had been admitted to hospital.

6. I have reviewed the entire evidence and I am satisfied that the incident took place during the day in broad daylight and that PW 1 and PW 2 knew the appellant. The injury suffered by PW 1 was confirmed by PW 4. I therefore find and hold that there was overwhelming evidence that the appellant assaulted PW 1 and caused him grievous harm by amputating his left hand. I therefore reject the appellant's alibi defence. His witnesses, DW 2 and DW 3 were not present on the material day and could not testify to the facts of the incident. What is clear though is that there had been a dispute between the complaints family and the appellant that had led to the assault. I therefore affirm the conviction.

7. The maximum sentence for causing grievous harm is life imprisonment and as such due allowance ought to have been made for this, noting what was stated in ***Josephine Arissol v R*** **[1957] EA 447** that, *"The general rule is that a maximum sentence should not be imposed on a first offender"*. In the sentencing notes the trial magistrate noted that the complainant had lost the use of his left hand. He did not consider any mitigation circumstances for example that there had been a dispute between the appellant and PW 1's son and that the appellant had been assaulted earlier and that the appellant was a first offender.

8. Sentencing is an exercise of discretion and the appellate court will not interfere in the sentence unless it is shown that the trial court took into account an irrelevant factor, or that a wrong principle was applied or short of that, the sentence was so harsh or excessive that it manifests an error of principle (see ***Ogalo s/o Owuora v R* [1954] EACA 270**, ***Nilsson v R* [1970] EA 599** and ***Wanjema v R* [1971] EA 493**). As I have shown, the trial magistrate erred in exercise of that discretion.

9. Taking all the circumstances into account, I quash the sentence of life imprisonment and substitute it with a sentence of **six (6) years imprisonment**. Such term shall run from the date of conviction before the trial court.

DATED and DELIVERED at KAKAMEGA this 6th day of April 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Ng'etich, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.