REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL CASE NO. 21 OF 2018

LENNY SHIERA MUNYASI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 26 of 2014 of the

Chief Magistrate's Court at Malindi – J.N. Wandia, RM)

JUDGEMENT

1. The Appellant, Lenny Shiera Munyasi, has limited her appeal to the sentence of five years imprisonment imposed on her by the trial court after finding her guilty of assaulting James Lyatama Martin contrary to Section 251 of the Penal Code as charged in the first count.

2. In her submissions, the Appellant states that she is a first offender, remorseful, the sole family bread winner taking care of her children and elderly mother, has reformed and has acquired dressmaking skills and a religious certificate of baptism. It is her case that in sentencing, the court ought to consider the nature of the crime and the purpose of the sentence. She relies on the decisions in **Said Athman Hamisi & 2 others v Republic [2016] eKLR** and **Douglas Muthaura Ntoribi v Republic [2018] eKLR** to press this point home.

3. The Appellant beseeches this court to take her as the father in the biblical account of the prodigal son and usher her back to society where she is ready to rejoin the society in total obedience of the law.

4. The Republic represented by the Director of Public Prosecutions left the question of sentencing to this court.

5. Sentencing is a discretionary exercise and it has long been established that this discretion will not be interfered with unless the sentence is unlawful or the trial court acted upon the wrong principles or overlooked some material factors or the sentence is manifestly excessive in the circumstances of the case.

6. In considering whether to interfere with the sentence imposed by the trial Court, an appellate court is governed by the parameters laid down by the Court of Appeal in **Bernard Kimani Gacheru v Republic [2002] eKLR.** In that case the Court stated that:

> **"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."**

7. I have perused the record and note that the Appellant was not given an opportunity to mitigate after her conviction. The sentence is contained in the judgement. The offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code, Cap. 63 attracts a maximum sentence of five years imprisonment. There is nothing on record to show that the Appellant was a repeat offender. She therefore ought to have been treated as a first offender and no reason can be gleaned from the record as to why she was given the maximum sentence.

8. For the reasons stated, it is apparent that the trial magistrate acted on the wrong principles in sentencing the Appellant. The appeal on sentence succeeds. The Appellant has already served over three years and eight months without taking into consideration the period she was held in custody pending trial. This is more than enough punishment. The sentence of five years is set aside and substituted with an order reducing sentence to the period already served. The Appellant is thus set at liberty forthwith unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 22nd day of November, 2018.

W. KORIR

JUDGE OF THE HIGH COURT