



**REPUBLIC OF KENYA**

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

**HCCRA NO. 163 OF 2017**

**DOUGLAS LEMPASON LEMELWAI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 656 of 2014 delivered on the 20<sup>th</sup> day of August, 2015 by Hon. E. Kigen, RM]**

**JUDGMENT**

1. The appellant who was convicted and sentenced to 5 years imprisonment for the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code on 21/8/2015 seeks to mitigate on the sentence for reduction thereof as set out in his grounds of appeal as follows:

*“I the above do hereby beg for leniency following the conviction and sentence to 5 years after being guilty with the offence of assault contrary to section 251 of the Penal Code. I do beg as follows:*

- 1. That although I was found guilty, I pray for leniency.*
- 2. That I am remorseful for all that took place and I am fully charged.*
- 3. That I promise to abide with the rules and regulations of the law of Kenya.”*

2. In sentencing the appellant, the Court considered that a harsh sentence was deserved for the repeat offender as follows:

*“Court: I have considered the mitigation as well as the fact that the accused has 2 previous records and one emanating from the offence of assault. **I do find that the accused deserves a harsh sentence so that he can be able to enjoy the benefits of reform with the prison.** I hereby sentence the accused to serve 5 years imprisonment. The sentences will run concurrently and will begin after finalizing cr. 720/2015. Right of Appeal within 14 days. E.M. Kigen, RM”*

3. The DPP opposed the appeal by oral submissions set out in the record of proceedings of this Court on 25/2/2019 as follows:

**“DPP**

*Appeal is opposed.*

*Appellant convicted for assault contrary to section 251 of Penal Code and sentenced to server 5 years imprisonment. Pw1 testified that he was a Police Officer attached to Luanda police station and appellant was his son. On 20/7/14, he was seated outside his house when appellant came and demanded Ksh.2000/= from him. Appellant strangled the complainant and pushed him to the ground before stealing Ksh.2000/= from his pocket.*

*The complainant screamed and Pw2 and Pw3 came to his rescue. Pw2 testified that they heard screams from the complainant's house and ran to the scene and they found the appellant assaulting the complainant. Pw2 said he saw the appellant pushing the complainant to the ground as he was holding his neck and leg. Pw3 testified that when he arrived at the scene at the scene he saw the appellant struggling with the complainant and when he saw him he started running away. Pw2 & 3 ran after the appellant and managed to arrest him when he fell into a ditch and they took him to Marigat Police Station. Pw4 Clinical Officer who examined the complainant had a slight swelling on the neck and the lower limb were swollen. He also had difficulty in walking and assessed degree of injury as harm.*

*In his defence, the appellant denied assaulting his father. He gave his defence on 10/12/14 and requested to be allowed to avail more witnesses. Further defence hearing was set for 5/1/2015 but the appellant who was out on bond failed to attend Court. The defence was marked as absent under section 206 of Criminal Procedure Code in the absence of the appellant on 21/7/15.*

*Appellant was brought to Court under Warrant of Arrest on 14/8/2015. He was convicted and sentenced to 5 years imprisonment. The accused by then had previous record in Cr. 34/2014 assault sentenced to 3<sup>1</sup>/<sub>2</sub> years and Cr. 720 of 2015 for escape sentenced 2 years imprisonment.*

*I urge the Court to dismiss the appeal considering that the evidence is overwhelming and the appellant is habitual offender who deserves rehabilitation.*

**Appellant**

*I pray for lenient sentence. I have been in 3 years ½. I am referred my father has forgiven.*

**Court**

*Probation Officer to file a presentable report on 18/3/19.”*

4. The Court attempted reconciliation between the appellant and his father, complainant in the matter, without success. The Probation Officer's Report dated 18/3/2019 recommended a reduction of the appellant's sentence as follows:

**“Recommendation**

*Going by the negative sentiments expressed by the complainant indicate neighbors and the local administration, complained with the fact the appellant's remaining period of custodial sentence is still only above the maximum period of non-custodial sentence, it is my opinion that the appellant's prospect of reform within the community is low and may be considered for a reduction of sentence.”*

5. As a first appellate Court, I have satisfied myself that the appellant was properly convicted on the evidence of the father complainant Pw1 as supported by eye-witnesses, neighbours, Pw2 and Pw3, who responded to the complainant's screams for help, when the appellant attacked him and started strangling him; and the injury confirmed by medical examination indicating “*slight –swelling to the neck otherwise no bruises noted or cuts.*”

6. Apart from his very reprehensible conduct of assaulting one's father the injuries noted were minimal. As held in **Omuse v. R** (2009) KLR 214, the sentence imposed on an accused must be commensurate to the moral blame-worthiness of the offender and the proper exercise of discretion in sentencing call for “*the Court to look at the facts and circumstances of the case in their entirety before setting for any sentence.*”

7. The circumstances of the case and relevant facts were not so serious as to call for what the trial admitted was a “*harsh sentence*”. It is that the duty of any Court to impose a “*harsh sentence*” as that would be contrary to the interests of justice. The Court only could impose an appropriate sentence in term of the objections of punishment for retribution, deliverance and reform or rehabilitation of the offender. The “*punitive obsession*” of some trial Courts is out of order in present-day penal regime.

8. According to the Prosecutor in presenting previous records of the appellant during the sentencing proceedings:

*“Accused has two count records file 34/14 with the offence of assault. He was initially sentenced to serve one year probation he did not comply and the sentence was substituted to 3<sup>1</sup>/<sub>2</sub> years imprisonment. Also vide Cr. 720/2015 he was charged with the offence of escaping from lawful custody and sentenced to 2 years imprisonment the sentence to run consecutively after Cr. 34/2014.”*

9. For all those findings set out in the Prosecution's Records, the appellant was not deserving of the maximum sentence causing actual bodily harm contrary to section 251 of the Penal Code. True, the sentence ought to have reflected the appellant's recalcitrant conduct but the imposition of the maximum sentence for the offence of assault causing actual bodily harm was excessive.

10. Indeed, I consider that for a trial Court to sentence an offender to the maximum sentence for the offence, unless it is a mandatory sentence, if any exists after the Muruateti decision of the Supreme Court, as the duty the appellate Courts the discretion to review and enhance, if appropriate, the said sentence. Section 354 (3) (b) of the Criminal Procedure Code, for example empowers the appellate Court to “*increase*” the sentence.

11. All in all, I think that the imposition of the sentence of imprisonment for 5 years for the offence of assault causing actual bodily harm in this case only shown to be “*slight swelling to the neck, otherwise no bruise noted or cuts*”, even with the previous conviction for assault and escape from custody was excessive. The Court will in accordance with principle from interference with discretion in sentencing set out in **Wanjema v. R** (1971) EA 493 and **Omuse v. R** (2009) KLR 214 reduce the sentence to imprisonment for term of 3 years to be reckoned from the date when the appellant completed his 2 years sentence in the previous criminal case no. 720 of 2015 as ordered by the trial Court on 21/8/2015.

*Order accordingly.*

**DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF JUNE 2019.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.