REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 192 OF 2010

MUSA KIBET TOROITICH……..……..……..……..APPELLANT

VERSUS

REPUBLIC…….……....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 3265 of 2009 Republic vs Musa Kibet Toroitich in the Senior Resident Magistrate's Court at Eldoret by Atieno Alego, Senior resident Magistrate dated 17th December 2010)

JUDGMENT

1. The appellant was convicted on a count of assault causing actual bodily harm contrary to section 251 of the Penal Code. The complainant was Shadrack Samoei. The offence was committed on the 22nd May 2009 at Merewet Location in Uasin Gishu District within Rift Valley Province. The appellant was sentenced to four years imprisonment.

2. The appellant was aggrieved by the conviction and sentence. His petition of appeal is dated 20th December 2010. It urges seven grounds: first, that the plea was equivocal; secondly, that the exhibits produced at the trial were dubious; thirdly, that the appellant's defence was not taken into consideration; fourthly, that the learned Magistrate erred in finding that the prosecution had proved its case prove beyond reasonable doubt; fifthly, that the appellant was convicted on a defective charge sheet; sixth, that the sentence handed down was harsh and excessive; and, lastly, that the charge was not read and explained to the appellant as prescribed by the law.

3. At the hearing of this appeal, learned counsel for the appellant informed the court that she would confine the appeal to the *severity* of the sentence. She abandoned the other six grounds that went to the root of the conviction. She submitted that the mitigation proffered by the appellant was disregarded. She said the appellant had pleaded for leniency saying he was a widower and the sole bread winner. His brother then informed the trial court that the appellant was married to one Rose Kangongo and who was within the court precincts. The learned trial Magistrate found the appellant was lying and not remorseful. The appellant was then jailed for four years. Learned counsel for the appellant submitted that the sentence was harsh and excessive in all the circumstances of the case. She pleaded with the court to substitute the custodial sentence with a non-custodial punishment.

4. The appeal is contested by the State. The case for the State is that the sentence was lenient. I was implored not to disturb the sentence.

5. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja*

v Republic [1986] KLR 190.

6. I have carefully studied the records of the trial court. PW1 had narrated the events leading to the assault as follows-

> *"I am a peasant farmer in Merewet. On 22/5/2009 at 5:00pm I was at home when I went to plant in a friend's shamba. Accused blocked me from accessing the shamba since he has leased the same. He started exchanging [words] with me. He came in front of the tractor, slapped me and pushed me away. I reported the matter to the owner of the shamba then I went to the police and hospital thereafter."*

7. As I have stated, the appellant is no longer challenging his *conviction*. That leaves the matter of the *sentence*. Sentencing is at the discretion of the trial court. But power still reposes in an appellate court to review the sentence if material factors were overlooked; or, the sentence was founded on erroneous principles. See *Amolo v Republic* [1991] KLR 392, *Omuse v Republic* [1989] KLR 214, *Macharia v Republic* [2003] 2 E.A 559.

8. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

> *"The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may…….(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or….. "*

9. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

> *"The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors. …The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirely before settling for any given sentence."*

10. The learned trial Magistrate upon convicting the appellant called for his mitigation. The appellant pleaded for leniency as I detailed earlier. The learned trial Magistrate then called the appellant's brother Edwin Toroitich to the stand. He told the court on oath that he was the brother of the appellant; that the appellant was married to Rose Kangongo and they had four children; and, that she was within the court vicinities. The learned trial magistrate then stated-

> *"demeanour is wanting and he is still cheating the court he is a widower yet his brother Edwin Torotoich is before court and also confirms that accused is married to one Rose Kangongo with four children and that she is alive. Under the circumstances, this court finds that accused is NOT remorseful"*

11. The procedure adopted by the learned trial Magistrate at the stage of mitigation was *irregular* and *prejudicial* to the appellant. For starters, Edwin Toroitich was not the complainant or a party to the case. He was only the *surety* to the appellant for purposes of bail. Secondly, the appellant had no opportunity to *respond* to the allegations. The information received from Edwin Toroitich gave the court the impression that the appellant was *untruthful* and *unrepentant*. The appellant may have *lied* to get sympathy from the court; but the procedure adopted to unmask the falsehoods was irregular at the tail end of sentencing.

12. From the evidence of the complainant the appellant slapped the complainant and pushed him. It was an assault; it arose out of a dispute over who held rights to the use of a farm. From the P3 form, the complainant was given some analgesics and antibiotics: which points to the fact that the injuries were minor. I am alive that the assault was assessed as *harm*. There is no contest that the appellant was a first

offender. In this case the learned trial Magistrate *acted upon some wrong principles or overlooked some material factors.*

13. Section 251 of the Penal Code provides for a sentence of up to *five* years. The appellant was sentenced to serve *four* years. Considering the nature of the assault, I find that the sentence was *harsh* in the circumstances. I will thus disturb the sentence. See *Orwochi v Republic* [1976-80] 1 KLR 1638 and *Marando v Republic* [1976-80] 1 KLR 1639 where sentences of *four* years for *manslaughter* were held to be manifestly excessive. I think the principle to be distilled from these cases is that sentencing must take into account the unique circumstances of each case. Fundamentally, a sentence must be *commensurate* with the *moral blameworthiness* of the offender. *Omuse v Republic* [1989] KLR 214, *Macharia v Republic* [2003] 2 E.A 559.

14. For all of those reasons the appeal on sentence is allowed. The sentence passed against the appellant is set aside. The appellant shall pay a fine of Kshs 50,000 and in default shall serve six months imprisonment.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 21st day of January 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

Appellant.

Mrs. Khayo for Ms. Lagat for the accused.

Mr. J. Mulati for the State.

Mr. J. Kemboi, Court clerk.