



REPUBLIC OF KENYA

High Court at Kisumu

Criminal Appeal 42 of 2011

PAUL WAMEYO ODIPO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**J U D G M E N T**

The appellant herein was charged with grievous harm contrary to section 234 of the Penal Code.

The particulars of the offence are that on the 6<sup>th</sup> day of October 2008 at Jera sub location in Ugenya district within Nyanza province jointly with others not before court unlawfully did grievous harm to **Vitalis Ogola Oketch**.

When this matter came up for hearing **Mr. Mwamu** counsel for the appellant restricted his appeal on sentencing alone and not the conviction. He argued that the sentence meted against the appellant was excessive considering his age and the circumstances obtaining at the time of the incident.

He further argued that the trial court did not have jurisdiction to entertain the suit at it was a Resident Magistrate's Court which according to him a second class court contrary to section 7 (1) of the Criminal Procedure Code and the schedule thereof.

**Mr. Meroka** on the other hand did not contest so much the issue of sentencing considering the appellant's age who is said to be over 75 years old. He however opposed the element of the court's jurisdiction as according to him the trial court was seized of it.

It would be prudent to start by addressing the last point of whether or not the trial court being a Resident Magistrate's court had jurisdiction. Section 7 (1) of the Criminal Procedure Code provides that:-

**“7 (1) A subordinate court of the first class held by**

**(a) A Chief Magistrate, Principal magistrate or Senior Resident Magistrate may pass any sentence authorized by law for any offence triable by that court.**

**(b) A Resident Magistrate may pass any sentence authorized by law for an offence under section 278, 308 (1) or 322 of the Penal Code or under the Sexual Offences Act 2006”.**

**Under section 2 (f) paragraph 6 of the Magistrate Court Act, a Magistrate Court of the first class is defined to mean:-**

**“Resident Magistrate's held by a District magistrate having the power to hold a magistrate's court of the first class”.**

Section 3 of the same Act goes ahead to establish and define what constitutes a Resident Magistrate's Court thus:-

**“There is hereby established the Resident Magistrate's court which shall be a court subordinate to the High Court and shall be dully constituted when held by a Chief Magistrate, Senior Principal Magistrate, a Senior Resident Magistrate or a Resident Magistrate.**

**Consequently, it is evidently clear in my opinion that the definition given under section 2 (f) that a magistrate's court of the first class is a Resident Magistrate's court held by a Magistrate with powers sufficient to hold a magistrate's court of the first class.**

The Court of Appeal in Republic -VS- Shande Ali & Abdi Nane – Nyeri Criminal Appeal No. 55 of 2004, held that:-

**“Under section 2 of the Magistrate Courts Act Chapter 10 of the Laws of Kenya a Resident Magistrate's court is a court of the first class. In the instance appeal therefore the Resident magistrate who presided over the trial of the respondents at Moyale for the offence of doing grievous harm contrary to section 234 of the Penal Code had jurisdiction.**

**Consequently, therefore we allow this appeal, set aside the orders of the first appellate court questioning the respondent's respective conviction, setting aside their respective sentences and for their retrial before the Nyeri Principal Magistrate and reinstate their conviction and sentence by the trial magistrate which sentence shall be the balance outstanding consequent to actualizing the orders of the first appellate court”.**

I need not add more. The trial court had jurisdiction and that prayer ought to fail.

The second limb to be considered is whether or not the sentencing was excessive. The maximum period given by the Act is seven (7) years.

I have perused the evidence on record. I have no doubt in my mind that the appellant who is claimed to be a hunter indeed prepared himself with the assistance of his family to harm the complainant, which they did. The complainant sustained serious injuries.

I have however considered the application and prayers and in particular his age. I took notice of his demeanor in court and although there was no proof of his age he appeared old and frail.

However he ought not to have taken the step he did to harm the complainant. Taking all the above factors, I shall dismiss the appeal but reduce the sentence from seven years to three years imprisonment from the date of sentencing at the lower court.

Orders accordingly.

**Dated, signed and delivered at Kisumu this 5<sup>th</sup> day of November, 2012 .**

**H.K. CHEMITEI  
JUDGE**

In the presence of:

Miss Oundo for state

Musomba for Mwamu for the appellant

*HKC/va*