



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 103 OF 2017**

**TOM NDAMBUKI MUTISO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an Appeal against the sentence by Hon. L. Mugambi-SPM in Kangundo SPM' Court in Criminal Case Number 660 of 2013, R. v Tom Ndambuki Mutiso delivered on 14/04/2015)**

**JUDGEMENT**

1. The Appellant herein **Tom Ndambuki Mutiso** was convicted of two counts of assault causing actual bodily harm contrary to Section 251 of the Penal Code and sentenced to three years imprisonment on the first count and four years imprisonment on the second count.
2. This being a first appeal, this court is required to re-analyse and re-evaluate the evidence adduced before the trial court and come up with its own conclusion while at the same time bearing in mind that it did not have the advantage of seeing the witnesses testify.
3. The prosecution called a total of 7 witnesses and after considering both the prosecution evidence and the defence evidence together with the statement in mitigation, the learned Magistrate convicted the appellant and sentenced him to **3 years imprisonment on the first count and 4 years imprisonment on the second count and the sentences were to run concurrently.**
4. Aggrieved by the said finding, the appellant appealed to this court against the sentence. The appellant in the petition of appeal advanced 7 grounds and sought leniency.
5. The appeal was canvassed by way of written submissions.
6. In my view all the grounds of appeal can be summarized into one, namely whether there are sufficient grounds to warrant a reduction of sentence.

**Submissions by the Parties**

7. The appellant vide his written submissions submitted that he is deeply remorseful, a first offender and a single parent with fatherly responsibility thus requests for leniency. He further submitted that he is a resourceful person who has gained skills in masonry and would like a lesser term or a non-custodial sentence.
8. Learned Counsel for the state opposed the appeal and submitted that the grounds of appeal raised by the appellant are mere mitigation and do not qualify to be called grounds of appeal. Further the said mitigations do not warrant this honourable court to interfere with the discretion exercised by the trial court. He submitted that the offence that the appellant was charged with carries a sentence of upto 5 years and thus a sentence of three years and four years in two counts where the sentences were to run concurrently is safe and within the law.
9. Counsel submitted that the appellate court would only interfere with the sentence if it was too harsh, excessive as to amount to miscarriage of justice or if the court acted on the wrong principle or if it exercised its discretion capriciously. He quoted the case of **Shadrack Kipchoge Kogovs Republic**, Criminal Appeal No. 253 of 2003 where the court of appeal stated:-

*“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”*

10. He concluded by submitting that no sufficient reason has been raised to warrant the interference with the discretion exercised by the trial

court and therefore the appeal be dismissed and the court uphold the conviction and sentence

### **Analysis**

11. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously. This was observed in the case of **Shadrack Kipchoge Kogo v Republic**, Criminal Appeal No. 253 of 2003 where the court of appeal stated:-

*“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”*

12. **Section 251** of the Penal Code Cap 63 provides that a person who is guilty of the offence of assault occasioning actual bodily harm is guilty of a misdemeanour and **is liable to imprisonment for five years**. The appellant was sentenced to **3 years imprisonment on the first count and 4 years imprisonment on the second count and the sentences were to run concurrently**. While exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered. This was observed in the case of **Soman vs Kerala {2013} 11 SC.C 382 Para 13, Supreme Court of India**.

13. I have considered the nature of the offence, the principles of sentencing listed above and I find no reason to interfere with the sentences imposed by the learned Magistrate on the two counts. It is noted that the Appellant had not been provoked at all and had viciously attacked the two complainants in their own compounds. The injuries sustained were severe. The sentences imposed were reasonable and within the law and further the trial court considered the Appellants' mitigation.

### **Determination**

14. The upshot is that I find no merit in the Appellant's appeal. the sentences by the trial court are hereby upheld.

It is so ordered

**Dated, Signed and Delivered at Machakos this 30<sup>th</sup> day of January, 2019.**

**D.K. KEMEI**

**JUDGE**