

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 90 OF 2015

BISHAR ADOW IBRAHIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Wajir SPM Criminal Case No. 314 of 2015 – B. Rogocho – RM).

JUDGMENT

The appellant was charged in the magistrate's court in Wajir with attempting to strike with intent to harm contrary to section 231 (b) of the Penal Code. The particulars of the offence were that on 14th July 2016 at Kulaaley Village in Wajir South Sub County within Wajir County with intent to harm Abdullahi Hussein unlawfully attempted to strike him with a spear. He was recorded as pleading guilty to the charge. He was thus convicted and sentenced to serve 10 years imprisonment.

He has now come to this court on appeal saying that he did not plead guilty to the charge. He has also complained that the complainant had refused to pay his money of Kshs. 1,500/= and that they had a verbal quarrel but no physical fight. He has further complained that the investigating officer did not come to court to testify, and that the sentence of 10 years imprisonment for an offence he did not commit was extremely harsh and excessive.

At the hearing of the appeal, the appellant submitted orally that he was arrested while pursuing a debt, and that when he demanded payment the man told him to go the next day and he went home. After two days however, that man came with two police officers, arrested him and took him to court. He submitted that the Probation Officer saw him in prison and made a report but he was sentenced to serve 10 years imprisonment. He asked for forgiveness as he had six children who depended on him who were suffering while he was in custody.

The Prosecuting Counsel Mr. Okemwa opposed the appeal and said that the record showed clearly that the appellant was explained the charge in a language he understood and he pleaded guilty. He said though that the charge was treated casually, as the prosecutor merely said that the facts were as per charge sheet and the court sentenced the appellant to 10 years imprisonment without alerting him of the consequences of pleading guilty in a case where the maximum sentence was life imprisonment.

I have considered the appeal and the arguments on both sides.

The appellant has appealed against conviction and sentence. His submissions relate to the sentence only.

Having perused the record, I am of the view that the appellant pleaded guilty to the charge. Though the typed record suggests a plea of not guilty was entered. I have perused the handwritten record and it shows that the appellant changed his plea from not guilty to a plea of guilty.

Indeed, the prosecutor merely stated that the facts were as per charge sheet. My view is that a prosecutor should give his own summary of the facts for an accused to hear the pertinent details and to respond to the same. However this was a simple charge and in my view no prejudice was caused to the appellant. I find that the conviction was proper.

As for the sentence, it is true that the magistrate did not warn the appellant of the consequences of

pleading guilty to this rather serious offence. The maximum sentence for the offence is life imprisonment. The appellant was sentenced to serve 10 years imprisonment after a Probation Report was supplied to the court. The Probation Officer suggested an intervention of teaching the appellant the importance of peace in the community and also giving him lessons in anger management. He felt however that the community and relatives, were unwilling to assist in that exercise and left the matter to the court to decide.

From the contents of the Probation Report, it emerges that there is an allegation that the appellant had killed somebody else before. The name of that person was not given in the Probation Officer's report.

In my view since there were no details given about the identity of the person or persons who gave the damaging information to the Probation Officer, the sentence of 10 years imprisonment imposed by the Magistrate was on the higher side. Life imprisonment was the maximum sentence and, in my view, in the circumstances of the case, the appellant who was a first offender should not have been handed down a sentence of 10 years imprisonment as no injury was alleged to have been occasioned to anybody.

Considering the above, I am of the view that the conviction was proper and I uphold the same. As for the sentence, I set aside the sentence imposed by the trial court and order that the appellant will serve a sentence of 5 years imprisonment from the date on which he was sentenced by the trial court.

Dated and delivered at Garissa this 11th day of October 2016

GEORGE DULU

JUDGE