



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 34 OF 2017

REPUBLIC.....APPELLANT

VERSUS

HUSSEIN BWANA MKUU.....RESPONDENT

[Being appeal against the sentence meted out by Hon Nyawiri, SRM on 9<sup>th</sup> November, 2017 in Malindi CM Court Criminal Case No. 61 of 2014, Republic v Hussein Bwana Mkuu]

JUDGEMENT

1. Through the charge sheet amended on 13<sup>th</sup> July, 2015 the Respondent, Hussein Bwana Mkuu, was charged with assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of the charge alleged that on 21<sup>st</sup> October, 2014 at Maweni Village in Malindi Sub-County within Kilifi County the Appellant unlawfully assaulted Mohamed Aboud Said by cutting his head with a panga thereby occasioning him actual bodily harm. At the conclusion of the trial the Respondent was found guilty and fined Kshs. 10,000 in default to serve three months imprisonment.
2. The Republic being dissatisfied with the sentence has filed this appeal and seeks an enhancement of the sentence on the grounds that:-
  - “1. That the learned trial magistrate erred in law by improperly exercising his discretion and meted out a sentence contrary to the provisions of section 251 of the Penal Code.
  2. That the learned trial magistrate erred in law by failing to take into account the gravity of the offence during sentencing.
  3. That the learned trial magistrate erred in law and did not exercise his discretion judicially and meted out a lenient sentence against the respondent.
  4. That the learned trial magistrate erred in law and did not take into account that the respondent used a dangerous weapon.
  5. That the learned trial magistrate erred in law in failing to impose a custodial sentence.”
3. The Appellant is urging the court to set aside the sentence imposed by the trial court and substitute the same with “a suitable custodial sentence or any other sentence that this court may deem just and fit.”
4. The only issue for the determination of this court is whether the Appellant has established grounds to warrant interference with the trial magistrate’s sentencing discretion.
5. The appeal proceeded by way of written submissions. On behalf of the Appellant it was submitted that the sentence imposed was too lenient considering that injuries were inflicted on the head of the complainant using a panga which is an offensive weapon.
6. As to what an offensive weapon is, this court was referred to the decision of the Court of Appeal in **David Odhiambo & another v Republic [2005] eKLR** where an offensive weapon was defined as any “article made or adapted for use for causing injury to the person or intended by the person having it in his possession or under his control or for such use. So the test of whether an article can be described as dangerous or offensive is really the use or the purpose for which the person possessing it intends to put it to.”
7. It is the Appellant’s case that an offensive weapon having been used to inflict injuries on the head of the complainant, a vital organ of the human body, the appropriate sentence is imprisonment. Counsel for the Appellant concluded by urging this court to be persuaded by the decision of J. Kamau, J in **John Maganga Shimbo v Republic [2015] eKLR** and impose a custodial sentence.

8. On his part the Respondent urged this court to dismiss the appeal on the ground that the Appellant has not provided adequate reasons for the reversal of the sentence.

9. It must be stated from the outset that sentencing is within the discretion of the trial court. An appellate court can only interfere with this power in limited circumstances. Those circumstances were restated by the Court of Appeal in the case of **Peter Mbugua Kabui v Republic [2016] eKLR; Criminal Appeal No. 66 of 2015 (Nairobi)** as follows:-

**“The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court are now old hat. The predecessor of this Court, in the case of Ogolla s/o Owuor vs Republic, [1954] EACA 270, pronounced itself on this issue as follows:-**

***“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”.***

To this, we would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263).” See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

***“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 inferred (see also Sayeka -vs- R. (1989 KLR 306)”***

In the more recent case of **Kenneth Kimani Kamunyu -vs- R. (2006) eKLR**, this Court reiterated this principle and stated that an appellate Court can only interfere with the sentence if it is illegal or unlawful.”

10. Section 26 of the Penal Code, Cap. 63 provides that:

**“Imprisonment**

(1) A sentence of imprisonment for any offence shall be to imprisonment or to imprisonment with hard labour as may be required or permitted by the law under which the offence is punishable.

(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term.

(3) A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment:

Provided that-

(i) where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment;

(ii) ...”

12. Section 251 of the Penal Code under which the Respondent was charged provides that:-

**“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years.”**

13. The sentence imposed on the Respondent could have been lenient in the circumstances of this case. It was however not unlawful or illegal. The trial magistrate was mandated by Section 26(3) of the Penal Code to impose a fine instead of imprisonment.

14. The Appellant has not demonstrated that the trial magistrate acted on the wrong principles in imposing a fine. In **Bernard Kimani Gacheru v Republic [2002] eKLR** the Court of Appeal stressed that:

**“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....”**

15. It is my finding that the Appellant has failed to advance any legitimate reason to warrant this court to interfere with the sentence imposed by the trial court. In short, this appeal is without merit. The same is therefore dismissed.

**Dated and Signed at Nairobi this 10<sup>th</sup> day of April, 2019**

**W. Korir,**

**Judge of the High Court**

**Dated, Countersigned and Delivered at Malindi this 30<sup>th</sup> day of May 2019**

**R. Nyakundi,**

**Judge of the High Court**