REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 167 OF 2013

DAVID KIMARU …….. APELLANT

VERSUS

REPUBLIC ……..…..... RESPONDENT

(An Appeal from the Judgment of the Principal Magistrate Honourable F. N KYAMBIA in Eldoret Criminal Case No. 3742 of 2013, dated 20th August, 2013)

JUDGMENT

1. The appellant was charged with the offence of threatening to kill contrary to *Section 223 (1)* of the *Penal Code.* The particulars of the charge alleged that on 18th August, 2013 at Outspan Market in Wareng district within Uasin Gishu County without lawful excuse uttered words "I will kill you" the words which intended to cause fear to *Charles Njogu*.

2. On 20th August 2013 when the appellant was arraigned before the lower court, he was convicted on his own plea of guilty and was sentenced to serve seven years imprisonment.

3. Being dissatisfied with his conviction and sentence, the appellant preferred an appeal to the High Court. The appeal was against both conviction and sentence but since the appellant had been convicted on his own plea of guilty, only the appeal against sentence was admitted for hearing as required by *Section 348* of the *Criminal Procedure Code.*

4. In the petition of appeal dated 2nd September, 2013 filed on his behalf by his advocates *Ms. Mwinamo Lugonzo & Company Advocates*, the appellant complained that the trial magistrate erred in law and facts in failing to consider his mitigation and in imposing a sentence of seven years imprisonment which was harsh and excessive.

5. At the hearing of the appeal, *Mr. Mwinamo* learned counsel for the appellant submitted that the sentence meted out against the appellant was harsh considering that he was a first offender and he had stated in his mitigation that he had a family which depended on him. Counsel further stated that the appellant suffers from a mental condition caused by alcoholism which is a matter that was brought to the attention of this court during the hearing of the appellant's application for bond pending appeal. He urged the court to note that the appellant has been serving sentence since the date he was convicted and reduce the sentence to the period already served.

6. The appeal is contested by the state. Learned prosecuting counsel *Ms Oduor* in her submissions invited the court to note that the appellant's alleged mental condition was not raised before the trial court in his plea in mitigation and cannot be considered on appeal. She also contended that the sentence of seven

years imprisonment was reasonable and lenient since *Section 223* of the *Penal Code* prescribes a sentence of ten years imprisonment. She urged the court to find that the sentence was lawful and to uphold it.

7. In rejoinder, *Mr. Mwinamo* urged the court to consider all the mitigating factors and that when the appellant took plea, he was acting in person and did not know that he could raise the issue of his mental status in his mitigation.

8. I have considered the grounds of appeal, the records of the lower court and the rival submissions made on behalf of the appellant and the state.

It is trite law that sentencing is always at the discretion of the trial court but there is a caveat in that the said discretion must be exercised judiciously taking into account all relevant factors which includes a consideration of whether the accused was a first or serial offender, his personal circumstances, the circumstances surrounding the commission of the offence and the public interest.

9. The principles which guides an appellate court in deciding whether or not to interfere with a sentence imposed by a trial court were elucidated by the Court of Appeal in ***Macharia V Republic (2003) KLR 115*** where it expressed itself as follows;

> ***"The court does not alter a sentence on the mere ground that if the member 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 v R, (1950) 18 EACA 147 "it is evident that the judge has acted upon some wrong principles 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:.."***

10. In this case, the lower court's record reveals that the appellant did not have a previous criminal record. He was to be treated as a first offender. In his plea in mitigation, the appellant pleaded for forgiveness saying that he had a family which depended on him. When sentencing the appellant, the learned trial magistrate noted that he had considered the appellant's plea in mitigation but he does not appear to have considered the fact that the appellant was a first offender.

11. I am alive to the fact that *Section 223 (1)* of the *Penal Code* which creates the offence with which the appellant stands convicted prescribes on conviction a maximum sentence of ten years imprisonment. And while I agree with *Ms.Oduor's* submissions that the sentence meted out against the appellant in this case was lawful, I am of the view that a sentence of seven years imprisonment for a first offender was harsh and excessive especially when one considers the circumstances in which the offence was committed. I am thus persuaded to find that there is good reason to interfere with the sentence imposed by the trial court in this case.

12. In the result, I find merit in the appeal and I accordingly allow it. Under the powers conferred on this court by *Section 354* of the *Criminal Procedure Code*, I set aside the sentence of seven years imprisonment imposed by the trial court and reduce it to the term already served. The appellant shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 24th day of June 2016

In the presence of:

The appellant

Mr. Mwinamo for the appellant

No appearance for the state

Naomi Chonde – Court clerk