



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.32 OF 2015**

*(An Appeal arising out of the conviction and sentence of Hon. S.K. Arome - RM delivered on 4<sup>th</sup> February 2015 in Kiambu CM.C. CR. Case No.296 of 2015)*

**JOSEPH NGATHO KANGETHE.....**  
**APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Joseph Ngatho Kangethe was charged with **assault causing actual bodily harm** contrary to **Section 251** of the **Penal Code**. The particulars of the offence were that on 2<sup>nd</sup> February 2015 at Kahawa West, Nairobi County, the Appellant assaulted Crispo Maliala, thereby occasioning him actual bodily harm. He was further charged with **creating disturbance likely to cause a breach of peace** contrary to **Section 95(1)(b)** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, the Appellant created disturbance in a manner likely to cause a breach of peace by using abusive language to insult members of the public at Kahawa West bus stage. When the Appellant was arraigned before the trial magistrate's court, he pleaded guilty to both charges. He was convicted on his own plea of guilty. He was sentenced to serve one (1) year imprisonment on the first count and three (3) months imprisonment on the second count. The sentences were ordered to run concurrently. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

Although in his petition of appeal the Appellant had challenged his conviction, during the hearing of the appeal, the Appellant through his counsel Mr. Kirori abandoned his appeal on conviction. He proceeded to argue his appeal on sentence. Mr. Kirori submitted that the sentence meted on the Appellant was manifestly harsh and excessive. The Appellant was a first offender. He had mitigated for the court to exercise leniency on him. The Appellant should have been given an option of a fine. The injury sustained by the complainant was minor. He urged the court to take into consideration that by the time the Appellant was granted bond he had spent a month in prison. Ms. Nyauncho for the State was not opposed to the court exercising its discretion under **Section 28** of the **Penal Code**. She was however of the view that the sentence imposed on the Appellant was legal. The Appellant had been sentenced to serve a lenient sentence. If there were any defects in the charge, it should be cured under **Section 382** of the **Criminal Procedure Code**. She urged the court to take into account the fact that the Appellant pleaded guilty to both charges.

When the trial magistrate sentenced the Appellant to serve the said period in prison, the trial magistrate was exercising judicial discretion. This court cannot interfere with such exercise of judicial discretion unless it is established that the trial court either took into consideration wrong factors in determining the sentence or failed to take into consideration the correct factors when sentencing the Appellant. Where the sentence is manifestly excessive or exceedingly lenient, the Appellate court will interfere with the sentence. In the present appeal, it was clear to the court that the trial court failed to take into consideration the nature of injuries that the complainant sustained after being assaulted by the Appellant.

According to the P3 form which was produced in evidence, the complainant essentially sustained soft tissue injuries. The sentence of one (1) year imprisonment was harsh and excessive in the circumstances.

This court will therefore exercise its appellate jurisdiction of revision and accordingly set aside the custodial sentence that was imposed. Instead, the Appellant is hereby ordered to pay a fine of Kshs.10,000/- or in default he shall serve six (6) months imprisonment. As regard the second count, the Appellant's sentence is set aside and substituted by a sentence of this court unconditionally discharging the Appellant under **Section 35(1)** of the **Penal Code**. It is so ordered.

**DATED AT NAIROBI THIS 16<sup>TH</sup> DAY OF JUNE 2015**

**L. KIMARU**

**JUDGE**