

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.189 OF 2019

JAMAL MOHAMED AHMED.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Jamal Mohamed Ahmed was convicted for the offence of **causing grievous harm** contrary to **Section 234** of the **Penal Code**. The trial court held that the prosecution had established to the required standard of proof beyond any reasonable doubt that the Applicant did unlawfully caused grievous harm to Hussein Hassan Muhumed (the complainant). The Applicant was sentenced to serve three years imprisonment on 14th June 2019. The Applicant has applied to this court to have the sentence that was meted on him revised.

In his application, the Applicant pleads with the court to either commute the custodial sentence that was imposed on him to the period served or alternatively sentence him to serve the remainder of the sentence to a non-custodial one. The grounds in support of the application are contained on the face of the application and in the affidavits sworn in support of the application. In essence, the Applicant states that since the outbreak of Covid 19 pandemic, he is worried that he may contract the disease while serving the sentence in prison. He also stated that he was suffering from physical ailment which has affected his movement especially on his legs, back and knees. He asked the court to take into consideration that he had made effort to compensate the complainant by paying him Kshs.200,000/- and defraying the sum of Kshs.1,110,000/- to the complainant's medical account. He was of the view that in order to promote reconciliation, it would be just and prudent for him to be released from prison.

The application is opposed. The prosecution denies that the Applicant has made any effort to be reconciled with the complainant. The complainant denies that the Applicant made any payment towards compensating the complainant or settling his medical bills. It is the prosecution's case that indeed the custodial sentence imposed on the Applicant was extremely lenient taking into account the permanent nature of the injuries that the complainant sustained. The prosecution was of the view that the custodial sentence imposed should be enhanced for justice to be seen to be done. The prosecution urged the court to disallow the Applicant's application for review of sentence since no sufficient grounds has been laid for this court to exercise its discretion in his favour.

During the hearing of the application, this court heard oral rival submission made by Mr. Nyaberi for the Applicant, Ms. Nyauncho for the State and Mr. Mutunga for the complainant. The issue for determination by this court is whether the Applicant made a case for this court to interfere with the sentence that was imposed by the trial magistrate. When the trial magistrate sentenced the Applicant to serve the custodial sentence, he was exercising judicial discretion. This court can only interfere with such exercise of discretion if it is established, either that the sentence was too harsh or too lenient in the circumstances. The court will also interfere with the imposition of custodial sentence if it is established that the trial magistrate applied the wrong principles of the law in sentencing the Applicant or that the sentence was illegal.

The Court of Appeal in Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No. 135 of 2016 (unreported) held at Page 25 thus:

“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v. Republic, Cr App No.188 of 2000 this Court stated thus:

“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, any one of the matters already stated is shown to exist.”

In the present application, it is clear to this court that, upon considering the sentence that was imposed by the trial court and in light of the submission made by the parties to this application, that the custodial sentence that was imposed on the Applicant was indeed lenient in the circumstances. **Section 234** of the **Penal Code** provides that anyone who unlawfully causes grievous harm to another is guilty of a felony and liable to imprisonment for life. In the present application, the Applicant assaulted the complainant and caused him to sustain a fracture of the tibia and fibula. According to the medical report prepared by Prof. Mbindyo, a Consultant Orthopaedic Surgeon based at Nairobi Hospital, the complainant:

“...sustained severe injuries resulting in fractures of the left tibia plateaus and the left fibula, blunt injuries to the face and a stab wound on the trunk. The injuries caused him severe pains and much suffering and had so far caused him 13 days of hospitalization and over one year and four months of treatment and sick leave. Though commendable surgery was carried out in fixing the fractures the nature of the injuries was such that the accurate reconstruction of the joint surfaces was not possible. Thus the fracture healed with compromised joint surfaces. The injuries will remain a source of pain and stiffness of the knee. The disabilities will get worse with time and will severely limit him in all functions of the kneel including his work in the construction industry. ...I reckon he suffered thirty per cent (30%) total body permanent disability.”

Although this court takes cognizance of the Applicant’s mitigation and circumstances, the injuries sustained by the complainant as a result of the assault, is such that this court must balance justice with the dictates of mercy. This court agrees with the prosecution that the custodial sentence imposed upon the Applicant was extremely lenient in the circumstances. The Applicant should ride on his luck and serve the sentence that was imposed by the trial court. This court sees no reason to interfere with the exercise of sentencing discretion by the trial court.

In the premises therefore, this court finds no merit with the application for revision of sentence. This same is dismissed. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF MAY 2020

L. KIMARU

JUDGE