REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO 68 OF 2017

(FORMERLY ELDORET HIGH COURT CRIMINAL APPEAL NO. 60 OF 2015)

MARGARET NJERI KIPCHILIS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[BEING AN APPEAL FROM ORIGINAL CONVICTION AND SENTENCE IN KABARNET PRINCIPAL MAGISTRATE'S COURT CRIMINAL CASE NO. 698 OF 2014 BY RESIDENT MAGISTRATE E. KIGEN ON 22ND APRIL 2015]

JUDGMENT

INTRODUCTION

1. It is a regrettable shame that the appellant's appeal against conviction and sentence for the offence of grievous harm contrary to section 234 of the Penal Code was heard only 64 days before she completed her sentence. The appellant was sentenced to imprisonment for a period of two years on the 22nd April 2015.

2. The appellant filed a Petition of Appeal dated 4th May 2015 in the High Court at Eldoret through her counsel M/S M.K Chebii and Co. Advocates on the 5th May 2015. However, on account of lack of a High Court sitting at Kabarnet until the 9th January 2017 when this Court was inaugurated, the appeal did not proceed to hearing.

3. When this Court while on a familiarisation tour visit to the Eldoret Prison where the appellant was held learned of her position, it fixed the appeal for hearing on priority basis in view of its urgency to ensure that the appellant does not complete her term before her appeal was heard. When the appeal came up for hearing, the appellant's counsel was not in court but the appellant chose to urge the appeal on self-representation basis, and the appeal proceeded to hearing.

THE APPEAL AND SUBMISSIONS THEREON

4. Although the appeal had been filed against both the conviction and sentence, the appellant merely urged the court to forgive her and to be lenient citing in mitigation personal problems that her two children had dropped out of school following her incarceration, and pleaded with the court to allow her to go out of prison to support them get back to school. One of the children was said to have been pursuing a degree course at Rongo University and the other secondary school at Kambimoi High School.

5. For the DPP, it was urged that the trial court had been lenient enough in sentencing the appellant to imprisonment for two years only out of a possible life imprisonment sentence prescribed for the offence of grievous harm. On a query by the Court, Counsel submitted that the provision for remission of sentence did not apply to the appellant as she had been sentenced when the provision of remission in the Prisons Act had been removed, and although it was reinstated later in the year, it could not be benefit the appellant and that in any event, the remission was in the discretion of the Commissioner for Prisons. Counsel urged the Court to dismiss the appeal and direct that the appellant serves the remainder of her sentence to completion.

POINTS FOR DETERMINATION

6. The only question for determination is whether the court will interfere with the sentence imposed by the trial court in the circumstances of this case.

7. The Court did not get the benefit of full argument on the question of applicability of the provisions for remission of sentence to the present case, and I do not, therefore, propose to make any concluded findings on the matter.

8. The provision of law on remission, that is, section 46 of the Prisons Act that empowered the Commissioner for Prisons to commute prison terms for 1/3 for prisoners for good conduct in prison which had been repealed by the Statute Law (Miscellaneous Amendments) Act No. 18 of 2014 (commencing 8th December 2014), was reinstated by the Statute Law Miscellaneous Act of 2015 commencing on 15th December 2015.

9. However, I would consider that the benefit of remission being one of *implementation* of a sentence should be available to all prisoners who continue to serve a sentence *during* the time when provision for remission *is in force*, without discrimination as to the time, in relation to existence of the remission provision, when the sentence was imposed.

10. Moreover, while I agree that discretion for remission of a prison term lies with the Commissioner for Prisons, ***David Oloo Onyango v. The Attorney-General,*** Civil Appeal No. 152 of 1986 (unreported), is an authority of the Court of Appeal on point on the question of remission, that discretion must be exercised fairly.

DETERMINATION

11. The penalty for the offence of grievous harm contrary to section 234 of the Penal Code is imprisonment for life. I have noted that the appellant is a first offender, and even with the counsel of ***Josephine Arissol -vs- Republic*** **[1957] EA 447 that the maximum sentence should not be imposed on a first offender**, the sentence of imprisonment for two years cannot be said to be excessive.

12. The principles for interference with sentences are settled as follows:

> *"The court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial Judge, unless it was evident that the Judge acted upon some wrong principles or* ***overlooked some material factors and that the sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender*** *and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the fact and circumstances of the case in their entirety before settling for any given sentence." See* ***Omuse v. R*** (2009) KLR 214.

13. I have perused the Probation Officers Report presented to the trial court before the sentence. I have confirmed that the appellant had with her complainant husband three children two of whom are in school. In accordance with the principle of the best interests of children under Article 53 of the Constitution, the best interests of a child may be considered in determining whether or not to impose a custodial sentence

on a mother who is the sole provider of the children.

14. In this case, there was evidence that the cause of the problems between the appellant and her complainant husband was alleged failure by the husband to provide for the children of their marriage. In her evidence, the Appellant said:

> *"The offence is not true.*
>
> *On that day I went to tell my husband that the child had been called to University. My son had a grudge with his father because he refused to circumcise him. I did not touch him at all I only wanted him to help me raise fees for my children because he had not been giving me any support even now I have a child who finished class eight and the father is not even aware. I want the court to forgive me since my children entirely depend on me, my husband has married another wife and I cannot access the wealth in that homestead."*

15. Although not presented on oath and subjected to cross-examination, the Probation Officer's Report confirmed the appellant's position as follows:

> *"**Conclusion and Recommendation***
>
> *The offender before this court has no previous convictions. She pleads to be treated with leniency citing her health and her sole role of bringing up and paying school fes for her children.*
>
> *Social inquiry revealed that the complainant and the accused are husband and wife respectively and had separated following mistrust and irresponsibility of the husband in providing for trhe children. The family members have been unable to intervene and end the wrangles citing accused's temperament and unwillingness to engage in reconciliation process.*
>
> *Owing to the unremorseful character of the accused coupled with stalled reconciliation process which is paramount in community based rehabilitation, supervision may be difficult. The case is recommended to be dealt with otherwise.*
>
> ***Ngochoi, M. J.***
>
> ***Probation Officer***
>
> ***Baringo Sub-County."***

16. Obviously, the Probation Officer did not consider community service order as a method of punishment and if he did, he thought, erroneously in my view, that community service orders depended on the remorsefulness and willingness to reconcile on the part of the offender and her alleged victim. The Court fell into error when it agreed with the Probation Officer's recommendation to deal otherwise with the appellant. Community service orders are prescribed under the Community Service Orders Act to be applied in accordance with the provisions of the Act.

17. In the respectful view of this court, to take away the parent who was discharging the parental care and protection duties of Article 53 (1) (e) of the Constitution cannot be in the best interest of the child. I consider that had the trial court considered the interests of the children and the blameworthiness of the appellant for the incident the subject of the criminal offence, it would have reached a different decision in the interests of the children to allow the appellant to continue to provide as best she can for their children. On this ground, I consider that the appellate court is entitled to interfere with the sentence by altering the nature of the sentence so that the appellant may serve the remainder of her two-year sentence under a Community Service Order pursuant to section 3 (1) (b) of the Community Service Orders Act, which provides as follows:

> *"3. (1) Where any person is convicted of an offence punish-able with -*

(a) imprisonment for a term not exceeding three years, with or without the option of a fine; or

(b) imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate,

the court may, subject to this Act, make a community service order requiring the offender to perform community service."

18. While the Court does not find the sentence of imprisonment for two years as excessive for the offence of grievous harm, the status of the appellant as a first offender and her moral blameworthiness in the conflict with the complainant husband that led to the offence of grievous harm and the finding by the court that the appellant was only an accessory before the fact, the directive provisions of section 3 (1) (b) of the Community Service Orders Act coupled with the need in the circumstances of this case to give effect to the best interests of the appellant's children with the complainant, would dictate a non-custodial sentence.

ORDERS

19. Accordingly, for the reasons set out above, the Court while dismissing the appeal on conviction for the offence of grievous harm contrary to section 234 of the Penal Code allows the appeal against sentence and alters the same to an order for Community Service Order for the period of two years under section 3 (1) (b) of the Community Service Orders Act.

20. Consistently with section 3 (3) of the Community Service Orders Act, having determined that a community service order should be made in this case, the Court, before making the said order, directs Community Service Officer, Kabarnet, to conduct an inquiry into the circumstances of the case and of the offender and report the findings to the Court for final orders on 22nd February 2017.

DATED AND DELIVERED THIS 20TH DAY OF FEBRUARY 2017.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in Person

M/S Kenei prosecution Counsel for the Respondent