



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL APPEAL NO. 9 OF 2015

JOHN MWANGI KIBUCHI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Chief Magistrate's Court (K. Cheruiyot) at Kerugoya, Criminal Case

No. 175 of 2015 dated 24th March, 2015)

JUDGMENT

1. JOHN MWANGI KIBUCHI the appellant herein was charged with an assault causing actual bodily harm to **JANE WAIRIMU** the complainant, contrary to **Section 251** of the **Penal Code** before **Kerugoya Chief Magistrate's Court Criminal Case No. 175 of 2015**. He was convicted of the offence upon entering a plea of guilty and sentenced to serve 2 years imprisonment. He was aggrieved by the sentence meted out against him and filed this appeal raising 4 grounds:

2. (i) That the trial learned magistrate erred in law and fact in holding that the appellant did not qualify for a non-custodial sentence.

(ii) That the trial magistrate erred in law and fact in failing to consider the mitigation of the appellant during sentencing.

(iii) That the sentence was manifestly harsh.

(iv) That the sentence was manifestly excessive with regard to being made in all the circumstances.

3. At the hearing of this appeal the Appellant's counsel condensed all the four grounds into one which was basically centered on the sentence meted out against the Appellant after entering a plea of guilty. The Appellant submitted that the 2 year imprisonment was excessive considering that the injuries inflicted on the complainant were minor soft tissue injuries and the fact that he was a first offender. The Appellant also contended that the mitigation he tendered was used against him rather than being used in favour of a non-custodial sentence.

4. The office of the Director of Public Prosecutions for the record conceded to this appeal but nevertheless this Court shall consider the same on the merits.

5. I have considered this appeal and the fact that the Appellant pleaded guilty to the charge facing him. The plea was taken in an unequivocal manner and the Appellant understood the charge facing him well at the trial court.

6. I have considered the facts which though appear cloudy show that the Appellant assaulted his neighbour after a misunderstanding arose concerning the alleged influence the neighbour was having on the behavior of his wife. The Appellant thought that his wife's conduct was being influenced by the neighbour and decided to take matters into his own hands to discipline and thwart further "misbehavior" from his wife.

7. The learned trial magistrate convicted the Appellant and sentenced him to 2 years holding that he was undeserving of a non-custodial sentence because he did not appear remorseful and because he had also beaten his wife. This Court notes that the offence on which the Appellant was convicted attracts a sanction of 5 years imprisonment. The trial court exercised its discretion and handed the Appellant 2 years imprisonment. This Court being an appellate court would not normally interfere with the discretion of a trial court unless it is demonstrated that wrong principles were applied in the exercise of that discretion or that the trial court never took into consideration relevant factors and therefore arrived at a wrong decision or that the court took into consideration extraneous factors that led into wrong conclusion and decision.

8. Looking at the brief proceedings of the trial court, and the submissions made by the Appellant, I am satisfied that the trial court considered some extraneous factors in sentencing the Appellant. The learned magistrate considered the fact that the Appellant had admitted to previously assaulting his wife, a fact or an offence that was not before the trial court or any court previously or at the time of sentencing. The fact was irrelevant and does appear to have weighed heavily on the mind of the learned trial magistrate in deciding that the Appellant did not deserve a non-custodial sentence. I have looked at the P3 produced as an exhibit and I am persuaded that the injuries were minor and given that the Appellant was a first offender, he deserved at least some leniency. But as I have said the trial court considered an irrelevant factor and thereby failed to consider the actual mitigating circumstances. As a result I do find that the sentence meted out against the Appellant was a bit harsh.

9. Consequently, I find merit in this appeal. The same is allowed. The sentence of two (2) years imprisonment is set aside and in its place the Appellant is fined Kshs.20,000/- or three (3) months imprisonment in def ault.

Dated and delivered at Kerugoya this 21st day of July, 2015.

R. K. LIMO

JUDGE

21.7.2015

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Muchira holding brief for Ngigi present

Omayo for State

MUCHIRA: We ask for 10 minutes to get the appellant.

LATER:

MWANGI: We have not gotten in touch with our client. We pray for another date.

OMAYO: In the absence of the Appellant, I pray for a warrant of arrest.

COURT: Warrant of arrest is hereby issued against the Appellant. Cash bail is forfeited to the State. Warrant of Arrest to be executed by O.C.S. Kerugoya.

MENTION: 21st September, 2015.

R. K. LIMO

JUDGE

Later at 2.30 p.m.

Mwangi for Appellant present

John Mwangi Kibuchi now present.

MWANGI: The matter was mentioned in the morning and the Appellant was absent. A warrant of arrest was issued. He later came when the matter had been mentioned. We pray that the warrant of arrest be lifted. He is remorseful.

COURT: The warrant of arrest is lifted and in view of the fact that the matter was listed for judgment today the same is signed, dated and delivered in open court in the presence of Mwangi, counsel for the

Appellant and in the absence of Omayo for Director of Public Prosecution.

R. K. LIMO

JUDGE

21.7.2015

MWANGI: The accused was out on a bail of kshs.10,000/-. We pray that the same be used as part of the fine so that he pays the balance of Kshs.10,000/-.

COURT: The money deposited as cash bail be treated as fine. The appellant will therefore pay the balance of Kshs.10,000/-.

R. K. LIMO

JUDGE

21.7.2015