



REPUBLIC OF KENYA



KENYA LAW
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**Barke v Republic (Criminal Appeal E005 of 2024)
[2024] KEHC 15058 (KLR) (25 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15058 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E005 OF 2024
SM GITHINJI, J
NOVEMBER 25, 2024**

BETWEEN

GUYO BARKE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from Original conviction and Sentence in Criminal Case No. E102 of 2023 of the Magistrate’s Court at Garsen before Hon E.Kadiama – SRM on 15th August, 2023)

JUDGMENT

Mr Soita Appellant

Ms Mkongo for the State

1. Guyo Barke was charged in the lower court with an offence of Assault causing actual bodily harm, contrary to section 251 of the Penal Code.
2. The particulars of this offence are that on the 1st day of August, 2023 at 13:00 Hours at Madingo Trading Centre, Handaraku Location in Tana Delta Sub County within Tana River County, the appellant assaulted Mustafa Twalib thereby occasioning him actual bodily harm.
3. The appellant herein was arraigned in court on 4th August, 2023 when the charge was stated to him in a language of which he well understands, which appears to be Swahili. He pleaded guilty to the offence and a plea of guilty was entered.
4. On 8th of August, 2023 the facts of the case were read to him as follows:-

“it was on 1/8/2023, the complainant in this matter Mustafa Twalib, an Orma male and a resident of Aandaraku was selling Muguka. The complainant gave the accused and he failed to pay. There was altercation which the accused hit with a rungu and later stabbed him.”



The victim was taken to Odha dispensary and later Ngao hospital, the wound was stitched and later he was referred to Malindi Sub-County Hospital for X-ray.

I wish to produce the dry blood-stained long sleeved cream shirt with blue stripes as prosecution exhibit -1. Dry blood-stained kitchen knife as exhibit -2. Medical notes from Ngao Hospital as exhibit 3. P-3 as exhibit 4, X-ray from Malindi Sub-County Hospital as exhibit -5.”

5. The appellant agreed to the facts and was convicted on his own plea of guilty.
6. In mitigation the appellant stated that;

“I pray for forgiveness. I have a family with many children. I pray for non-custodial sentence.”
7. A pre-sentence report was requested for, but it appears the probation officer made oral presentation on 15/8/2023 where he stated that the victim was at home recuperating as the family was poor and unable to afford medical treatment.
8. Prosecutor stated that the appellant had shown no remorse. He opined if he was the prosecutor from the word go, he would have preferred a different offence.
9. The Court observed that the appellant had shown remorse but reluctantly. He also alleged that the facts disclosed a more serious offence of unlawful wounding, contrary to section 237 of the Penal Code. He fined the appellant 300,000/= in default to server 5 years’ imprisonment.
10. The appellant dissatisfied with both the conviction and the sentence appealed to this Court on four grounds. However, he later dropped the appeal on conviction and proceeded on sentence of which he alleged was harsh. He raised grounds of mitigation on sentence that; -
 1. He has been in custody for a period of one year and is remorseful.
 2. He is a first offender and begs for forgiveness.
 3. The 5 years’ imprisonment though within the law is harsh.
 4. He has gone through rehabilitation programmes while in custody.
 5. He pleaded for a non-custodial sentence.
 6. He is the sole provider for his family.
11. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.
12. The appellant appeal on sentence is in line with provisions of section 348 of the Criminal Procedure Code which reads; -

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”
13. It’s undisputed that the appellant herein pleaded guilty to the offence and he is a first offender. A plea of guilty is by itself a sign of remorse and an acknowledgement of responsibility by the accused person. It reduces the trial time and saves the trial costs. It definitely entitles the accused person to a good discount on sentence.



14. The law allows for leniency on sentence for first-time offenders especially for non-serious offences. Judiciary Sentencing Policy Guidelines emphasize rehabilitation and integration for first offenders, particularly if they demonstrate remorse and are unlikely to reoffend.
15. Assault causing actual bodily harm is a misdemeanor which attracts under section 251 of the Penal Code, in my view, a maximum sentence of 5 years' imprisonment. What the trial court alleged was a disclosed more serious offence of unlawfully wounding under section 237 of the Penal Code, is also a misdemeanor which in my view carries a maximum sentence of five years' imprisonment. I do not therefore understand the basis which implored the trial court to view unlawful wounding as a more serious offence. Even the opinion that the facts disclose the offence is not supported or explained at all.
16. In *Wanjema-vs-Republic* [1971] EA 493, the Court held that an appellate Court can only interfere with sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not consider a relevant factor or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive.
17. From the foregoing considerations it's vivid that the trial court in imposing five years' sentence failed to consider some relevant factors which were in favour of a lenient sentence.
18. The appellant has been in jail/prison since 4th August, 2023. This is a period of about 15 months. It's enough sentence for the offence. I therefore do reduce his sentence to the period already served. He is now set free, unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25TH DAY OF NOVEMBER, 2024

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Appellant present
2. Ms Ochola holding brief for Ms Mkongo for Republic

