REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.65 OF 2019

REPUBLIC.....APPLICANT

VERSUS

BELO ADAN HASSAN.....RESPONDENT

RULING

The Respondent, Belo Adan Hassan was charged with the offence of **causing grievous harm** contrary to **Section 234** of the **Penal Code** in **Makadara Chief Magistrate's Court Criminal Case No.929 of 2016.** The particulars of the charge were that on 21st March 2016, the Respondent assaulted Albanus Kioko (the complainant) and caused him to sustain grievous injury. When the Respondent was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, she was found guilty as charged. She was ordered to pay a fine of Kshs.20,000/- or in default to serve three (3) months imprisonment. She was further ordered to pay compensation to the complainant to the sum of Kshs.55,000/-. This compensation was in respect of medical expenses that the complainant is alleged to have incurred in seeking treatment after the assault. The Respondent paid the fine and the compensation.

The Director of Public Prosecution was aggrieved by the sentence meted by the trial court. He filed an application before this court seeking the revision of the sentence. The prosecution was of the opinion that the sentence that was meted on the Respondent did not take into consideration the aggravating circumstances including the fact that the complainant sustained a fracture of the skull and further, that he required in-patient hospitalization for two weeks after the assault. The prosecution further stated that the trial court failed to take into consideration that the assault occasioned the complainant economic loss, medical expenses and cost of necessary transport to the hospital. In the circumstances, the prosecution was of the view that the trial court improperly exercised its sentencing discretion and thereby sentenced the Respondent to serve a manifestly lenient sentence. He therefore urged the court to set aside the sentence and substitute it with an appropriate sentence of the court.

The Respondent was served with the application. There is an affidavit of service on record. The Respondent did not attend court during the hearing of the application. This court being satisfied that the Respondent had been duly served, ordered the Applicant to proceed with the application, the absence of the Respondent notwithstanding. Ms. Atina for the prosecution essentially relied on the contents of the application and supporting affidavit. She submitted that taking into consideration the injuries that the complainant had sustained, the sentence that was meted on the Respondent was lenient in the extreme. She stated that the trial court did not take into consideration that the complainant had incurred considerable expenses in getting treatment and therefore the order of compensation that was made was not consonant with the grievous nature of the offence that had been committed. She submitted that the victim of the assault was nearly killed by the Respondent and therefore the sentence that was meted on him amounted to a slap in the wrist. In the circumstances, she urged the court to set aside the sentence that was imposed on the Respondent and substitute it with an appropriate sentence of the court.

When the trial magistrate sentenced the Applicant to serve the custodial sentence, it was exercising judicial discretion. This court can only interfere with such exercise of discretion if it is established, either that the sentence was too harsh or too lenient in the circumstances. The court will also interfere with the imposition of the custodial sentence if it is established that the trial magistrate applied the wrong principles of the law in sentencing the Applicant or that the sentence was illegal. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another – vs- Republic Criminal Appeal No. 135 of 2016** (unreported) held at Page 25 thus:

"As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v. Republic, Cr App No.188 of 2000 this Court stated thus:

"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked

some material factor, or took into account, some wrong material, or acted on a wrong principle. 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 unless, any one of the matters already stated is shown to exist."

In **Arthur Muya Muriuki v Republic [2015] eKLR**, Mativo J held thus:

> ***"…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 the wrong principle or if the court exercise its discretion capriciously. In Shadrack Kipchoge Kogo v Republic Criminal Appeal No.253 of 2003 (Court of Appeal – Eldoret), the Court of Appeal stated:***
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> ***"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.""***

In the present application, it was clear to this court that the sentence that was meted on the Respondent was lenient in the extreme that this court reached the irresistible conclusion that there was an obvious and apparent error in principle. According to the medical report which was prepared as part of the prosecution's evidence and which PW4 Dr. Joseph Maundu presented to the court as exhibit, the complainant:

> ***"…had a head injury. He came with x-rays which showed he had sustained a fracture on the right side of the skull behind the right ear and suffered bleeding on the right side of the brain. Injury was seven weeks old. Blunt object was used. He was attended to at KNH and Mama Lucy. Injury classified as grievous harm."***

The trial court failed to take into consideration the serious injury that was inflicted on the complainant. Indeed during trial, the court was informed that at the time plea was taken, the complainant was in a serious condition having been admitted at Kenyatta National Hospital. The trial court failed to take into consideration that it was the Respondent who provoked the complainant and later assaulted him. These are relevant circumstances that the trial court ought to have taken into consideration in determining the sentence to be imposed on the Applicant. The trial court further erred in imposing an order of compensation that was unreasonable taking into consideration the amount that the complainant had incurred in seeking treatment for the injuries that he sustained during the assault. It was evident that the trial court ignored the complainant views when meting out the order of compensation as provided under **Section 3(b)(i)** and **Section 15(3**) of the **Victim Protection Act**. It was therefore clear that the sentence that was meted on the Respondent was extremely lenient as to constitute a miscarriage of justice.

In the premises therefore, this court will allow the application filed by the prosecution. The sentence imposed on the Respondent by the trial court is set aside and is substituted by a sentence of this court. Since the Respondent was absent from court when the application was argued (though she was served), this court hereby issues a warrant for her arrest so that she can be brought before this court for appropriate sentencing after the court has considered her mitigation. Mention on 31st October 2019 for further orders. It is so ordered.

DATED AT NAIROBI THIS 30TH DAY OF OCTOBER 2019

L. KIMARU

JUDGE