



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Criminal Appeal 295 of 2006

THOMAS OECHA ANUNDA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence in Chief Magistrate's Court

Kisii Criminal Case No.2341 of 2003 – S. M. S SOITA ESQ. P.M.)

JUDGMENT

The Appellant was charged before the Principal Magistrate, Kisii with grievous harm contrary to **section 234** of the **Penal Code** whose particulars were that on the night of 22nd/23rd October 2002 at Igemo sub location in Central Kisii District within Nyanza Province he unlawfully grievously injured **Gladys Kerubo Onsongo**. He pleaded guilty, was convicted and sentenced to serve 10 years in jail. This is his appeal against the sentence. The grounds of appeal are that he was first offender, he is remorseful and asks for leniency and that he has been ailing since the imprisonment. He submitted that the sentence imposed was excessive.

Mr. Kemo for the Republic opposed the appeal on basis that the maximum sentence for the offence was life imprisonment and therefore what was handed down was merited. The learned Senior Principal State Counsel went on that the facts admitted disclosed attempted robbery with violence and therefore that the Appellant was lucky to be charged with grievous harm. Of course, the sentence for attempted robbery with violence is death.

The facts which the Appellant admitted were that during that night at about 2 a.m. the complainant was asleep in her house when she was woken by a knock on the door. As she prepared to open, the door was hit open. The Appellant entered armed with a knife. He tied her hands with a rope before stabbing her on the cheek and left shoulder. When she screamed the Appellant ran away. The complainant was treated at Kisii District Hospital where she was admitted for a week. Medical report produced showed she suffered "**maim**". Appellant disappeared until 23/9/03 when he was arrested and charged.

During mitigation, the Appellant stated he committed the offence because he was moving in wrong company at the time. He said he had since become a born-again Christian. The friends who had asked him to commit the offence had died, he said. The trial court considered all these, including the fact that he was first offender, before imposing the sentence.

When sentencing an accused the trial court is exercising a discretion. An appellate court should not interfere with the discretion unless it is demonstrated that it overlooked some material factors, took into consideration some immaterial fact, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case (**Wanjema v. Republic [1970] EA 491**).

In passing the sentence in this case, the trial court observed that the Appellant had acted beastly by tying up the complainant before stabbing her. This was a violent attack on a woman in the night and the behaviour of the Appellant was, I agree, beastly. He was viciously armed. However, the injury sustained at the end of the day was not lethal, life-threatening, permanent or capable of causing permanent disfigurement to any external or internal organ. Complainant suffered swollen and tender anterior left chest wall. The opinion of the Doctor that complainant suffered "**maim**" was an

exaggeration of the situation. On basis of the injury the extent of injury should have been “*harm*”.

It is expected of the first appellate court to submit the entire case and evidence in the trial court to fresh and exhaustive scrutiny to satisfy itself that justice was done in the matter (**Okeno v. Republic [1972] EA 32**).

I quash the conviction and, under **section 179(2)** of the **Criminal Procedure Code**, enter conviction of assault causing actual bodily harm contrary to **section 251** of the **Penal Code**. The punishment for this lesser offence is 3 years imprisonment. The sentence of 10 years is consequently set aside. Given the beastly behaviour of the Appellant, and considering what he told the trial court in mitigation, he is ordered to serve 3 years in jail.

Dated and Delivered at Kisii this **8th** Day of July, 2009

A. O. MUCHELULE

JUDGE

8/7/2009

Coram: A. O. Muchelule Judge.

Mongare cc.

Mr. Kemo present.

Appellant present.

Court: Judgment in open court.

A. O. MUCHELULE

JUDGE