



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 41 OF 2014**

**SIMON KIPKOGEI SAMOEI..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[Appeal from the original conviction in Criminal Case No. 2965 of 2012 in the Resident***

***Magistrate's Court at Kapsabet by B. Limo, Resident Magistrate, dated 31<sup>st</sup> December 2012]***

**JUDGMENT**

1. The appellant *pleaded* guilty to a charge of *causing grievous harm* contrary to section 234 of the Penal Code. He was sentenced to *life* imprisonment.
2. The particulars of the *substituted charge sheet* were that on 10<sup>th</sup> December 2012 at about 23:45 hours at Ielwak village within Nandi County, he unlawfully assaulted *Emily Chepkosgei Serem* by chopping off her left hand and cutting her on the right hand palm using a *panga* thereby occasioning her grievous harm.
3. The original petition of appeal challenged *both* the conviction and sentence. On 16<sup>th</sup> March 2017, the appellant abandoned the appeal on *conviction*. I warned him on the record of the consequences of his decision. The appellant confirmed that he was challenging his *sentence* only.
4. At the hearing of the appeal, the appellant pleaded for *leniency*. He said he is *remorseful* for his actions. He stated that he is a *first offender*. In a synopsis, the entire appeal is a plea for *clemency*.
5. The appeal is contested by the Republic. The case for the State is that the sentence was well within the law. I was implored to dismiss the appeal.
6. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
7. The substituted charge was read and explained to the appellant in *Kiswahili*. He answered: *Kweli* (True). The facts were fairly straightforward. The appellant and complainant were separated. On 10<sup>th</sup> December 2012 at about 11:30 p.m., the complainant was asleep. The appellant came into her room and switched on the light. He was brandishing a sharp *panga*. He attempted to cut the complainant on the neck. As she tried to fend off the attack, the appellant chopped off her left hand. He lifted the *panga* again but it fell off injuring the complainant on her right palm. The complainant screamed for help. The

appellant took off. A neighbor responded and gave her first aid. He called one Rugut who availed a vehicle to take the complainant to the Moi Teaching and Referral Hospital. The appellant was later arrested on 14<sup>th</sup> December 2012 and charged with the offence.

8. The *panga* was produced as exhibit 2. I have also studied the P3 form (exhibit 1). It indicates that the complainant's left hand was completely severed; and, she had wounds on her right hand. It corroborates the statement of facts. The degree of injury is recorded as *grievous harm*.

9. The facts were read to the appellant in *Kiswahili*. He again answered in the affirmative. The appellant was thus properly convicted of the offence of *causing grievous harm* contrary to section 234 of the Penal Code. I find the plea was *unequivocal*. See *Lusiti v Republic* [1976-80] 1 KLR 585, *Desai v Republic* [1974] EA 416, *Adan v Republic* [1973] EA 445.

10. In any event, the appellant confirmed that he is no longer challenging his conviction. I will now turn to the appeal on *sentence*. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

*“The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may.....(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or..... ”*

11. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

*“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. ...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 facts and circumstances of the case in their entirety before settling for any given sentence.”*

12. The learned trial Magistrate considered that the appellant was a *first offender*. He also took into account the *mitigation* tendered. The appellant in mitigation said: *“I pray for forgiveness”*. But the court considered the *nature* of the offence; and, the *brutality* of the attack. The plea for mercy before this court must be looked at through those lenses. The appellant had prayed for leniency in the lower court. In short, the appellant has *not* told the High Court anything *new*.

13. Despite the fresh clamour for leniency, this was a *felony*. Section 234 of the Penal Code provides that any person who commits grievous harm to another is guilty of a felony and is liable to imprisonment for *life*. I have stated that the lower court considered the *mitigation* tendered and the fact that the appellant was a *first offender*. Considering the savage attack on the complainant that completely severed her left hand; and, the permanent disability, the appellant deserved a *long* prison sentence.

14. However, the appellant was a *first offender*. The *maximum* sentence of *life*, though well within the law, was in the circumstances *too* harsh. I will allow the appeal on sentence. The sentence passed against the appellant is *set aside*. The appellant shall now serve *fifteen (15) years imprisonment*. For the avoidance of doubt, the term of imprisonment shall take effect from 31<sup>st</sup> December 2012, the date of his original conviction.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 9<sup>th</sup> day of May 2017

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of-**

Appellant.

Ms. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.