

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL DIVISION

CRIMINAL REVISION E005 OF 2020

BENARD MUTUNGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence(Judgement) by Hon. M. Munguti-PM in criminal case no. 606 of 2013 of the Chief Magistrate’s Court at Kitui)

RULING

1. **Benard Mutunga Muthoka** was charged and convicted vide **Kitui Chief Magistrate’s Court criminal case No. 606 of 2015**, for the offence of grievous harm **Contrary to Section 234** of the **Penal Code**. The particulars are that, on **1st day of October, 2013**, he assaulted **Sebastian Mwanduka** at **Ikave village, Katulani District**.

2. The Applicant was aggrieved by both the conviction and sentence and preferred an Appeal No. 9 of 2020 and later filed this application to have his sentence reviewed from 7 years to a non-custodial sentence. He withdrew his earlier appeal.

3. This court has called for the lower court file and have perused through the same in order to satisfy myself with the correctness, legality and propriety of the sentence passed going by the **provisions of Section 162 of the Criminal Procedure Code**.

4. This court has noted that though it is not clear as to when the judgement was delivered, it is apparent that the trial upon conviction or delivery of judgement did not immediately impose a sentence. Instead the trial court gave the parties time to settle although the written judgement was silent on the issue of compensation to be paid to the complainant.

5. The record shows that on 4.4.2019, the trial court gave the parties up to 18.04.2019 to discuss the issue of settlement which was later pushed to 4th June, 2019 when the complainant informed the court that they had agreed on a compensation of Kshs. 600,000 to be paid to him. It appears that the said settlement did not come to fruition and on 20th February, 2020, the Applicant was sentenced to serve 7 years’ imprisonment after failing to pay compensation as agreed.

6. This court has perused through the proceedings to satisfy itself on the legality of the conviction and sentence and have noted that though the Applicant was charged with the offence of causing grievous harm, the medical report tendered indicates that the degree of harm was “maim” which is less than classification of “grievous” degree as per the P3 form tendered as Prosecution Exhibit 3. The trial court was required to make a definite finding that though the medical reports was not consistent with the charge, it was convinced that the complainant had suffered grievous harm notwithstanding. The trial court ought to have convicted the Applicant for the offence of assault, causing actual bodily harm rather than the offence of causing grievous harm **Contrary to Section 234 of the Penal Code**.

The lawful conviction given the evidence tendered at the trial, was the former and in the regard, I find no hesitation in invoking **Section 364 of the Criminal Procedure Code** by reviewing and setting aside the conviction of the Applicant on grounds of legality and in its place the Applicant is hereby convicted for the offence of assault causing actual bodily harm **contrary to Section 251 of the Penal Code**.

7. Having reviewed the conviction of the Appellant it follows that the sentence cannot remain the same because under **Section 251 of the Penal Code** the maximum sentence prescribed in 5 years’ imprisonment. That prescription renders the 7 years’ imprisonment passed against the Applicant excessive and unlawful.

8. This court has considered the gravity of the offence and the mitigating circumstances aptly captured by the probation report. I also note that the Applicant has been in jail for 1 year now and some weeks.

As per the lower court record, attempts were made to compensate the complainant and the same failed, perhaps due to high demand made by the complainant. A demand of Kshs. 500,000 by all standards is quite high for a person with humble background such as the Applicant herein, who has school going children. When I enquired from him how much he would raise if I was to order compensation in lieu or in addition of any other lawful sentence, the Applicant stated that he could afford Kshs. 20,000 and three goats in compensation.

Taking everything into consideration, this court hereby set aside the 7-year jail sentence and in its place sentenced the Applicant to the period he has already served and in addition to that as provided under **Section 31 of the Penal Code**, he shall compensate the victim(complainant) with Kshs. 40,000 and 3 goats in default of payment of compensation, he shall serve the community service in Maliku location in a public facility to be identified by the Probation Officer who shall oversee the compensation to the victim and thereafter file a report in this court. For now, the Applicant shall be released forthwith and shall report to the Probation Officer Kitui County for supervision as ordered above.

DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF MARCH, 2021.

HON. JUSTICE R. K. LIMO

JUDGE