



Case Number:	Criminal Appeal 78 of 2015
Date Delivered:	24 Nov 2016
Case Class:	Criminal
Court:	High Court at Kitui
Case Action:	Judgment
Judge:	Lilian Nabwire Mutende
Citation:	Mutia Malingi v Republic [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	B. M. Kimemia
County:	Kitui
Docket Number:	-
History Docket Number:	Criminal Case No. 331 of 2014
Case Outcome:	Conviction quashed.
History County:	Kitui
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CRIMINAL APPEAL NO. 78 OF 2015**

**M M.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in **Kitui Chief Magistrate's Court Criminal Case No. 331 of 2014** by **Hon. B. M. Kimemia P M** on **04/03/15**)*

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

1. **M M**, "the Appellant" was charged with the offence of **Causing Grievous Harm** contrary to **Section 234** of the **Penal Code**. Particulars of the offence were that on the **18<sup>th</sup>** day of **April, 2012** at about **11.00 a.m.** at **[particulars withheld]** in **Kitui County** jointly with another before court unlawfully did grievous harm to **S T**.

2. He was tried, found guilty, convicted and sentenced to serve **fifteen (15) years imprisonment**.

3. Being aggrieved by the conviction and sentence he appealed on grounds that:

- Evidence adduced was contradictory and uncorroborated.
- Prevailing conditions did not favour recognition.

4. In supplementary grounds of appeal the Appellant stated that:

- The fact of the Appellant having been provoked was not considered.
- Basic sentencing principles were ignored.
- Mitigating factors were not given due weight in view of the fact that the Appellant's wife was also in jail and the two (2) had children which called for an alternative sentence.

5. The case as presented by the Prosecution was that on the **18<sup>th</sup>** day of **April, 2012** at about **7.00 a.m.** **PW1, S T** was on his way to **[particulars withheld]** when he encountered the wife of the Appellant who requested him to go and see the Appellant. Being persons known to him he complied. Reaching **[particulars withheld]** area, the Appellant emerged from the bush while armed with a knife. He threatened to kill him if he screamed. The Appellant and his wife tied his legs prior to undressing him and cutting his left scrotal sac. They removed his testis using a razor blade. After committing the act they gave him **Kshs. 1,000/=** to seek treatment. The Complainant sought treatment at a private clinic owned by **PW3, Losatima Josephat**, a Clinical Officer who administered on him first aid prior to being taken to **Kitui District Hospital** for treatment. **PW4, Dr. Mutuku Patrick**, a Medical Officer examined him and assessed the degree of injury sustained as grievous harm. The Appellant disappeared after the act. He was traced at **[particulars withheld]** on the **12<sup>th</sup>** **April, 2014** and arraigned in court long after his wife had been prosecuted, convicted and sentenced.

6. When put on his defence, the Appellant stated that on the material date while on the farm near the **[particulars withheld]** he was called by a neighbour at his shop. He went only to find his child who had soiled himself. As he cleaned the child, one **K** went and sought to know why the (Appellant) was at the shop yet his wife had cut the Complainant's testis. Members of the public went to his shop threatening to burn it down unless he produced his wife. He could not raise up his wife. The crowd was calmed down by **K**. He took his children home. The following day he took them to **[particulars withheld]**.

7. Further, he stated that his wife told him that she was having sexual intercourse with the Complainant in the bushes as usual when some three people tied him and took him away and later she was told that his private parts had been cut off. He alleged that he had caught them having sex previously and advised PW2 **E M K** the Complainant's mother to warn him.

8. This being the first Appellate Court, I am bound to subject evidence adduced at trial to a fresh and exhaustive examination and come to my own conclusion bearing in mind that I did not see nor hear witnesses who testified at the hearing. **(See Okeno vs. Republic (1972) EA 32).**

9. In his submissions learned Counsel for the Appellant opted to base the appeal on the supplementary grounds of appeal.

10. It is argued that the appeal raised immense provocation of the appellant by the Complainant. It is further averred that the Complainant had formed a habit of having extra-marital sex with the Appellant's wife.

11. Provocation is defined by **Section 208** of the **Penal Code** as:

***“(1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.***

***(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.***

***(3) A lawful act is not provocation to any person for an assault.***

***(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.***

***(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.”***

12. The Complainant testified that on the material date he was called by the wife of the Appellant who led him to the bushy area where the Appellant emerged and injured him. In cross examining the Complainant, the Appellant suggested to the Complainant that he found him engaged in coitus with his wife **Y**. This was an admission that he was indeed at the scene of the incident. However, in his defence he denied having been at the scene. It was his allegation that he was told by his wife that the

Complainant was having sex with her when three people tied and took him away. The allegation that he got information from his wife was hearsay as the wife was not called as a witness. It was erroneous on the part of the court to take such evidence into consideration as it was inadmissible.

13. That notwithstanding, having denied being present at the scene, the trial court was right in believing what was stated by the Complainant as to what transpired. The Complainant explained circumstances in which he found himself at the bushy area/path. Per his evidence he was called by the Appellant's wife. On being asked to go and see the Appellant he obliged. To his dismay, he was assaulted by the two (2), the Appellant and his wife. The Appellant who argued that he was not at the scene cannot purport to have encountered a provocative scenario. From the defence put up, there is nothing to suggest the wrongful act that the Complainant did on the fateful day that deprived the Appellant of the power of self control and induced him to commit an assault on the person of the Complainant that resulted into the grievous harm that he sustained.

14. The Complainant narrated how the Accused tied his hands and instructed his wife to remove his trousers and underwear. Thereafter he used a razor blade to cut the scrotal sac thereby removing his testis. The act of the Appellant was premeditated which precludes him from relying on the defence of provocation.

15. The learned Magistrate has been faulted for ignoring basic principles of sentencing. When the Appellant's wife and co-assailant of the Complainant was arrested and arraigned in court in **Criminal Case No. 477 of 2012**, the Appellant was at large. His wife was sentenced to serve **Five (5) years imprisonment**.

16. It is argued that initially the learned Magistrate had indicated **5 years** prior to a cancellation and subsequent imposition of **15 years imprisonment**; and that the wife of the Appellant was sentenced to serve **five (5) years imprisonment** in **Criminal Case No. 477 of 2012**.

17. This brings in question whether this court should interfere with the sentence imposed" In the case of **Shadrack Kipkoech Kogo vs. Republic, Eldoret Criminal Appeal No. 253 of 2003** the Court of Appeal held that:

***"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered with. (Also see sayeka vs. Republic (1989) KLR 360)".***

18. A person who commits the offence of grievous harm is liable to life imprisonment. The sentence meted out by the trial court is therefore within the law. This is a case where the Appellant committed the offence jointly with his wife who was tried, convicted and sentenced to serve **5 years imprisonment**. The principle of parity however would call upon the court to treat the offenders alike. It would call upon the court to avoid subjecting one offender to a harsher sentence as compared to another. The question to be asked is whether imposition of an appropriately lenient sentence for the Appellant's wife in itself is a ground for interfering with a more severe sentence meted out against the Appellant.

19. To answer the question, this court must consider circumstances that prevailed. The Appellant fled the jurisdiction to avoid arrest. He was arrested two (2) years after the commission of the offence. The conduct of the Appellant after the commission of the offence cannot be disregarded. Therefore the

marked disparity cannot give a rise to a justifiable grievance. Considering the circumstances that prevailed, equal justice was not violated.

20. This therefore brings us to the issue whether mitigating factors were considered. In mitigation the Appellant stated thus:

***“It is okay if the court has found me guilty. I have a wife who is in jail and I have children.”***

21. There was no expression of remorse. In sentencing him the learned Magistrate noted that he had occasioned a permanent damage to the Complainant. The court is duty bound to consider mitigating factors but it must also note the gravity of the offence and where it outweighs the need of the person accused, it could ignore those circumstances.

22. This was a case where the Appellant removed the Complainant’s testis which may have an adverse effect on his sex life. It called for a deterrent sentence. However, being a first offender, I uphold the conviction but quash the sentence imposed and substitute it with one of **ten (10) years imprisonment**.

23. It is so ordered.

**Dated, Signed and Delivered at Kitui this 24<sup>th</sup> day of November, 2016.**

**L. N. MUTENDE**

**JUDGE**



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