REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL CASE NO. 75 OF 2011

DENNIS KIPCHUMBA …………… APPELLANT

VERSUS

REPUBLIC ……………………….. RESPONDENT

(Being an Appeal from the original conviction and sentence by Honourable G.A M'masi Senior Resident Magistrate, dated 9th February ,2011 in Eldoret Chief Magistrate's Court Criminal Case No.2544 of 2010)

JUDGEMENT

1. The Appellant ***Dennis Kipchumba*** was tried and convicted of the offence of causing grievous harm Contrary to ***Section 234*** of the ***Penal Code.*** He was sentenced to life imprisonment.

2. The particulars of the charge alleged that on 23rd April, 2010 at Kosyin village Kapsang location of Uasin Gishu District in the Rift Valley Province, the appellant unlawfully caused grievous harm to Joel Rotich by cracking his skull.

3. The appellant was dissatisfied with his conviction and sentence.

   He lodged an appeal to this court through a petition of appeal he filed in person on 10th May, 2011. He subsequently engaged the services of the firm of ***Ms. Chepseba Lagat & Associates*** who filed a supplementary petition of appeal on 12th July, 2011.

4. In the Supplementary petition of appeal, the appellant raised nine grounds which I reproduce verbatim as follows;-

   i. That the Learned Magistrate erred in law and fact in entering an equivocal plea.
   ii. That the Learned Magistrate erred in law and fact in failing to find that exhibits which were produced were not beyond reasonable doubt.
   iii. That the Learned Magistrate erred in law and fact in finding that the prosecution had proved its case beyond reasonable doubt.
   iv. That the Learned Magistrate erred in law and fact in convicting the Appellant on the basis of a defective charge sheet.
   v. That the charge was not read and explained to the Appellant in the manner prescribed by law and there was no proper recording of this fact.
   vi. The sentence imposed on the Appellant is manifestly excessive.
   vii. The Learned Magistrate erred in law and fact in failing to consider the defence evidence.
   viii. That the Learned Magistrate erred in law and fact in sentencing the accused to life

imprisonment.

ix. That the sentence to life imprisonment is unconstitutional and severe in the circumstances.

5. When the appeal came up for hearing on 24th November 2014, the appellant was represented by Learned counsel ***Mrs. Khayo*** who held brief for ***Mrs. Lagat*** while learned prosecuting counsel ***Mr. Mulati*** appeared for the state.

   In her submissions, ***Mrs. Khayo*** abandoned grounds No. 5 and 7 but submitted on the rest of the grounds of appeal.

   Briefly, ***Mrs. Khayo*** submitted that the charge sheet on the basis of which the appellant was convicted was defective as its particulars contained additions written by hand which were not countersigned; that the charges against the appellant were not proved beyond reasonable doubt as the prosecution failed to call an eyewitness one ***Patrick Kiptoo*** and that no other medical evidence was adduced to confirm the complainant's claim that he had been injured on 23rd April, 2010.

   On sentence, counsel submitted that the sentence of life imprisonment was harsh considering that the complainant and the appellant were childhood friends.

   She urged the court to allow the appeal on both conviction and sentence.

6. The appeal is contested by the state.

   Learned prosecuting counsel ***Mr. Mulati*** supported the appellant's conviction and sentence pointing out that the prosecution had

   adduced evidence which was sufficient to prove the charges against the appellant beyond reasonable doubt. Counsel further submitted that the claim that the charge sheet was defective was never raised before the trial court and though conceding that part of the particulars were written by hand, he was of the view that such an anomaly was curable under ***Section 382*** *of the* ***Criminal Procedure Code.***

   On the appeal against sentence, ***Mr. Mulati*** submitted that the sentence imposed on the appellant was within thelaw and should be confirmed.

   He invited the court to dismiss the appeal for lack of merit.

7. This is a first appeal to the High Court. Being the first appellate court, I am required to evaluate and examine afresh the evidence adduced before the lower court to draw my own conclusions while bearing in mind that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses – See:***Pandya V Republic (1975) EA 336; Kinyanjui V Republic (2004) 2 KLR 364 and Kiilu & Another V Republic (2005) KLR 175.***

8. I have considered the evidence on record, the rival submissions made by learned counsel for the appellant and the state as well as the grounds of appeal.

   I have also read the judgment of the learned trial magistrate. I find that though it is true that the prosecution failed to call an eye witness one ***Patrick Kiptoo***, this omission was not fatal to the prosecution case in view of the evidence which was tendered by the other prosecution witnesses. Besides under ***Section 143*** of the ***Evidence Act,***no particular number of witnesses is required to prove a fact.

   The complainant who testified as PW1 narrated how the appellant who was his friend and neighbour assaulted him on 23rd April, 2010 at 2p.m by hitting him with a stone on his head after a brief quarrel over a belt. He was taken to Ziwa hospital and according to the medical evidence in the P3 form produced as exhibit 1, on examination, the complainant was found to

have sustained a deep cut wound on the right side of his head. An X-rayon the injured area revealed a cracked skull.

PW2 the clinical officer who completed the P3 form classified the degree of injury as grievous harm. The appellant in his defence gave an unsworn statement which comprised of only one sentence in which he stated ***"I stay at Ziwa I ask for leniency I assaulted Joel Rotich".***

9. In view of the foregoing, it is common ground that the complainant and the accused were friends and neighbours and that the offence was committed on 23rd April, 2010 at 2 p.m. It was during the day and the complainant's recognition of the appellant as his assailant is beyond question. As the two were friends, the complainant had no reason to give false evidence against the accused and the defence did not allude to any. Besides, in his statement in defence, the appellant admitted to have assaulted the complainant as alleged and though this did not amount to an admission of guilt with regard to the offence with which he was charged, this admission was significant because it was as a result of that assault that the complainant sustained injuries which were classified as grievous harm. The P3 form was sufficient evidence to prove the degree of injury sustained by the complainant.There was no need for production of further medical evidenceas submitted by ***Mrs. Khayo.***

10. On the claim that the charge sheet was defective, I find that the addition of some particulars on the charge sheet by hand did not render the charge sheet defective as it is not a requirement of the law that charge sheets must be in printed form.

11. It is therefore my finding that the learned trial magistrate in her judgment properly addressed her mind to the issues that required determination by the court; evaluated the evidence and arrived at the correct conclusion that the prosecution had proved the charges preferred against the appellant beyond any reasonable doubt. I have consequently come to the conclusion that the appellant was properly convicted. His conviction is therefore upheld.

12. Turning to the appeal against sentence, the offence for which the appellant stands convicted attracts a maximum sentence of life imprisonment. In ***Macharia V Republic (2003) 115,*** the Court of Appeal had the following to say on the circumstances under which an appellate court can interfere with a sentence imposed by the trial court;

> ***" ….. The Court does not alter a sentence on the mere ground that if the member of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James v R, (1950) 18 EACA 147 ' it is evident that the judge has acted upon some wrong principle or overlooked some material factors' To this we would also add third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case…."***

13. In this case, the record of the trial court shows that the appellant was a first offender and that at the time of his conviction, he was twenty one years old.

Though the offence for which he was convicted is serious, imposing the maximum sentence of life imprisonment on a young offender like the appellant who was also a first offender was in my view harsh. The sentence was manifestly excessive in the circumstances of this case. I am therefore inclined to allow the appeal against sentence.

Under ***Section 354*** of the ***Criminal Procedure Code***, I alter the sentence of life imprisonment imposed by the trial court and substitute it with a sentence of five years imprisonment. The sentence shall take effect from the date of conviction.

14. In conclusion, I have noted from the court record that the appellant has been out on bond pending the conclusion of his appeal. He was granted bond pending appeal on 2nd August 2011. As his

appeal has now been determined, the orders granting him bond pendingappeal are hereby vacated. His surety is also discharged. And as the appellant’s conviction has been confirmed and sentence handed down by the trial court reduced, the appellant shall serve the sentence imposed by this court which for the avoidance of doubt shall include the period the appellant had served before he was released on bond pending appeal. It is so ordered.

C. W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF APRIL 2015

In the presence of:-

Appellant

Mr.Aseso for the Appellant holding brief for Ms. Lagat

Ms. Mwaniki for the DPP

Mr. Paul Ekitela court clerk