



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CRIMINAL APPEAL NO. 52 OF 2013

BETWEEN

EDWARD MUTHENGI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Lesiit, J.)

dated 22nd September, 2011

in

H.C.CR.A No. 165 of 2010)

JUDGMENT OF THE COURT

1. **Edward Muthengi**, the appellant, was charged with the offence of assault causing grievous harm contrary to **Section 234** of the **Penal Code**, Chapter 63, laws of Kenya in the Senior Resident Magistrate's Court at Marimanti. The particulars of the charge were that on 3rd October, 2009 at around 1430 hours at Irunduni Village, Gikingo Location in Tharaka District within the then Eastern Province, the appellant willfully and unlawfully assaulted one Joshua Mbugi occasioning him actual grievous harm.
2. The appellant pleaded not guilty to the charge and the prosecution called a total of six witnesses. It was the prosecution's case that on 3rd October, 2009 at around 1:00p.m PW1, Joshua Mbugi Gaichu (Joshua) and his wife PW2, Rhoda Karimi (Rhoda), were on their farm planting. The appellant went to the farm armed with a panga and cut Joshua on his right knee. Joshua fell down and the appellant continued to viciously cut him all over his body. Rhoda started screaming. At the material time PW3, Geoffrey Mwathi (Geoffrey), had gone to visit PW4, Alex Kimathi (Alex), Joshua's neighbour. Attracted by the screams, Geoffrey and Alex came out of the house and saw the appellant cutting Joshua with a panga. The appellant ran away before he could be apprehended. The incident was reported to the police station. PW6, PC Geoffrey Kamau (PC Geoffrey), testified that on the material day the appellant reported that he had fought with Joshua and surrendered himself to the police station. It was Joshua's evidence that prior to the incident he had disagreed with the appellant over a road that passed on the appellant's land. According to

- PW5, Dr. Julius Kitili, the degree of injuries sustained by Joshua was classified as grievous harm.
3. In his defence the appellant gave a sworn statement and called two witnesses. The appellant testified that Joshua was his neighbour. He stated that on the material day while he was herding his cattle he met Joshua on the road; Joshua redirected the cattle back into the appellant's home. When the appellant inquired about his conduct, Joshua tried to cut him with a panga. The appellant managed to restrain Joshua. Rhoda (Joshua's wife) ran towards Joshua and the appellant armed with a panga; in an attempt to slash the appellant with the panga, Rhoda accidentally cut Joshua twice. Joshua fell down and the appellant ran away. The appellant testified that he reported the matter to the police station. DW2, Regina Muthoni, testified that earlier in the day she had also had a disagreement with Joshua over the road passing in his land.
 4. After considering the evidence on record, the trial court convicted the appellant and sentenced him to 20 years imprisonment. Aggrieved with the said decision, the appellant preferred an appeal in the High Court. By a judgment dated 22nd September, 2011, the learned Judge (Lesiit, J.) dismissed the appeal. It is that decision that instigated this appeal. The appeal is based on the following grounds:-
 - ***The learned Judge contravened the express provisions of Section 359 (1) of the Criminal Procedure Code, consequently rendering the proceedings null and void.***
 - ***The learned Judge erred in law by upholding a sentence which was manifestly harsh and excessive considering the nature and circumstances in which the offence was committed.***
 5. Mr. Kaumbi, learned counsel for the appellant, submitted that the appellant's appeal in the High Court was heard by one Judge contrary to ***Section 359 (1)*** of the ***Criminal Procedure Code***. He argued that the sentence meted against the appellant was harsh and excessive. He urged the Court to allow the appeal. Mr. Isaboke, Senior Prosecution Counsel, in opposing the appeal, submitted that the appellant had been charged with causing grievous harm to Joshua; the appeal was properly heard by a single Judge. According to him, a criminal appeal can only be determined by two Judges where the penalty attracts a mandatory death sentence. Mr. Isaboke argued that the issue of the matter having been heard by a single Judge was never raised in the High Court. He submitted that severity of sentence was not a point of law and therefore could not be entertained on a second appeal.
 6. We have considered the record, submissions by counsel and the law. By dint of ***Section 361*** of the ***Criminal Procedure Code*** we are restricted to only consider matters of law in this second appeal. In ***Chemagong -vs- Republic (1984) KLR 213*** at page 219 this Court held,

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic 17 EACA146).”

We are of the considered view that the issues that arise for determination are as follows:-

- ***Were the High Court proceedings a nullity?***
- ***Can issue of severity of sentence be entertained by this Court?***

7. ***Section 359 (1)*** of the ***Criminal Procedure Code*** provides:-

“Appeals from subordinate courts shall be heard by two Judges of the High Court, except when in any particular case the Chief Justice, or a Judge to whom the Chief Justice has given authority in writing directs that the appeal be heard by one Judge of the High Court.”

It is on the basis of the foregoing provision that the appellant claims that the proceedings in the High Court were a nullity. The first appeal was heard and determined by a single Judge. We cannot help but note from the record that on 17th January, 2011, the resident Judge at Meru High

Court admitted the appeal for hearing before one Judge. We are of the view that the resident Judge admitted the appeal and directed it to be heard by a single Judge with the authority of the Chief Justice. The authority is derived from the express appointment of the resident Judge by the Chief Justice to head the High Court station at Meru. Consequently, the proceedings before the single Judge are valid. Moreover, counsel for the appellant should have raised the matter with the Judge, raising it now is a mere afterthought.

8. The appellant also submitted that the sentence meted to him was harsh. The penalty for the offence of causing grievous harm is life imprisonment. See **Section 234** of the **Penal Code**. The appellant was sentenced to 20 years imprisonment. The issue of sentence was considered by the High Court which held that the same was fair and legal. **Section 361(1)(a)** of the **Criminal Procedure Code** provides:-

“(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section - (a) On a matter of fact, and severity of sentence is a matter of fact; ..”

Based on the foregoing provision this Court has no jurisdiction to consider any issue on severity of sentence on a second appeal. See **Solomon Kiptoo Sawe -vs- Republic- Criminal Appeal No. 66 of 2006** & **James Oromo -vs- Republic- Criminal Appeal No. 68 of 2006**.

9. We find that the appeal has no merit and is hereby dismissed.

Dated and delivered at Nyeri this 3rd day of June, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR