



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEAL 183 OF 2011

FRANCIS NGUI KONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the sentence of J. Omenge PM in Criminal [Case](#) No. 1937 of 2010

delivered on 24th March 2011 in the Principal Magistrate's Court at Makueni)

JUDGMENT

The Appellant was charged the offence of attempted murder contrary to Section 220(a) of the Penal Code. The particulars of the offence were that on the 4th day of September 2010 at Mikuyuni village, Masii location, Mwala District within Eastern Province, he attempted to unlawfully cause the death of Magdalene Katungwa Mulwa by beating her with an iron bar and also stabbing her on the forehead with an arrow. The Appellant was arraigned in court on 13th September 2010 where he pleaded not guilty to the charge. He was tried, convicted of the offence and sentenced to 15 years imprisonment.

The Appellant being aggrieved by the judgment of the trial magistrate has appealed his sentence. The Appellant in his initial Petition of Appeal filed in court on 8th June 2011 appealed against both his conviction and sentence, and also filed a statement of mitigation. However, at the hearing of the appeal on 10th February 2016, he indicated to the Court that he wanted to appeal on the sentence only, and he relied on amended grounds of leniency dated 10th February 2016 that he availed to the Court.

The Appellant's grounds of mitigation were that the sentence was harsh and excessive; he was a first offender, he was the sole breadwinner of his elderly parents and extended family; and that he was remorseful and rehabilitated.

The learned Prosecution counsel, Ms Rono had initially given notice of enhancement of sentence which she later withdraw at the hearing on 15th March 2016, when the learned counsel noted that the sentence of 15 years imprisonment was lawful, as the maximum sentence for attempted murder is life imprisonment but is not mandatory.

I have considered the Appellant's mitigation and the arguments by the Prosecution, and find that the issues for determination by the court are whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive as provided for under the Penal Code or in any other statute, and whether the said sentence is amenable to reduction.

Section 354 (3) (b) of the Criminal Procedure Code provides as follows on the powers of the Court on an appeal on sentence as follows:-

“ In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence”.

The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of Ogolla s/o Owuor vs R, (1954) EACA 270 wherein the Court of Appeal stated as follows:

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”. To this, we would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263).” See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)”

See also the case of Shadrack Kipkoech Kogo –v- R, Eldoret Criminal Appeal No.253 of 2003 where the Court of Appeal stated thus:-

“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)”

In the instant appeal, the Appellant was charged with, and convicted of the offence of attempted murder contrary to section 220(a) of the Penal Code, which provides as follows:

“Any person who—

(a) attempts unlawfully to cause the death of another; or

(b) with intent unlawfully to cause the death of another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life, is guilty of a felony and is liable to imprisonment for life.”

The complainant was the Appellant’s wife, and the trial magistrate in imposing the sentence of 15 years imprisonment after having taken into account the mitigation by the Appellant, noted that lives had been lost due to domestic violence, and that it was vital a deterrent sentence be issued.

The maximum sentence for the offence of attempted murder is life imprisonment, and the sentence imposed upon the Appellant of fifteen (15) years imprisonment was therefore lawful to that extent. It is however my view that the sentence of 15 years imprisonment although lawful, was excessive in light of the fact that the Appellant was a first offender, and was remorseful, which factors ought to have been taken into account by the trial Court.

I accordingly uphold and affirm the conviction of the Appellant for the charge of attempted murder contrary to section 220(a) of the Penal Code. I will however set aside the sentence imposed by the trial magistrate and substitute it with an appropriate sentence of this Court. I accordingly sentence the

Appellant to ten (10) years imprisonment, which term of imprisonment shall run from the date of the Appellant's conviction by the trial Court.

Orders accordingly.

DATED AT MACHAKOS THIS 31ST DAY OF MAY 2016.

P. NYAMWEYA

JUDGE