



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KABARNET
HCCRA NO. 84 OF 2017
FORMERLY ELD HCCRA 76/16

PETER KIPLEGO TERGAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the original conviction and sentence in Kabarnet Principal Magistrate's Court Criminal Case No. 868 of 2015 delivered on the 1st day of July, 2016 by S.O. Temu,PM]

JUDGMENT

1. The appellant who was convicted for the offence of grievous harm contrary to section 234 of the Penal Code and sentenced to imprisonment for 4 years on 1/7/2016 has appealed to the High Court challenging the conviction on the ground of insufficiency of evidence and the sentence on the ground of severity in pointing out that he had been Pre-trial detention awaiting conviction of the case for about 9 months.

2. From the record, however, it is shown that the appellant was not on bond from 6/4/16 when his surety was approved. The charge sheet indicates that he was arrested on 11/10/2015, so that the period of remand awaiting trial is about 7 months.

3. With remission the sentence of 4 years becomes 2 years 8 months ($2/3 \times 48 = 32$ months) from 1/7/2016, the appellant has already served 2 years add the 7 months of pre-trial detention awaiting trial and the appellant is due for release on **31/7/18**. There is no evidence from the record that the trial court considered the period of pre-trial detention required by section 333 (2) Proviso as follows:

“333(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 days of the date on which it was pronounced, except where otherwise provided in this code.

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

4. I would agree with the trial court that the actions of the appellant in assaulting his step brother is abhorrent however, the period of close to 3 years that he has been in custody since his arrest on 11/10/15 and before his release on bond on 6/4/16 and subsequent imprisonment on 1/7/16 is sufficient punishment in the circumstances of the case with injuries of tenderness and slight swelling of the right hand and fracture of the right hand.

5. Having considered the evidence of PW1, the complainant and PW2, the clinical officer who examined

the complainant against the unsworn statement of the accused, I have no doubt that the appellant had hit the complainant with his stick as alleged by the complainant and the latter hand suffered the injuries set out in the medical examination P3 form. Indeed, the accused concedes that a confrontation exchange between the two had ensued her attempt to trace her calf but only then claiming that the “*I had gone to my home and on 11th I was arrested at night at 9.00 pm*”.

6. Accordingly, for the reasons set out above, I do not find merit in the appellant’s appeal from the conviction for the offence of grievous harm contrary to section 234 of the penal code. I do, also however, find merit in the challenge on the sentence on the ground that there is no indication that the court had directed its minimal as it was required by section 333(2) of the Criminal Procedure code to the period of pre-trial detention spent by the appellant awaiting conclusion of his trial.

7. The sentence is therefore reduced to the period of 2 years and 7 months that the appellant has been in prison custody while on remand awaiting trial and subsequently upon conviction and sentence, so that the appellant is released from custody immediately unless he is otherwise lawfully held.

DATED AND DELIVERED ON THIS 16TH DAY OF JULY, 2018

EDWARD MURIITHI

JUDGE

Appearances:

Appellant in Person.

Ms Macharia Ass. DPP for the Respondent