REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 49 OF 2019

AHMED MOHAMED HASSAN.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal against the sentence delivered by Hon. D.W. Mbuteti (RM) on 22/11/2019 in Garissa Chief Magistrate's Court Criminal Case No. 258 of 2019)

JUDGMENT

1. This is an appeal arising from the judgment of Hon. D.W. Mbuteti (R.M) in Criminal Case No. 258 of 2019.

2. The appellant, **Ahmed Mohamed Hassan** was aggrieved by the sentence and preferred this appeal on grounds that though he is a first offender the sentences meted out were high.

3. The appellant in urging the appeal mitigated further by informing the court that he is the sole bread winner of his extended family, his mother is disabled and after his incarceration his wife ran away. He also sought to have the jail terms run concurrently and his time in remand considered while being sentenced.

4. Mr. Mulati for the State on his part implored the court to evaluate the evidence on record and come up with the appropriate sentences.

5. It is trite law that the sentencing rests at the discretion of a trial court and an appeal court should only interfere where the trial court misdirected itself on principle or the sentence is manifestly excessive so as to cause an injustice.

6. The Court of Appeal in **Bernard Kimani Gacheru vs Republic [2002] eKLR** stated as follows:

> **"It is now settled law, following several authorities by this court and the High Court that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive on the circumstances of the case, or the trial court overlooked some material factor, or acted on a wrong principle. Even if, the Appellate Court might itself have not passed that sentence and feels that the sentence is heavy these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."**

7. In this instant appeal the court has considered the three offences the appellant was charged with, one being that of causing grievous harm and two of assault.

8. In the 1st Count the appellant was charged with unlawfully causing harm to **Aden Muktar Mohamed**. In his evidence the complainant said,

> **"when I stood up his net and the bed fell on me because also the man was trying to ran. My kikoi also fell down. When I stood up the man held my genitals. I screamed because I was in pain."**

In cross examination by the appellant the complainant stated:

> **"…. You fell on me as you were trying to run away, but you were on the mattress where the girl was. …. You grabbed my genitals, it was painful. I fell down."**

9. The complainant was first attended to on 1st April 2019 and the hospital record reads *inter alia:*

> **"Having been injured by a person who was trying to rob them…..was allegedly held by the scrotum, fainted and then hit on the left palm, was bitten. Swollen palm."**

The complainant was given floxapen and ibuprofen for a week.

10. The P3 form signed on the same date stated that; -

> **- testicle pain noted.**
>
> **- Bitten left hand and swollen.**
>
> **- Left knee bruises and swollen thigh.**

11. In my considered opinion though the complainant's genitals were grabbed and he felt pain and in the struggle between the complainant and the appellant the complainant fell, hurt his palm and had bruises on his thigh, none of the said injuries amount to grievous harm. Indeed, the testimony of the complainant and the two medical documents do not tally. The medical record and the P3 form are exaggerated as indeed the treatment and medication the complainant received tell a different story and was not different from those prescribed to those the appellant is said to have assaulted.

12. However, since the appellant did not appeal against the conviction, I will say no more on the count of causing grievous harm safe to find that in the circumstances of the case I find that the sentence of 6 years was manifestly excessive. Secondly, I also find that the trial court in ordering that the sentences run consecutively so that in total the appellant would be jailed for 8 years, to have been too punitive in the circumstances.

13. In **Ogolla S/O Owuor vs Republic [1954] EACA 270**, the Court of Appeal stated:

> **"The court does not alter a sentence unless the trial judge has acted upon wrong principles or overlooked some material factors."**

In **Shadrack Kipkoech Kogo vs Republic Eldoret Criminal Appeal No. 253 of 2003** the Court of Appeal stated:

> **"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered."**

14. Guided by the above Court of Appeal authorities and the guidelines on sentencing requiring that sentences should be commensurate to the offense, I will only consider the sentence on the 1st count. Which the court sets aside. In re-sentencing I will also consider the 8 months the appellant was in custody.

15. The court further finds the sentences on the 2nd and 3rd count to be appropriate save for the holding that they run consecutively.

16. Consequently, for the 1st count the appellant will be sentenced to a period of 2 years, the court having considered the 8 months he was in custody.

17. Further all the sentences will run concurrently.

DATED AND DELIVERED AT GARISSA THIS 17TH DAY OF DECEMBER, 2020.

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ALI ARONI

JUDGE