



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL CASE NO. 116 OF 2013

[Arising From Kimilili Criminal Case No. 1076 of 2013 Judgment of G.R. Sagero (Ag. Principal Magistrate) dated 25/9/2013]

HARON MANDELA NAIBEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. HARON MANDELA NAIBEI, the Appellant, faced a charge of grievous harm contrary to Section 234 of the Penal Code before the Principal Magistrate's Court at Kimilili. The particulars of the offence were that; on 10th June, 2013 at Kaptegendet village of Kongit location in Mt. Elgon District within Bungoma County the Appellant unlawfully did grievous harm to RODGERS KIPROTICH NDIEMA. At first he denied the charges and a plea of not guilty was entered. However, after the Complainant, PW1 had testified, instead of cross-examining him, the Appellant told court that he had no questions as what PW1 had stated was the truth. The trial Court thereupon read to the Appellant the charge and particulars afresh to which he pleaded guilty.
2. The Appellant was therefore convicted on his own plea of guilt. The prosecution asked the court to treat the Appellant as a first offender. In his mitigation, the Appellant told the court that he had reconciled with the Complainant and that the latter wanted to withdraw the charges. Before sentencing the Appellant, the trial Court ordered for a Probation Report. That report was positive on the Appellant. However, that notwithstanding, the trial Court proceeded to sentence the accused to 3 years imprisonment on the ground that the attack on PW1 would have been fatal and it was imperative to give a deterrent sentence.
3. Aggrieved by that decision, the Appellant has appealed to this court against the conviction and sentence. His grounds of appeal were that the trial Court disregarded the probation report; that it failed to consider the fact that the Appellant had reconciled with the Complainant and that the sentence was excessive. He filed his submissions elaborating on these grounds and stated that he had already paid for the offence he had committed by paying 2 cattle that was demanded for by the Complainant's family as compensation.
4. The state on the other hand opposed the appeal stating that the act was grave considering that the injuries that were occasioned on the Complainant had been admitted by the Appellant and that the submissions by the Appellant were a mere mitigation. It was further submitted that the sentence of 3 years meted out was lenient considering that the offence for which the Appellant had been

convicted for carried a sentence of life imprisonment. That it was not fatal to have disregarded the Probation Report as, nevertheless, the court established that there was intention to cause grievous harm.

5. This being a first appeal, the court has to evaluate afresh the evidence adduced at the trial and come up with its own findings and conclusions but bearing in mind that the court did not have the advantage of examining the witnesses. See **OKENO V REPUBLIC (1973) EA**.
6. It is not in dispute that the Appellant was convicted on his own plea of guilt. The facts that he admitted were that on the material day he assaulted the Complainant with a knife on his left side of the chest. The injuries were assessed as grievous harm by the Medical Officer who examined the Complainant. A P3 Form dated 12th July, 2013 was produced in evidence. Before convicting the Appellant, the trial Court called for a Probation Report, which although positive on the Appellant, the trial Court disregarded.
7. Since the Appellant pleaded guilty to the charge, his appeal cannot lie as against the conviction. He can only validly appeal against the sentence. This is clear from Section 348 of the Criminal Procedure Code which provides:

“348. No appeal shall be allowed in the case of an accused who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”

His appeal against the conviction is therefore dismissed.

8. As regards the sentence, the Appellant’s complaint is that the trial Court erred in disregarding the Probation Report; that it failed to consider that he and the complainant had reconciled and that the court failed to consider that he was a first offender. I have looked at the record of the trial Court. It is clear that the trial Court did consider the fact that the parties had reconciled and that the Complainant had wished to withdraw the charges. It is on this basis that the court called for the Probation Report before passing its sentence. The trial Court recorded as follows:-

“Mitigation considered and since the complainant has indicated that he has forgiven the accused and wished the case to be withdrawn I will call for probation officer’s report with a view of pronouncing sentence the report to cover social records of the accused and sentiments of the complainant’s family.”

9. It is clear from the foregoing that, not only did the trial court consider the reconciliation by the parties, but it was also interested to know the outcome of the social inquiry before passing the sentence.
10. A court is entitled to call for a probation report on an accused before passing its sentence. However, such a probation report is not binding on the court. The report only acts as a guide. A court can either adopt or ignore such a report. In the case of **Samuel Maobe Sereti –vs- Republic (2004) eKLR** the court held that:-

“Of course the court is not bound by the recommendations of the probation officer but having called for the report and the report being favourable the court should have stated why it felt that it was not proper to place the Appellant on probation.”

11. In the present case, after considering the probation report, the court gave reasons for not placing the Appellant on probation. It considered the fact that the assault was deliberate, the same was near fatal and that it was important to mete out a deterrent sentence. Accordingly, I reject the ground that the trial court failed to consider the Probation Report.
12. The other issue raised by the Appellant is that the trial court failed to consider that the parties had reconciled. I am aware that under Article 159 (2) of the Constitution, courts are enjoined to

promote other alternative modes of dispute resolution. This includes promoting reconciliation of parties where necessary. However, my view is that this has to be within the parameters allowed by law. Under Section 176 of the Criminal Procedure Code (Cap 75), the courts are called upon to encourage and facilitate amicable settlement by way of reconciliation of parties in certain criminal cases, such as in the case of common assault or in any case of a personal or private nature. However, courts will not facilitate reconciliation where the offence, although of a personal or private nature, is aggravated in degree or where the offence amounts to a felony. The section provides:-

“In all cases the Court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation, or other terms approved by the Court, and may thereupon order the proceedings to be stayed or terminated.”

13. In the present case, the assault caused grievous harm. Grievous harm, in my view, is an assault of an aggravated nature and does not fall under the criminal offences that a court can allow for reconciliation. The record shows that the trial Court acknowledged the findings of the probation report and proceeded to sentence the Appellant on the ground that the offence was of a serious nature and that despite the reconciliation, there was intention to inflict injury and that such an offence should be discouraged.

14. On the complaint that the sentence was excessive, my view is that in law, sentence is essentially a discretionary matter for the trial court. However, in exercising that discretion, a trial court has a duty to take into account all the relevant factors and leave out any irrelevant matter. An Appellate Court would interfere with that exercise of discretion where it is shown that, the court whose exercise of the discretion is impugned, has either not taken into account a relevant factor or has taken into account an irrelevant factor, or that short of those two, the exercise of the discretion is plainly wrong. See **Felix Nthiwa Munyao vs. Republic CA. No. 187 of 2000**. In the cases of **Diego –vs- Republic [1985] KLR 621** and **Dismas –vs- Republic [1984] KLR 634**, the courts held that an Appellate Court should not interfere with the discretion by a trial Court as to sentence except in such cases where it appears that in assessing the sentence, the court acted on some wrong principle or has imposed a sentence which is manifestly inadequate or manifestly excessive.

15. The offence of causing grievous harm fetches a punishment of life imprisonment as provided for under Section 234 of the Penal Code. That being the case, I find the sentence of 3 years that the trial Court imposed to have been informed by the probation report which was positive on the Appellant. Accordingly, I find no reason to interfere with the sentence by the trial Court.

16. In the premises I find the Appellant’s appeal to be without merit and I accordingly dismiss the same. Right of appeal within 14 days.

DATED and **DELIVERED** at BUNGOMA this 16th day of July, 2014.

MABEYA

JUDGE