



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 48 OF 2016

BASISIO KAMAU NYAGA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Resident Magistrate's Court (D. Nyaboke) at Wanguru, Criminal Case No. 447 of 2016 delivered on 8th August, 2016)

JUDGMENT

1. The appellant **Basilio Kamau Nyaga** was charged and convicted of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code** and sentenced to 4 years imprisonment in **Criminal case No. 447 of 2016** before the **Resident Magistrate Wanguru Court**. The conviction was on his own plea of guilty. He lodged an appeal claiming that:

(i) He pleaded guilty without the knowledge of the dire consequences.

(ii) He didn't have any ill motive on the side of the victim.

(iii) The victim was dictated by the mother on what to testify.

(iv) He left behind a family of 3 children who depend on him.

(v) The sentence of 4 years has affected his health status psychologically and mentally he feels tormented since he had no intent of assault.

2. I have considered the appeal and the submissions. In the case of **John Oketch Abongo V Republic [2000] eKLR** the Court of Appeal at Kisumu in dismissing the appeal stated:

“The duty of a first appellate court in regard to the evidence and facts is now settled in law. It is required to subject the evidence to fresh and independent analysis and, in appropriate circumstances, even to make its own independent findings and conclusions. In doing so however, the first appellate court must bear in mind that it has only the record and has not enjoyed the advantage of seeing and observing witnesses under testimony.....We must take the evidence on record in its entirety. The evidence of the prosecution witnesses must be taken together with the evidence of the appellant. We are satisfied that, the entire evidence on record left no doubt, as the subordinate court found, that the appellant assaulted the complainant in the manner described by the complainant and supported by other witnesses”.

3. This being a first appeal, this Court is mandated to re-evaluate the entire evidence adduced during the trial in order to arrive at its own conclusion and draw its own. In doing the re-evaluation this Court will bear in mind the fact that the trial court had the advantage of hearing and seeing the witnesses testify. The Appellant was convicted of the charge on his own plea of guilty after the facts were read to him.

4. Analysis and Determination

As per the facts, the complainant and the appellant met at Itangi and when the appellant went home in the evening he inquired from his wife who sent their daughter to Itangi market. After being explained that she had gone for fundraising for Catholic Church, the appellant who appeared drunk started beating the complainant with his hands. He sent the wife for the cattle whip but she refused and they started quarreling. The appellant hit the wife on the face and she ran away. He ordered the complainant into the house, took a panga and started hitting and cutting her. The complainant raised alarm, the neighbours rescued her and took her to hospital.

5. The Appellant admitted the facts as correct before the trial Court proceeded to convict him. The trial Court called for probation report which indicated the Appellant as a violent man and if accorded a non-custodial sentence, he might pose a danger to his family. Thereafter the trial Court sentenced him to 4 years imprisonment.

6. The Appellant admitted the facts. The plea was unequivocal and the Court was right to convict him. The trial Court followed the guidance in **Adan -V- Republic (1973) E.A. 445** where it was held:

(i) "The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

(iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

(iv) if the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered;

(v) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

7. **Section 251** of the **Penal Code** states:

"Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years."

In the case of **Francis Nkunja Tharamba V Republic [2012]eKLR** the Court of Appeal in Nyeri stated the following in regard to interfering with sentencing by the subordinate court:

".....sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing.

The next principle that the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere."

8. The Appellant's conviction and sentence was lawful. I agree with the finding of the trial Magistrate that a custodial sentence was called for to tame his violence and discourage domestic violence. The appeal is without merits and is dismissed.

Dated and delivered at Kerugoya this 19th day of December, 2017.

L. W. GITARI

JUDGE

Judgment has been read out in open Court, in the presence of Mr. Ombiri for State, appellant present, court assistant Naomi Murage this 19th day of December, 2017.

L. W. GITARI

JUDGE

19.12.2017