



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 180 OF 2019**

**JUMA MAKOKHA MOHAMMED..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(Appeal against the original conviction and sentence in Criminal*

*Case No. 1781 of 2019 at the Chief Magistrates Court Bungoma by*

*(Hon. S.O. Mogute -PM on 8/11/2019)*

**JUDGMENT**

1. Upon arraignment **Juma Makokha Mohammed**, the appellant, was charged with the offence of causing grievous harm contrary to **Section 234** of the Penal Code. Particulars were that on the 18<sup>th</sup> day of October, 2019 at Bacoda Village in Musikoma Location within Bungoma County, unlawfully did grievous harm to **IVW**.

2. At the outset the appellant denied the charges but later on he changed plea and admitted the charge. He was convicted and sentenced to serve four (4) years imprisonment.

3. Aggrieved, he appeals against the sentence on grounds that it was harsh and excessive; the case did not warrant a conviction as evidence adduced was contradictory, weak and uncorroborated.

4. The appeal was canvassed through written submissions. It was urged by the appellant that he pleaded guilty to charges after realizing that what he did was wrong. That on the material date he was having a bad day following family issues and when the complainant mocked him, he was provoked and he acted. But, he regretted his action thereafter and it was for that reason that he admitted having committed the offence. He now pleads with the court to reduce the sentence imposed. And that he is a student and remorseful for the offence committed.

5. In response thereto, the State/Respondent argues that having pleaded not guilty at the outset, the appellant changed plea and pleaded guilty. That pursuant to **Section 348** of the Criminal Procedure Code (CPC) no appeal can lie on conviction. That the sentence imposed was reasonable and not excessive. That the court considered that the complainant was a minor aged two (2) years and the sentence provided under **Section 234** of the Penal Code was life imprisonment.

6. Facts presented by the prosecution were that the complainant, a child aged two (2) years was with his mother when the appellant went and held him, he proceeded to bite the child on his upper lip and upper jaw and as a result he lost three (3) incisor milk teeth. The minor was subjected to medical treatment and the degree of injury sustained was assessed as grievous harm.

7. The appellant having been convicted on his own plea of guilty the appeal on conviction may not be allowed unless it is demonstrated that the plea was equivocal or the appellant was incapable of taking plea or such intervening circumstances that would affect the legality of the plea. **Section 348** of the Criminal Procedure Code provides thus:

***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.***

8. A reading of what has been submitted by the Appellant is mitigation on sentence. **Section 234** of the CPC provides thus:

***Anyone convicted of the offence of grievous harm is liable to life imprisonment.***

9. The Appellant was remorseful, he sought leniency and was a first offender. He pleaded guilty at the earliest opportunity therefore saved the court's time.

10. I have been called upon to interfere with the sentence meted out by the trial court. In the case of ***Ogola s/o Owuor Vs. Reginum (1954) EA CA 270*** it was held that:

*“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that of 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- Republic (1950) 18EACA 147.*

*It is now settled law that sentence is a matter of discretion of the trial court and must be based on the facts and circumstances of each case. An appellate court will not normally interfere with sentence unless the sentence is ...excessive as based on wrong principles...”*

11. In the case of ***Alister Anthony Pareira Vs. State of***

***Maharashtra (2012)2 SCC 648 the Supreme Court of India held that:***

*“....What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of crime, motive for the crime, nature of the offence and all attendant circumstances”*

12. In the case of ***Elijah Munene Ndundu and Another Vs.***

***Republic (1978) 163 the Court of Appeal stated that:***

*“An offender's remorsefulness and attitude should be taken into account when determining suitability of sentence”*

13. When a court makes a decision to impose a sentence it must bear in mind the purpose of sentence. The sentence imposed must be proportional to the gravity of the behaviour of the accused person, it must be just and appropriate considering the circumstances in which the offence was committed.

14. The Appellant was remorseful, what was however not interrogated was what prompted the Appellant to act by simply attacking a baby in manner that an animal would. Had a social inquiry been conducted, the court would have had better facts and even established the offender's previous character. That notwithstanding, the offender pleaded guilty and saved the court from going through the lengthy process of trial. This must be discounted, and the reduction the offender receives in the sentence must be greater than what is envisaged.

15. In meting out the sentence, the learned Magistrate rightly so, took into account the serious act committed by the appellant but in this case it should have considered the intention the Appellant had in acting as he did.

16. From the foregoing, it is apparent that the trial court failed to consider the fact of the appellant having been a first offender, having saved the court's time by pleading guilty, and his remorse; this calls upon me to interfere with the sentence meted on the appellant. Therefore, I set aside the sentence meted out which I substitute with three (3) years imprisonment.

17. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 22<sup>ND</sup> DAY OF OCTOBER, 2021.**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF:**

*Mr. Ayieka for ODPP*

*Appellant*

