

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 53 OF 2018

ADEN MOHAMED HUSSEIN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from the sentence in Mandera Magistrate's Criminal Case No. 411 of 2018 by Hon. P. N. Areri (SRM))

JUDGEMENT

1. The appellant was charged in the Magistrate's Court at Mandera with assaulting a police officer in execution of duty contrary to section 103(a) of the National Police Service Act No. 11A of 2011. The particulars of the offence being that on 19th September 2018 at Bulla Power in Mandera East Sub-County within Mandera County assaulted PC Edward Mutwiri a police officer who at the time of the said assault was in the due execution of his duty.

2. When he was brought to court on 20th September 2018, he pleaded guilty to the charge, was convicted and sentenced to serve four (4) years imprisonment.

3. He has now come to this court in an appeal filed on 26th September 2018 through Counsel Paul Mugwe Nyaga against sentence only. Counsel also filed written submissions to the appeal.

4. At the hearing of the appeal, Mr. Nyaga learned counsel for the appellant relied on the written submissions filed. Counsel emphasized that the appellant was relying on a similar case of **Daniel Ikenye Muhoro vs Republic Criminal Appeal No. 100 of 2011** in the High Court at Nairobi, determined by **Kimaru J** and reported as **2018 eKLR**, and asked this court to review the sentence passed on the appellant by the trial court.

5. Mr. Okemwa the learned Principal Prosecuting Counsel submitted that this court could consider the option of a fine, but in determining the fine, the court should consider the seriousness of the matter.

6. I have considered the appeal and submissions of counsel for the appellant and the Prosecuting Counsel. Section 103 of the National Police Service Act under which the appellant was charged provides for the sentence or a fine not exceeding 1 million shillings or imprisonment for a term not exceeding 10 years or both. The appellant pleaded guilty to the offence. The prosecution stated that they did not have any record of previous convictions. The appellant in mitigation said that his first born child was in Std. 8 and that he would not repeat the offence. The learned magistrate stated that he had considered the mitigation on record and sentenced him to four (4) years imprisonment.

7. Indeed, sentencing is an exercise of discretionary power by the trial court, and appellate courts have to be slow in interfering with such discretion. The court must have taken into account that the appellant assaulted a police officer who was performing his duties. However, in my view, the court should have also considered that the appellant did not waste the court's time and pleaded guilty when he was first brought to court. The court should also have considered that the penal section for the offence provides the sentence of a fine before the option of imprisonment. The presumption therefore, in my view, is that the court should have considered the fine first before considering the imprisonment. The record does not show that a sentence of a fine was considered by the trial magistrate at any time which in my view was a mistake. Consequently, I will interfere with the sentence imposed.

8. I thus allow the appeal, I set aside the sentence of four (4) years imprisonment imposed by the trial court, and substitute therefore a sentence of a fine of Kshs.100,000/= and in default four (4) years imprisonment from the date he was sentenced by the trial court.

9. It is so ordered.

Dated and delivered at Garissa this 20th day of February 2019.

George Dulu

JUDGE