



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KERICHO

HIGH COURT CRIMINAL APPEAL NO.E018 OF 2021

SAMWEL KIPYEGON BII.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(Being an appeal from the sentence Hon. B. R. Kipyegon (PM) IN Criminal Case No.E1549 of 2021 delivered on 16/5/2021)**

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

1. The Appellant was charged with assault causing actual bodily harm Contrary to Section 251 of the Penal Code and he was convicted on his own plea of guilty and sentenced to five (5) years imprisonment on 6/5/2021.
2. The particulars of the charge were that on 4/5/2021, at around 1500 hours at KAPKWEN VILLAGE, KERCHO DISTRICT within KERICHO County, the Appellant willingly and unlawfully assaulted JOSEPH MUSEE LANGAT by hitting him on the head with a Jembe handle.
3. The Accused Person pleaded guilty. The facts of the offence as given by the Prosecuting Counsel were that on 4/5/2021 at 15 hrs, the Complainant was at a tea buying center when he saw the Accused Person wanting to beat kids. The Accused Person then turned on to the Complainant and hit him with a Jembe handle. Members of the public rescued the complainant. The Prosecution produced a P.3 Form as an Exhibit in this case.
4. The Appellant asked for forgiveness in his mitigation. The Trial Court sentenced him to 5 years imprisonment.
5. The Appellant has now appealed to this court on the grounds that the Trial Court did not give the appellant an option of a fine. The appellant withdrew all the other grounds of appeal.
6. The parties filed written submissions which I have duly considered. The appellant submitted that he pleaded guilty on the first instance and therefore saved the court's time in hearing and determining the case and also being a first-time offender, he should be given an option of a non-custodial sentence or a fine.
7. The respondent on the other hand, submitted that the custodial sentence was adequate as the trial court exercised its discretion in sentencing the appellant in a judicious manner, as it was guided by evidence and sound legal principles, and it took into account all relevant factors.
8. The respondent further submitted that the custodial sentence was adequate, just and proportionate, as it is commensurate with the nature and gravity of the offence and manner in which the offence was committed. The respondent also submitted that the appellant was charged and convicted of an offence that provides for a custodial sentence only.
9. The sole issue for determination in this appeal is whether the trial Court ought to have given the Appellant an option of a fine.
10. The appellant pleaded guilty to the charge of assault. He has no right of appeal except on sentence only. Section 348 of the Criminal Procedure Code provides as follows:

**“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.”**

11. The court of appeal in *Kisumu Criminal Appeal No.581 of 2010, Alexander Likoye Malika versus Republic (2015) eKLR*, stated as follows:

**“May we, by way of commentary only remind that there is ordinarily no appeal against conviction resulting from a plea of guilty – See Section 348 of the Criminal Procedure Code which only permits an appeal regarding legality of sentence. A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous, or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also, where upon admitted facts, the appellant could not in law have been convicted of the offence charged.”**

12. I find the plea was taken in accordance with the rules laid down in the case of *Aden -vs- Republic (1973) EA 445*, which state as follows: ***“The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.***

**The accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded.**

**The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.**

**If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.**

**If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused’s reply should be recorded.”**

13. I find that it is not mandatory for the Court to give an option of a fine.

14. I find that a custodial sentence is appropriate in the current case. However, I reduce the sentence to three years imprisonment for reasons that the Appellant is a first offender and also that he pleaded guilty and saved the court’s time.

**DELIVERED, DATED AND SIGNED AT KERICHO THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2021**

**A. N. ONGERI**

**JUDGE**