



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 10 OF 2018

SAMSON SHIRAKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence by F. Makoyo, SRM,

in Butere PMC Criminal Case No. 26 of 2017 dated 6/6/2017)

JUDGMENT

1. The appellant was convicted of the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code and sentenced to serve four years imprisonment. He was aggrieved by the sentence imposed on him and filed the instant appeal. The appellant challenges the sentence on the grounds that it was severe and harsh. He faults the trial court for failing to consider his mitigation.
2. The particulars of the charge against the appellant were that on the 20th January, 2017 at Ingotse Village, Shikunga Sub-location in Butere Sub-County within Kakamega County, he unlawfully assaulted Tabitha Shiraku (herein referred to as the complainant) thereby occasioning her actual bodily harm.
3. The case for the prosecution was that the complainant was at the material time aged 10 years. The appellant is her father. That on the material day the appellant returned home and found the complainant doing school homework. He told her to read an English work. She was unable to do so. The appellant took an electric wire rod and beat her up with it. She suffered injuries on the hands, back and on the thighs. On the following day her mother took her to Butere Sub-County Hospital where she was admitted. On the 23/1/2017 her step mother reported at Butere Police Station. PC Miriam Chelagat PW3 investigated the case. She issued a P3 form to the girl. It was completed by a clinical officer PW1 at Butere Sub-County Hospital. The clinical officer observed that she had whip marks on her back, buttocks, upper limbs, thighs and swellings and tenderness on the upper limbs. The clinical officer classified the degree of injury as harm. Photographs of the girl were taken by a Scene of Crime officer showing the injuries. The appellant was arrested and charged with the offence. During the hearing the clinical officer PW1 produced the treatment notes and the P3 form as exhibits, P.Ex.1 and 2 respectively. PC Chelagat produced the photographs as exhibits, P.Ex.3 (a) – (c).
4. When placed to his defence the appellant gave unsworn testimony in which he stated that the complainant is his daughter. That on the material day he arrived home and tried to teach his children. The complainant abused him and said that he was stupid. He beat her up with a stick as a disciplinary measure. On the following day he was called and told that the child had malaria. He took her to hospital. He was thereafter arrested and charged.
5. The appellant stated in mitigation that the complainant's mother ran away from home in 2013. That his wife left him after this incident and that he is the sole breadwinner of his children.
6. In sentencing the appellant to 4 years imprisonment, the trial court stated that the appellant did not exhibit any remorse and that the appellant brutally assaulted the child.
7. The prosecution left it to this court to determine appropriate sentence.
8. In his submissions during the appeal the appellant stated that his first wife died in 2013 and left him with other 2 children. That the children are currently living with neighbours. That he was a first offender. That the trial court did not consider the negative effect that the sentence of 4 years imprisonment will have on his children. Further that his parents are deceased.

9. Sentencing is a discretion of the trial court. In **Ambani –Vs- Republic (1990) KLR 161**, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.

10. The appellant was sentenced to serve 4 years imprisonment. The complainant in the case had sustained injuries that amount to actual bodily harm. The injuries were not aggravated. I am of the view that a sentence of 4 years imprisonment for the kind of injuries sustained was manifestly excessive and harsh.

11. I have considered that the appellant was a first offender at the time that he was sentenced. He was the sole breadwinner of his family. His incarceration has no doubt affected the welfare of his children who have no parent to take care of them. The appellant has by now served 2 years and three months of the sentence imposed on him. I am of the view that the time served is sufficient sentence for the offence committed.

12. The upshot is that the appellant is sentenced to the time already served. He is therefore set at liberty forthwith unless lawfully held.

Delivered, dated and signed in open court at Kakamega this 24th day of September, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Omondi for state

Appellant

Court Assistant - George

14 days right of appeal.