



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 115 OF 2014
DOMINIC NJENGA MBUI.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Being an appeal arising from the Judgment and Sentence of Mrs. C. Oluoch, Senior Principal Magistrate on 5th August 2014 in the Original Criminal Case No. 1911 of 2013 at Kiambu Law Courts)

JUDGMENT

Dominic Njenga Mbui, the Appellant herein was charged with the offence of grievous harm contrary to **Section 234 of the Penal Code**. The particulars of the offence were that on the 21st July, 2013 at 22:20 Hours at Victory Bar, Karuri Location within Kiambu County unlawfully did grievous harm to Samuel Nganju Mungai. The trial went to full hearing and the Appellant was convicted and sentenced to serve 3 years imprisonment. He was dissatisfied with the sentence and he preferred this appeal against the sentence. In a memorandum of Appeal dated 19th September 2014, he faulted the learned trial magistrate for jailing him for three years without an option of a fine. He also faulted him for failing to appreciate that himself and the complainant were involved in a brawl which resulted into the injuries the complainant sustained. Finally, he faulted the learned trial magistrate for imposing a manifestly excessive, unfair and extremely harsh punishment in the circumstances.

The appeal was canvassed before me on 14th October 2015. Learned counsel Mr. Kibunja represented the Appellant. His submissions were that the sentence was harsh and excessive. Besides, the court convicted the Appellant based entirely on the evidence of PW2 who was a Clinical Officer at Karuri Health Centre who never treated the Appellant. Of worth noting is that the Appellant did not cross-examine the witness so as to test the gravity of the injury the complainant suffered. He further submitted that the court ought to have taken into account the fact that both the complainant and the Appellant were involved in a fight and that it was unfortunate the complainant got injured. Finally, he urged the court to take into account that the Appellant had already served two months in jail.

Learned state counsel Ms. Atina opposed the appeal. She submitted that under **Section 234 of the Penal Code**, a person who commits the offence of causing grievous harm is liable upon conviction to a maximum of life imprisonment. As such, the penalty imposed against the Appellant, though lawful, was lenient. She also refuted the fact that the Appellant was involved in a fight with the complainant. The circumstances surrounding the case were that he complainant had been involved in a fight with the father of the Appellant. The Appellant intervened and he hit the complainant on the head as he spoke with his father. The P3 form produced by PW2 showed that the complainant suffered a dip cut wound and the

injury was assessed as grievous harm. Those injuries were serious; and in any case, the Appellant committed the offence without any provocation. She urged the court to dismiss the appeal.

I have accordingly considered the respective submissions. This court is conferred with the jurisdiction to interfere with the sentence of a trial court under **Section 354 (3)(b) of the Criminal Procedure Code** which provides as follows;

“(3) The court may then, if it considers that there no sufficient ground for interfering, dismiss the appeal or may-

(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence.”

The power to do so must nevertheless be exercised judicially, in the interest of justice and based on circumstances of each case. In the present case, the complainant Samuel Nganju Mungai who testified as PW1 was at Victory Bar in Thimbigwa in Kiambu County on 27th July, 2013 at 1.00 pm. While there, he disagreed with one Mbui, the Appellant’s father. A fight ensued and they were ejected from the bar by a security guard employed by the bar. The Appellant then picked a stone and hit him on the head as he was talking with his father. He was rushed to Karuri Health Centre and thereafter referred to Kiambu District Hospital and then to Kenyatta National Hospital. The matter was reported to Karuri Police Station where he recorded a statement and was issued with a P3 form. PW2, Richard Munene a Clinical in Karuri Sub-District Hospital produced as exhibit PW1’s P3 form. In corroborating the evidence of PW1, he testified that the probable type of weapon used to injure PW1 was a brunt forceful object. He also confirmed that PW1 had been treated at Karuri, Kiambu and Kenyatta Hospitals. He assessed the degree of injury as grievous harm.

From the above analysis, it is clear that the Appellant proceeded to attack the complainant when he had not been provoked in any manner. Although PW1 and the Appellant’s father had fought in the bar, as at the time the Appellant attacked PW1, the latter was just standing talking with his father. Although by nature he was bound to protect his father, he first ought to have enquired about the genesis of the problem and more so, acted as an arbiter on taking note that the fight had ceased. For that reason, my view is that the Appellant was an aggressor and he attacked PW1 with so much force that was not warranted.

I have had a look at the P3 form which shows that PW1 suffered a dip cut wound on the left side of the head and a small one on the occipital aspect. Be that as it may, it is clear that the injury though grave, did not call for admission to hospital. I also take note of the fact that the Appellant was a first offender and although he was the aggressor, this court may nevertheless treat him with mercy. On the latter ground, it is also my view that the learned trial magistrate ought to have given an option of a fine in sentencing. I also take note of the fact that the complainant was also involved in the fight with the Appellant’s father whose genesis was not disclosed. He may not have been an innocent party after all. For these reasons, in exercise of the discretion conferred on me by **Section 354 (3)(b) of the Criminal Procedure Code**, I am inclined to reduce the sentence.

In the end, the appeal partially succeeds. I set aside the three years jail term. I substitute the same with an order that the Appellant be and is hereby sentenced to pay a fine of Kshs. 50,000/=, in default serve twelve months imprisonment. In the event that he does not pay the fine, the sentence shall run from the date of sentencing by the learned trial magistrate.

It is so ordered.

DATED and DELIVERED this 5TH day of November, 2015.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Kibunja for the Appellant.*
2. *Mr. Muriithi for the Respondent.*