



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, J. MOHAMMED & KANTAI J.J.A)

CRIMINAL APPEAL NO. 54 OF 2015

BETWEEN

ALOISE ABUYA AURO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at

Homabay (S. Majanja, J.) dated 18th December, 2014 in H.C.C.R.A. No. 42 of 2014)

JUDGMENT OF THE COURT

[1] This is an appeal against the sentence of ten years imprisonment imposed against the appellant by the trial court and upheld by the first appellate court for the offence of grievous harm.

[2] The appellant was charged in the Principal Magistrate's Court at Ndhiwa with two counts namely; count 1- grievous harm contrary to section 234 of the Penal Code and count II - resisting arrest contrary to section 253 (b) of the Penal Code. The charge in the first count stated that on 7th May, 2013, the appellant unlawfully caused grievous harm to **Margaret Muga Okomo**. The appellant pleaded not guilty to the two charges. The prosecution called six witnesses at the trial. The appellant gave sworn evidence and called two witnesses. The prosecution evidence disclosed that on 7th May, 2013 at about 9.30 p.m. the appellant went to the complainant's house armed with two spears and stabbed the complainant with a spear on the chest and ran away. The complainant who is an aunt of the appellant was taken to hospital and admitted for three days. The appellant was arrested in his house on 13th May, 2013. It was alleged that he resisted arrest. A clinical officer who examined the complainant assessed her age as 60 years. He found that the complainant sustained a penetrating wound on the chest and assessed the injury as grievous harm. The trial magistrate acquitted the appellant of the offence of resisting arrest but convicted the appellant for the offence of causing grievous harm to the complainant and sentenced him to ten years imprisonment.

[3] The appellant appealed to the High Court at Migori against the conviction and sentence. However, his appeal was dismissed. As regards sentence, the High Court stated that the act of the appellant was deliberate, unprovoked and fell short of causing death.

[4] In this appeal, the appellant states that the sentence was manifestly harsh and excessive and prays that the sentence be reduced.

[5] By section 234 of the Penal Code, a person who unlawfully commits the offence of grievous harm is liable to imprisonment for life. By section 361(1) of the Criminal Procedure Code, a second appeal is allowed only on a matter of law. That section prohibits the Court of Appeal from hearing a second appeal on a matter of fact and states that severity of sentence is a matter of fact, or to hear an appeal against sentence except where the sentence has been enhanced by the High Court unless the subordinate court had no jurisdiction to pass the sentence.

In the instant appeal, the subordinate court had jurisdiction to pass the sentence of ten years imprisonment and the High Court did not enhance the sentence. It follows that this Court has no jurisdiction to hear the appeal against the sentence and the appeal is thereby incompetent.

Accordingly, the appeal is dismissed. We so order.

Dated at Kisumu this 31st day of January, 2020.

E.M. GITHINJI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR