



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 15 OF 2020

FMJ.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in Mandera Senior Principal Magistrate's Court Criminal Case No. 498 of 2019 delivered by P.N. Areri on 10/12/2019)

JUDGEMENT

1. The Applicant was convicted and sentenced to serve 4 years' imprisonment for assault causing actual bodily harm contrary to section 251 of the Penal Code Cap 63 Laws of Kenya.
2. He pleaded guilty to the charge on his own plea. The facts were read and he admitted same.
3. In his mitigation he said he assaulted his wife (victim) because she insulted him yet he feeds her.
4. The court found that he was not remorseful thus sentenced him to 4 years imprisonment without any option.
5. He has lodged instant appeal complaining that there was no evidence against him and that the sentence was excessive.
6. He agrees in his appeal that he pleaded guilty thus he cannot question the facts which plainly he admitted and even confirmed via mitigation.
7. The court turns to the sentence of 4 years' imprisonment under section 251 of the Penal Code, which states that; ***"any person who commits assault occasioning actual bodily harm (a misdemeanor) is liable to a sentence of up to 5 years' imprisonment."***
8. The Appellant was a first offender and husband of the victim with 2 children (minors 3 and 4 years old). She is a housewife and he was a casual worker in construction industry feeding his family in Mandera.
9. He has already served from 9/12/2019 (7) or so months. The injuries noted were a cut and swollen forehead and were classified harm via the P3 produced.
10. Though the court does not condone domestic violence, this court is prepared to give the Appellant a second chance to go and take care of his family.
11. However, the court will have to consider whether the appellant could benefit from conditional discharge in the circumstances of the instant matter. The relevant Provisions of the Law are under Penal Code Section 35 (1) which states that;
 - (1). ***"Where a court by or before which a person is convicted of an offence is of opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order under the Probation of Offenders Act (Cap. 64) is not appropriate, the court may make an order discharging him absolutely, or, if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding twelve months from the date of the order, as may be specified therein."***
12. In the case of Wilson **Kipchirchir Koskei v Republic Criminal Appeal 333 of 2013** High Court at Nakuru the court held that there were two conditions precedent to the exercise of the jurisdiction to grant a discharge, either conditionally or absolutely;

a. the court could consider that it was in the best interests of the accused; and

b. the Court had to consider that a grant of discharge was not contrary to the public interest.

13. In the consideration of that aspect, a discharge, conditional or absolute, should not be granted routinely. Further, that the jurisdiction should be used sparingly.

14. In consideration of the exercise of the discretion to grant an absolute or conditional discharge, it was quite impossible to lay down rules which would cover the myriad of situations which could appear before a trial court confronted with the task of appropriate sentence in any given case. However, some of the relevant factors which had to be considered in every case were;

- *nature of the offence: While it was to be borne in mind that the section could be used in respect of any offence, one had to nevertheless be concerned with the seriousness of the offence, and it would seem appropriate that the more serious the offence, the less frequent would be the use of a discharge in sentencing. It would, for instance, be a most exceptional case where a crime involving violence or sexual assault would be dealt with by an order of discharge;*
- *one had to consider the prevalence of the particular offence as it could exist in the community from time to time;*
- *where the offence was relating to property, the value of the property destroyed or stolen had to be relevant;*
- *where the offence involved sexual assault, as in the instant case, the Court should consider the rights of the victim and whether there were aggravating circumstances including violence; and*
- *whether the crime was committed as a matter of impulse, and in the face of unexpected opportunity, or whether it was calculated and the propensity of the accused to commit such offences.*

15. Thus, the considered the circumstances as earlier stated and found it fit for conditional discharge, thus makes the following orders;

i. The court will conditionally discharge Appellant to be of good conduct for the next 12 months and in event he commits any other crime he will be arrested and taken to prison to serve the balance of the unserved sentence.

ii. Orders accordingly.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 23RD DAY OF JULY, 2020.

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C. KARIUKI

JUDGE