



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 36 OF 2014

IBRAHIM ABAJILA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrates Criminal Case No. 900 of 2014 dated 13/05/2014 M. Wachira CM)

JUDGMENT

The appellant was charged in the subordinate court with two counts. Count one was for malicious damage to property contrary to section 339 (1) of the Penal Code. The particulars of the offence were that on the 8th of May 2014 along Kismayu road within Garissa township of the Garissa county willfully and unlawfully damaged one veil (gumbis) valued at Kshs. 1,000/= the property of SAADA NOOR ALI. Count two was for assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that on the same day and place assaulted BARE ABDI MADINA thereby occasioning him actual bodily harm.

He was recorded as pleading guilty to both counts. He was thus convicted and sentenced to serve two (2) years imprisonment on each count. The learned magistrate did not indicate if the sentences were consecutive or concurrent.

The appellant has now appealed to this court. He initially filed his grounds of appeal on 23rd May 2014. He however filed the same grounds of appeal on 14th November 2014 as well as written submissions. His grounds of appeal are on sentence only and are as follows:-

1. That he is remorseful.
2. He did not intend to cause the alleged harm or damage, which was a mistake.
3. He is sorry and regretful.
4. He is begging for leniency.
5. He is a student committed to studies.
6. He promises to change and become an advocate for peace in the community.
7. The sentence imposed is harsh and excessive.

8. That the court should consolidate the two counts, and reduce the sentence by making it run concurrently.

The appellant also filed written submissions which I have perused.

The Learned Prosecuting Counsel Mr. Orwa opposed the appeal.

Counsel submitted that the plea of guilty was unequivocal as the appellant understood the Kiswahili language which was used. Counsel also supported the sentence and submitted that the mitigation of the appellant was considered by the trial court before sentencing. As such, the appellant did not suffer any prejudice as the sentence was lawful. Counsel submitted further that ordering concurrent sentences was a discretion of the court.

This is an appeal on sentence. The appellant is a lay man. As a first appellate court, I have to reconsider the entire record and satisfy myself that the conviction was proper, though the appeal is primarily on sentence.

Having perused the record, I am satisfied that the conviction on both counts was proper. The plea of guilty was unequivocal.

The appeal is on sentence. Sentencing is the discretion of the trial court. The appellant was a first offender. In his mitigation he asked for forgiveness.

In my view, in the circumstances of the case, the sentences of two years imprisonment should have run concurrently. This is because the appellant pleaded guilty and did not waste the court's time. He was also a first offender and asked for forgiveness. The two offences were committed by him at the same time and place and conviction was in the same criminal case and at the same time.

In my view, therefore, had the learned magistrate applied her mind to the above issues the two sentences should have run concurrently not consecutively. The failure of the magistrate to state whether the sentences were concurrent or consecutive shows that the court did not consider the above factors. This, in my view, prejudiced the appellant during sentencing.

As such, I find merits in the appeal against sentence. I allow the appeal on sentence. I order that two sentences run concurrently from the date on which they were imposed by the trial court. In effect the appellant will serve a total sentence of two (2) years imprisonment.

Dated and delivered at Garissa this 20th April, 2014

GEORGE DULU

JUDGE