



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Muimi (Criminal Appeal E018 of 2022)
[2022] KEHC 15765 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15765 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E018 OF 2022
MW MUIGAI, J
NOVEMBER 22, 2022**

BETWEEN

REPUBLIC APPELLANT

AND

GLADYS MASAA MUIMI RESPONDENT

*(Being an Appeal from the Conviction and Sentence of the Principal
Magistrate Court in Kithimani Hon B.S. Khapoya (Pm) Delivered
On 17.03.2022 In SPMCC Criminal Case No. E177 of 2022)*

JUDGMENT

Lower Court Record

1. The Accused person was charged with the offence of assault contrary to section 251 of the *Penal Code*.
2. The particulars of the offence are that on diverse dates as from 18 to 21 December 2021 in Kithyoko Market in Masinga Sub County within Machakos County willingly and unlawfully assaulted minor JMW thereby occasioning her actual bodily harm.
3. When the matter came up for plea taking, the substance of the charge(s) and every element thereof was stated by the court to the accused person in the language she understands and she said 'it is true.' A Plea of guilty was entered.
4. The prosecution facts were as follows;

' On December 21, 2021 the complainant's auntie noticed the accused person canning her child.



She reported to the police that the accused person has in the name of disciplining this child been giving her severe punishment. Accused person was arrested and taken to Kithyoko police station.

Complainant was taken to hospital for examination and a P3 form was filed. It was on February 16, 2022. Degree of injury classified as harm. She had a swollen limb. I produce the P3 form as exhibit. That is all'

5. The Accused in response stated; 'facts are correct.'
6. The Accused person was convicted on her own plea of guilt. She had no previous records and in mitigation she said she was forcing the child to eat.
7. The Court sentenced the accused to probation for a period of 12 months.
8. Dissatisfied by this sentence, the Appellant filed a memorandum of Appeal on the following grounds, that;
 - a. The Learned Trial Magistrate erred in law in failing to consider the seriousness of the injuries.
 - b. The Learned Trial Magistrate erred in law in failing to consider that there were multiple injuries occasioned on the minor who is only three and a half years old.
 - c. The Learned Trial Magistrate erred in law in failing to find that the accused's/Respondent's ground of mitigation was unmerited.
 - d. The Learned Trial Magistrate erred in law in failing to consider that the mitigation vis a vis the serious injuries inflicted on the tentatively young minor and issue a corresponding tough sentence.
9. The Appeal was canvassed by written submissions.

Appellant's Submissions

10. The Appellant filed submissions on October 13, 2022 in which Counsel contended that there were serious injuries sustained as evidenced from the P3 form are;
 - a. Bite mark on the back of the neck
 - b. Scratch marks on the chin (both right and left)
 - c. Both ears wound on the corner (attached to the head)
 - d. Old marks on the back (all over)
 - e. Burned wound (healing on the chest)
 - f. Fresh wound on the left lumber region
 - g. Swollen right limb (lower)
 - h. Swollen right limb
 - i. Hymen torn- not freshly torn.
11. Counsel submitted that the victim is suffering from psychological trauma as a result of the ill-fated ordeal. Reliance was placed on the case of *Benson Ochieng & Another vs Republic [2018] e KLR* on the circumstances to be looked at by the court before sentencing.



12. It was submitted that there was evidence of abuse from the Respondent who was responsible to look after her. Further, that in mitigation, forcing the child to eat did not justify the use of force on the victim and she was not remorseful for her actions to the minor.
13. Counsel submitted that a deterrent sentence was mandatory in the circumstance and a 1 year probation sentence was a drop in the ocean compared to the injuries sustained. The court was asked to enhance the sentence. Reliance was placed on the case of *Benard Kimani Gacheru vs Republic [2002] e KLR*, *Ogolla s/o Owuor vs Republic (1954) EACA 270* and *Francis Matonda Ogeto vs Republic (2019) e KLR*.

Respondent Submissions

14. The Respondent filed submissions on September 9, 2022 and raised two issues. On the issue of whether the mitigation was unmerited, it was submitted that in the Respondent's mitigation she stated that she was forcing the minor to eat and further stated that she was remorseful and sought the court's forgiveness. It was submitted that Section 4 of the *Probation of Offenders Act*, cap 64 Laws of Kenya provides;
 - (1) Where a person is charged with an offence which is triable by a subordinate court and the court thinks that the charge is proved but is of the opinion that, having regard to youth, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may—
 - (a) convict the offender and make a probation order; or
 - (b) without proceeding to conviction, make a probation order, and in either case may require the offender to enter into a recognisance, with or without sureties, in such sum as the court may deem fit.
15. The Respondent submitted that the court considered the Respondent was 22 years of age, a step mother to the minor, a first offender and the probation report which indicated that the Respondent was remorseful and apologetic indicating that her actions were not intentional. It was contended that the grounds of mitigation were merited and asked this court to find it so.
16. Secondly, it was submitted that the sentence imposed was reasonable in the circumstances. The Respondent contended that the offence committed was a misdemeanor whose sentence would be determined by the seriousness of the injury. Making reference to the Sentencing Policy Guidelines on the factors to consider before giving a custodial and a custodial sentence as well as the case of *HCC Revision 120 of 2022 Stephen Muriuki Ndinwa vs Republic*, it was submitted that the sentence was reasonable taking into account that the Respondent was a first offender and the nature of the offence was that of a misdemeanor.

Determination

17. This Court considered the Appeal, the Trial Court record and the submissions of the parties on record. It is not in contention that the Respondent is guilty of the offence of assault contrary to Section 251 of the Penal Code.
18. The said section provides as follows;

' Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.'



19. Section 4 of the Penal Code defines harm as any bodily hurt, disease or disorder whether permanent or temporary.
20. The sentence provided for by law is 5 years. That appears to be the maximum sentence. The Court of Appeal in the case of *Bernard Kimani Gacheru vs Republic* [2002] eKLR had the following to say on sentences;
- ' It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.'
21. In *Daniel Kipkosgei Letting vs Republic* [2021] eKLR this Court pronounced itself as follows;
- ' With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to.'
22. From the P3 form, the injuries sustained were classified as harm. The injuries are serious or aggravated, and they are;
- a. Bite mark on the back of the neck
 - b. Scratch marks on the chin (both right and left)
 - c. Both ears wound on the corner (attached to the head)
 - d. Old marks on the back (all over)
 - e. Burned wound (healing on the chest)
 - f. Fresh wound on the left lumber region
 - g. Swollen right limb (lower)
 - h. Swollen right limb
 - i. Hymen torn- not freshly torn
23. From the P3 form, the assault was ongoing (old and new wounds) and the probable type of weapon(s) causing injury are sharp and blunt objects, assaulter is teeth. I have considered these remarks in the P3 form.
24. The Judiciary Sentencing Policy Guidelines para 23 had provides circumstances to be considered by a court in determining whether an accused person should be given a custodial or a non-custodial sentence.
25. The aggravating factors are as follows;



- i. Use of a weapon to frighten or injure a victim; the more dangerous the weapon, the higher the culpability.
 - ii. Multiple victims.
 - iii. Grave impact on national security.
 - iv. Serious physical or psychological effect on the victim.
 - v. Continued assault or repeated assaults on the same victim.
 - vi. Commission of the offence in a gang or group
 - vii. Targeting of vulnerable groups such as children, elderly persons and persons with disability.
 - viii. Previous conviction(s), particularly where a pattern of repeat offending is disclosed.
 - ix. Intricate planning of an offence.
 - x. An intention to commit a more serious offence than was actually committed.
 - xi. High level of profit from the offence.
 - xii. An attempt to conceal or dispose of evidence.
 - xiii. Flagrant use of violence or damage to person or property in the carrying out of an offence
 - xiv. Abuse of a position of trust and authority.
 - xv. Use of grossly inhuman and degrading means in the commission of an offence.
 - xvi. Targeting those working in the public sector or providing a service to the public.
 - xvii. Commission of offence motivated by ethnic, racial and gender bias [Emphasis is mine]
26. The mitigating factors provided under para 23.8 Judiciary Sentencing Policy Guidelines are;
- i. A great degree of provocation.
 - ii. Commitment to repairing the harm caused by the offender's conduct as evidenced by actions such as compensation, reconciliation and restitution prior to conviction.
 - iii. Negligible harm or damage caused.
 - iv. Mental illness or impaired functioning of the mind.
 - v. Age, where it affects the responsibility of the individual offender.
 - vi. Playing of a minor role in the offence.
 - vii. Being a first offender.
 - viii. Remorsefulness.
 - ix. Commission of a crime in response to gender-based violence.
 - x. Pleading guilty at the earliest opportunity and
 - xi. cooperation with the prosecution and the police



27. The Respondent is the step mother of the victim and had a duty to protect and take care of the child. She had parental responsibility and custody of the victim. The manner in which the injuries were inflicted was truly savage. Why would you beat up a child and then go ahead to bite her? The Appellant contends that the child has been subjected to trauma and the Court is inclined to agree. The child does not deserve such injuries in the name of being forced to eat. There are better ways to handle children who are very delicate. One may even need to go a step further to sit down with the child and establish why they are not even eating in the first place, they could be unwell or there may be something else hindering them from eating. The Court notes that the assault has been ongoing and it is not only this one instance that the minor was assaulted.
28. The Court notes that during mitigation, the Respondent stated that she was forcing the minor to eat. The issue of being remorseful is not reflected in the Trial Court's proceedings but was/is contained in the Probation Report of March 8, 2022.
29. Article 53 of CoK 2010 provides for rights of Children as follows;
- (1) Every child has the right—
 - (a) to a name and nationality from birth;
 - (b) to free and compulsory basic education;
 - (c) to basic nutrition, shelter and health care;
 - (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
 - (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and
 - (f) not to be detained, except as a measure of last resort, and when detained, to be held—
 - (i) for the shortest appropriate period of time; and
 - (ii) separate from adults and in conditions that take account of the child's sex and age.
 - (2) A child's best interests are of paramount importance in every matter concerning the child
30. The *Children Act* No 8 of 2001 provides for safeguards for the rights and welfare of the child as follows;
- Section 3 provides;
- The Government shall take steps to the maximum of its available resources with a view to achieving progressively the full realization of the rights of the child set out in this Part.
- Section 4 provides;
- Survival and best interests of the child
- 1) Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.
 - 2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities



or legislative bodies, the best interests of the child shall be a primary consideration.

- (3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—
 - (a) safeguard and promote the rights and welfare of the child;
 - (b) conserve and promote the welfare of the child;
 - (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.
- 4) In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity.

31. The Constitution and subsidiary legislation provide for safety and security of children. The growth and development of a child in a safe environment is of paramount importance and overrides the Accused person's remorse. The injuries contained in the P3 Form depict a continuous visiting of violence on the child of tender age and the child cannot be retained in the same environment as there is no guarantee of the child's life development and growth.
33. Considering the injuries, the manner of commission of the offence, the principles of sentencing and the sentence imposed, a non-custodial sentence was/is not appropriate in the circumstances. I find that the sentence of probation for 1 year was lenient. The victim was only three and a half years old and does not deserve violent treatment but a safe environment especially not from a person of higher authority. The Court substitutes the One (1) year Probation sentence to three (3) years imprisonment.
34. This Court notes with concern that orders issued/granted on July 27, 2022 that the Director of Children Services investigates the safety and wellbeing of the child pending the appeal and a report filed on September 29, 2022 were not implemented or enforced.
35. The appeal is allowed, the non-custodial sentence is set aside and the Accused Person sentenced to three (3) years imprisonment.
36. Probation is cancelled. Warrant of Arrest issued to be executed by OCS Machakos Police Station.

It is so ordered.

**DATED, DELIVERED & SIGNED AT MACHAKOS THIS 22ND DAY OF NOVEMBER, 2022
(VIRTUAL/PHYSICAL CONFERENCE).**

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. MWONGERA - FOR THE APPELLANT

NO APPEARANCE – FOR RESPONDENT



GEOFFREY/PATRICK - COURT ASSISTANT(S)

