



**REPUBLIC OF KENYA**  
**IN THE HIGH OF KENYA AT MURANGA**  
**CRIMINAL APPEAL NO. 80 OF 2015**

**JOHN KAIGAI KAMURI..... APPELLANT**

**VS**

**REPUBLIC .....RESPONDENT**

**(Appeal from the judgment of Hon. V.O.Chianda (SRM) Mukurweini delivered on 6/12/2015 in P.M.Criminal Case No. 141 of 2015)**

**JUDGMENT**

1. The appellant, **John Kaigai Kamuri**, was charged with the offence of assault causing bodily injury contrary to **Section 251** of the **Penal Code**. The particulars of the charge are that on the 19<sup>th</sup> April, 2015 at 7.45pm within Giathugu Trading Centre in Mukurweini Ngararia Village Nyeri County he unlawfully assaulted **Joseph Njoroge (PW1)** occasioning him actual bodily harm.

**FACTS**

2. The facts of the case as recorded by the trial magistrate are that on the 19/04/2015 at about 6pm the complainant (PW1) was going to the shop when he met the appellant who then for no apparent reason started assaulting him and struck him on the head and in the mouth causing him to lose a tooth; a crowd gathered and rescued him from further injury; he reported the matter to the police and was referred to Mukuruweini District hospital and a P3Form was filled and issued PW3 who produced the P3Form and the treatment notes which were marked as exhibits "**PExh.1** and **Pexh.2**".

3. The evidence of Elias Mukuria Gichinga (**PW2**) a Nyumba Kumi elder was on the 19/04/2015 at about 7.30pm he heard the appellant singing in a drunken voice; that a verbal altercation ensued between PW1 and the appellant arising from long outstanding issues between the appellant and **PW1**; that upon appearing on the scene he found the appellant attacking **PW1**; when the appellant saw **PW2** approaching he fled;

4. The appellant was subsequently charged at the Principal Magistrates Court at Mukuruweini and was found guilty and convicted and sentenced to serve a term of three (3) years imprisonment.

5. Being aggrieved by both conviction and sentence, the appellant filed a Petition of Appeal on the 23<sup>rd</sup> October, 2014.

6. The appeal was heard on the 6<sup>th</sup> June, 2016 with Ms. Gicheha appearing for the State and the appellant appeared in person; both Prosecuting Counsel for the State and the appellant made oral presentations; at the hearing the appellant abandoned his appeal on conviction and proceeded only on the appeal against

sentence; hereunder is a brief summary of the parties submissions.

### **APPELLANTS SUBMISSIONS**

7. The appellant abandoned his appeal on conviction and prayed that the sentence be reduced he was a first offender and had reformed and that he also suffered from epilepsy.

### **RESPONDENTS SUBMISSIONS**

8. The appeal was opposed; Counsel submitted that the appellant assaulted the complainant who was aged 62 years of age; that the appellant had no respect for the elderly especially when drunk; that in mitigation he did not mention that he was epileptic and that it was an after-thought; that the appellant was convicted and sentenced to a term of three (3) imprisonment; that the sentence imposed was legal and in accordance with the law and not excessive.

9. Counsel prayed that the sentence be upheld.

### **ISSUES FOR DETERMINATION**

10. After hearing the presentations this court has framed only one issue for determination;

(i) Whether the sentence was harsh and excessive in the circumstances.

### **ANALYSIS**

11. The case of **Wanjema vs Rep [1971] EA 493** lays down the principles as to when an appellate court may interfere with a sentence imposed by a trial court. The principles to be taken into consideration by the appellate court are that it must satisfy itself that the trial court overlooked material factors; or took into account immaterial factors; or acted on a wrong principle; or in the circumstances of the case the sentence was harsh and excessive.

12. This court makes reference to Section 251 of the Penal Code which reads as follows;

**251. A person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for a term of five (5) years.**

13. The trial court convicted the appellant after finding him guilty of the offence and proceeded to sentence him on the same; the appellant when called to mitigate stated that he had children that he took care of and prayed for a non-custodial sentence.

14. It is this courts considered view that the trial court overlooked a material factor when passing sentence and ought to have taken into consideration the circumstances of the case; that from the evidence adduced the appellant was drunk at the time he committed the offence; and this court also notes that the trial court did take into consideration the fact that the appellant was a first time offender and ought to have given him a more lenient sentence.

15. This court is satisfied that there are good reasons that warrant interference with the sentence imposed; hopefully the appellant has learnt a lesson during this period of incarceration; and has reflected upon where his alcoholic waywardness leads him to and hopefully he will mend his ways; the term imposed is therefore set aside and substituted with the term served.

### **FINDINGS**

16. For those reasons this court finds the sentence imposed to be harsh and excessive in the circumstance and that the sentence warrants interference.

**DETERMINATION**

17. The appeal is found to be meritorious and it is hereby allowed.

18. The conviction is hereby upheld and the sentence is hereby set aside and substituted with the term served.

Orders accordingly.

**Dated, Signed and Delivered at NYERI this 29th day of September, 2016.**

**HON.A. MSHILA**

**JUDGE.**