IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: GICHERU, C.J., O'KUBASU & WAKI, JJ.A.)

CRIMINAL APPEAL NO. 358 OF 2008

BETWEEN

CHARO NGUMBAO GUGUDU …………………………...…...…………….. APPELLANT

AND

REPUBLIC …………………………………………...………………….. RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Malindi (Khaminwa, J.) dated 5th September, 2002

in

H.C.CR.A. NO. 56 OF 2001)
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JUDGMENT OF THE COURT

The appellant, **CHARO NGUMBAO GUGUDU,** was convicted and sentenced to life imprisonment together with 15 strokes of the cane by the learned Ag. Principal Magistrate (Mrs. J. M. Matu) on a charge of causing grievous harm contrary to **Section 234** of the Penal Code. The particulars of the offence were as follows:

"Charo Numbao Gugudu: on the 25th day of June 1999 at Mabaoni village in Gunda location within Malindi District of the Coast Province, did grievous harm to Kenga Karisa Mangi"

The appellant's trial commenced on 15th December, 1999 when the following prosecution witnesses testified: **Ngumbao Kavitsa Tsofa** (PW1), **Habiba Bakari Saro** (PW2), **Ahmed Roba Manza** (PW3), **PC Leonard Kiplimo** (PW4) and the complainant **Kenga Karisa Mangi** (PW5). The complainant's evidence was brief and was supported by the evidence of **Tsofa** (PW1) and **Saro** (PW2) who witnessed the incident. In his evidence in chief, the complainant stated:

"**My names are Kenga Karisa Mangi. I stay at Ganda. I am a farmer. I know the accused. He is my uncle (Mjomba wangu). I was coming from the mosque. I had a bicycle. I was going home. The accused came from the hotel of Chengo Bundi. The accused told me "utaona". One day as I was coming from work in Malindi the accused abused me: He told me "Utaona". He then beat me with "Muti" on the neck and waist. People poured water on me. I was injured. I was unconscious I next found myself in hospital. The weapon that hit me is in court (exhibit 1 identified). It was Charo who hit me with this weapon. My left leg and arm are paralyzed".**

In his evidence in chief **Dr. Frank Mwangemi** (PW6) who examined the complainant stated as follows:
"I am Dr. Frank Mwangemi of Malindi Hospital. On request by Malindi Police Station on 17/9/99. I examined one Kenga Karisa Mangi who was said to have been assaulted. He was unconscious, in deep coma, responding only to severe pain on the chest. He had a swelling on the top of the head. There was no other injury noted. The probable type of weapon used was blunt. The degree of injury was grievous harm. The injury was life threatening. The coma had lasted 3 months. There were severe brain damages (sic). He will not assume his normal senses again".

On being put on his defence the appellant defended himself thus:
"My names are Charo Ngumbao Gugundu (sic). I stay at Ganda Mabaoni village. I am a farmer. On 25/6/99 on a Friday I was at home at Mabaoni. PW1 came home drank. He asked me to say why I was having an affair with his wife. He produced a knife. I got a chance, and ran. I fell down where there was a club I got hold of it and hit PW1. I was defending myself against PW1 who was alleging something I had not done. I hit him and he fell down. All witnesses who testified saw what happened. I went to the Chief where I reported. Police took me to the scene. They then arrested me I was taken to the police station where I was charged."

yi The learned trial magistrate considered the evidence before her and in a judgment delivered on 9th February, 2000 convicted the appellant by stating:

"There is no evidence that PW1 attacked the accused. Even if there was such evidence, it is clear that the accused who had all the chance to escape from PW5 armed himself calculatedly re-attacked PW5 with the intention of killing him. The reason of the accused's attack on PW1 was irrational. The force he used on PW5 was excessive. The accused's assault on PW5 was therefore by all means unlawful. Reasons wherefore I find the accused person guilty and convict him of the offence of grievous harm contrary to section 234 of the Penal Code".

The prosecutor informed the learned trial magistrate that the appellant was a first offender and that the complainant was completely mentally disabled. The prosecutor asked the trial court to take a serious view of the matter.

The learned trial magistrate stated that she wholly accepted the prosecutor's request and proceeded to sentence the appellant to life imprisonment plus 15 strokes of the cane.

Being aggrieved by the foregoing, the appellant filed an appeal in the High Court and when his appeal came up for hearing before Khaminwa J. on 31st July, 2002, the appellant informed the learned Judge that the appeal was against the sentence only.

The learned State Counsel (Ms. Mwaniki) appearing for the State addressed the Court as follows:

"I do not oppose appeal. The court to consider the injuries inflicted to complainant. He was admitted for 3 months up to date the complainant cannot speak properly. He suffered severe injury. He is a relative of appellant. He was in deep coma. I ask this court to take those factors in consideration. The sentence is excessive punishment provided is that the sentence be life imprisonment. Appellant is first offender. I leave the matter to court".

The superior court considered the appeal before it and dismissed the same. In dismissing the appeal in a judgment delivered on 5th September, 2002 the learned Judge stated:
"I have examined the record carefully and I am not convinced that there is any reason to interfere with sentence of trial magistrate. I therefore find that the trial magistrate exercised her discretion correctly and the sentence is fair and just in the circumstances. The appeal is hereby dismissed".

Still dissatisfied with the judgment of the High Court, the appellant now comes to this Court by way of second appeal. This is the appeal that came up for hearing before us on 18th January, 2011 when Mr. Gikandi appeared for the appellant while Mr. Ondari (Assistant Deputy Public Prosecutor) appeared for the State.

In his submissions, Mr. Gikandi stated that he wished to confine himself to the legality of the sentence only. He argued that when the appellant was convicted he was only 22 years old so that as of now (2011) the appellant has been in prison for 11 years. Mr. Gikandi informed us that the appellant who was a first offender was awarded the maximum sentence of life imprisonment as provided under **Section 234** of the Penal Code.

We also were reminded that corporal punishment had been taken away by *Act No. 5 of 2003* which came into effect on 25th July, 2003.

It was Mr. Gikandi's submission that the appellant who is remorseful for what happened has suffered enough.

In his brief address, Mr. Ondari conceded that the two courts below did not consider all the circumstances of the case which would have affected the sentence like the fact that there was provocation and that the appellant was a first offender.

In this appeal, we have set out the genesis of the appellant's tribu,lations by reproducing portions of the evidence given during the trial. There can be no doubt that this was uncalled for incident in which the appellant inflicted very serious injuries on the complainant. The fact that the appellant's appeal in the High Court was against the sentence only, confirms that the appellant accepted his wrongdoing but sought the intervention of the High Court as regards the sentence. **Section 234** of the Penal Code under which the appellant was charged and convicted provided:

"Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life with or without corporal punishment".

From the foregoing, it is clear that maximum sentence under that section was life imprisonment with or without corporal punishment. It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged. In this appeal, the appellant was a first offender aged about 22 at the time of the offence. It is true that the complainant suffered serious injuries but it is equally true that the appellant was provoked at the time that he hit the complainant. There was no basis for the finding made by the trial magistrate and upheld by the superior court, that the complainant was *"completely mentally disabled"*. It is also to be noted that the State had conceded during the appeal in the High Court that the sentence of life imprisonment was excessive. This was not considered by the superior court.

Having considered the history of this matter and taking into account the submissions of Mr. Gikandi together with what Mr. Ondari stated on behalf of the State we are satisfied that the two courts below did not apply the correct principles of sentencing in which case the appellant was entitled to challenge the legality of the sentence imposed on him (a young man aged 22 years who was a first offender). It is only in exceptional cases that a maximum sentence would be imposed on a first offender.

In **Kennedy Indiema Omuse vs. Republic** in *Criminal Appeal No. 344 of 2006*, (unreported) this Court said:

"In this appeal we have indicated that the appellant's co-accused (a man with a previous conviction) was given what was comparatively lenient sentence while the appellant (a first offender) was given what would appear a severe sentence. In Macharia vs. R. (2003) 2 E.A. 559 this court stated:-

*'The principle upon which this Court will act in exercising its jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of **Ogola s/o owuor [1954], EAA 270** wherein the predecessor of this court stated:-*

*'The court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in **James vs. R. (1950) 18 EACA 147** it is evident that the judge has acted upon some wrong principle or overlooked some material factors. To this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case **R. vs. Shershawsky (1912) CCA 28 TL 263**'*

Further, the law is that sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that it is thus not proper exercise of discretion in sentencing, for the Court to fail to look at the facts and circumstances of the case in their entirety before settling for any given sentence – see Ambani vs. R. [1990] KLR 161".

We know that by dint of **Section 361 (1)** of the *Criminal Procedure Code* this Court has no jurisdiction to entertain appeals on severity of sentence. But what is before us in this appeal is not severity of sentence but the legality of it.

Before we conclude this judgment we wish to point out that although corporal punishment was provided for when the appellant was convicted and sentenced by the learned Principal Magistrate, that provision was removed by **Section 44** of the *Criminal Law (Amendment) Act No. 5 of 2003* which provides:

"Section 234 of the Penal Code is amended by deleting the words *"with or without corporal punishment"***.**

In view of all the foregoing, we think that it is within our mandate to correct the failure by the two courts below to take into account the usual circumstances to be considered in deciding the appropriate sentence. As we have stated elsewhere, this appeal relates to the principles of sentencing as opposed to the severity of sentence. Accordingly, we allow this appeal to the extent that, we set aside the sentence of life imprisonment and corporal punishment imposed and substitute the same with the sentence of twelve (12) years imprisonment which sentence is to be served from the date of conviction and sentence by the trial court i.e. from 9th February, 2000.

Dated and delivered at Mombasa this 21st day of January, 2011.

J. E. GICHERU

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CHIEF JUSTICE

E. O. O'KUBASU

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR