REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 127 OF 2017

TITUS KIPKORIR KULEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction and sentence in KBT Residents Magistrates court criminal case no. 84 of 2015 made on 12th August, 2015 by Hon. E. Kigen, [RM]

JUDGMENT

1. The appellant was sentenced to imprisonment for 5 years for a first count offence of Grievous harm contrary to section 234 of the Penal Code and 2 years for a second count of assault causing bodily harm contrary to section 251 of the Penal Code, both sentences running concurrently from 12/8/2015, the date of the sentence.

2. On appeal, the appellant challenged the sentence in the offence of Grievous harm by Petition of Appeal dated 17/2/2017. By Submissions dated 14/11/2017, the appellant urged the court to revise the sentence taking into account that "at the time I was convicted and sentenced remission had been withdrawn" and that he was "a first offender and the current matter was accelerated by my faulty temperamental behavior which at that time I could not hold back. I do also attest before you that my actions were influenced by alcohol abuse which so far I have made up by mind to do away with its use and pursue God's divine power."

3. The DPP considered the sentence of 5 years imprisonment as lenient considering the maximum sentence for the offence of Grievous harm is life imprisonment, and that the complainant in Count I was admitted in hospital for 3 weeks showing the extent of the injuries on the complainant.

4. ***Wanjema v. R*** [1971] EA 493 has set down the principles for consideration of a sentence of the trial court by an appellate court as follows:

> "*The appellate court should not interfere with the discretion of which the trial court has exercised as to sentence unless it is evident it overlooked some material factors, acted on a wrong principle or sentence is manifestly excessive in the circumstances of the case.*"

5. I consider that the fact that the provision for remission of sentence had been removed at the time of the sentence by Statute Law (Misc. Amendments) Act, 2014 (coming into force on 8th December, 2014) amending the Provision Act by repealing section 46 thereof as a material factor which the court ought to have considered in arriving at the term of imprisonment. The court bearing in mind that the offender would in the absence of remission serve the full term of the sentence without rebate from good conduct. As it turned out the provision for remission was restored just one year later on 15/12/2015 by the Statute Law (Misc. Amendments) Act, 2015 and the appellant, having been sentenced on 12/8/2015, could not benefit from it restoration.

6. In her sentencing, the learned Resident Magistrate is shown only as considering the accused's mitigation, the fact the accused was a first offender and the seriousness of the offence which she finds to warrant a deterrent sentence. No consideration is shown of the fact of the absence of any possibility of remission, and it is not possible to tell whether the trial court intended that the offender should serve the full calendar term of the sentence. I consider that failure to consider the factor of withdrawal of remission warrants this court to interfere with the sentence.

7. In addition, the trial court's sentence does not indicate that the court considered, as it was required by the Proviso to section 333 (2) of the Criminal Procedure Code, the period from 27/1/2015 when the appellant had been in remand awaiting trial. Section 333 (2) provides as follows:

> "*2. Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the*

whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

8. Having considered the circumstances of this case, without altering the finding of guilty for the offence of grievous harm contrary to section 234 of the Penal Code, the court finds, pursuant to section 354 (3) (b) of the Criminal Procedure Code, the appropriate sentence to be an imprisonment term for 3½ years. The said period of $3^{1}/_{2}$ years shall be reckoned from the 27/1/2015 when the appellant was first remanded to await trial.

Orders

9. Accordingly, for the reasons set out above, the Court, pursuant to section 354 (3) (b) of the Criminal Procedure Code, reduces the sentence of 5 years imprisonment for Count I offence of grievous harm contrary to section 234 of the Penal Code to imprisonment for $3\ ^{1}/_{2}$ years from the 27/1/2015, the date of remand in custody of the appellant awaiting his trial.

DATED AND DELIVERED ON THIS 9TH DAY OF APRIL, 2018.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in Person.

Ms. Macharia Ass. DPP for the Respondent.