



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MAKUENI**  
**CRIMINAL APPEAL NO. 108 OF 2017**  
**(FORMERLY; MACHAKOS HCRA NO. 48 OF 2016)**

SAMSON MUTHENYA KIMONDIU..... APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

**JUDGEMENT**

**INTRODUCTION**

1. The appellant was initially charged before the Senior Resident Magistrate's Court at Kilungu with assault causing actual bodily harm contrary to Section 251 of the Penal Code. On 4<sup>th</sup> April 2016, the prosecution substituted the charges to 'Grievous harm contrary to section 234 of the Penal Code.
2. The accused was called upon to plead to the substituted charge. He denied the charge and a plea of not guilty was entered.
3. On 30<sup>th</sup> June 2016, he requested the Court to read the charges afresh whereupon he pleaded guilty to the offence. Consequently, he was sentenced to 20 years imprisonment.

**THE APPEAL**

4. The appellant's memorandum of appeal is titled 'An Appeal of mitigation'. He proceeded to list the following grounds:-

a) ***That*** I plead guilty to the charges.

b) ***That*** I am just a first offender who has never been caught on the wrong side of the law hence prays for leniency.

c) ***That*** being the first born in a family of 8 members with young children who are still going to school and I was the only sole breadwinner.

d) ***That*** I pray to the honorable Court under the powers conferred to it in article 165(6) (7) of the Constitution of Kenya 2010 and section 322(2) of the Penal Code to please review, reduce or substitute the sentence to a lesser or to a non-custodial sentence under the community service order.

e) ***That*** after deeply soul searching, I am remorseful, repentant and thus regret the offence that I had committed.

f) ***That*** I implore the Hon. Court to issue any order it may deem fit in any circumstances and I promise to comply.

g) ***That*** these mitigation factors are true to the best of my knowledge, information and belief.

h) He urged the Court to consider his mitigation.

5. The appeal was opposed by the learned prosecution Counsel Mrs Gitau. She submitted that according to the probation officer's report filed in Court, the appellant had previously been convicted of manslaughter and was jailed for 15 years but the sentence was reduced to 10 years on appeal. He had also been convicted of creating disturbance and put on a probation order.

6. It was further submitted that the victim in the instant case sustained severe injuries that resulted in disfigurement and caused her to be hospitalized for six months.

7. According to the prosecution counsel, the sentence of 20 years was lenient in light of **Section 234 of the Penal Code** which prescribes a maximum sentence of life imprisonment.

### **LEGALITY OF THE SENTENCE**

8. From the onset, it is important to note that this appeal is against sentence only as the appellant pleaded guilty to the charge of causing grievous harm.

9. **Section 348** of the Criminal Procedure Code provides:-

***No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.***

10. In the case of; **MACHARIA- VS- R. [2003] 2 E.A. 559** the Court stated:-

***“The principle upon which this Court will act in exercising its jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of Ogola s/o Owuor (1954) EACA 270 wherein the predecessor of this Court stated:-***

***“The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in JAMES VS. R. (1950) 18 EACA 147 it is evident that the judge has acted upon some wrong principle or overlooked some material factors. To this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case R. VS- SHERSHAWSKY (1912) CCA 28 TLR 263.”***

11. Clearly, the sentence imposed on the appellant is lawful. The learned trial Magistrate had the jurisdiction and the power to impose a life sentence as provided for in **Section 234** of the Penal Code but instead found it fit to sentence the appellant to 20 years imprisonment.

### **PRE SENTENCE REPORT**

12. From the pre-sentence report, it is evident that the appellant is a habitual offender. As submitted by the learned prosecution Counsel, he has been convicted for various offences.

13. The appellant is therefore not candid in his second ground of appeal where he stated that he has never been caught on the wrong side of the law.

14. I have observed that the prosecutor in the lower Court requested the Court to treat the appellant as a first offender, however, from the record, it is clear that he was not seized of the pre-sentence report at the time of making the request.

15. In a nutshell, the pre-sentence report is not favourable to the appellant. It states that he is violent and erratic in behavior, forcible in his demands, arrogant in character and has an unpredictable behavioral pattern.

16. In my opinion, the fact that the appellant has the audacity to mislead the Court by saying that he has never been caught on the wrong side of the law gives credence to this report.

### **IMPACT ON THE VICTIM**

17. From the medical evidence of record, the injuries sustained by the complainant were very severe. She was hospitalized for a long time and according to the Victim Impact Assessment report, she developed a post trauma disorder, is unable to do heavy work due to constant headaches, her face was denatured leading to loss of self-esteem, her social life was affected and there were cost implications as well.

18. The report further states that her family requires Kshs. 30,000/= to carry out plastic surgery on her face as advised by Kangundo Hospital. This is in addition to Kshs. 100,000/= already spent on her treatment.

### **CONCLUSION**

19. Sentencing is the process by which a Court imposes a penal sanction once an accused person has pleaded guilty or has been convicted of an offence following a trial.

20. The objectives of sentencing include *inter alia* rehabilitation, deterrence, and retribution and community protection. Regard is usually had to the nature of the crime, the offender and the purpose of the sentence.

21. As observed by the learned trial Magistrate, this is a serious case of domestic violence whose impact has been discussed above.

22. According to the pre -sentence report, the offender is a social misfit who has demonstrated his inability to live harmoniously with those around him.

23. The appellant's suggestion that he should be considered for a non-custodial sentence flies in the face of the evidence of record.

24. It will not be proportional to the gravity of the offence.

25. In view of the total circumstances of this case and the guiding principles sentencing, I am of the view and do hold that there are no special circumstances or error in principle to warrant this Court's interference with the sentence imposed.

**1. The appeal is dismissed, conviction affirmed and sentence confirmed.**

**SIGNED, DATED AND DELIVERED THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2017.**

**C. KARIUKI**

**JUDGE**

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