

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 219 OF 2012

(An appeal against the sentence of the Senior Resident Magistrate's Court at Butere in Criminal

Case No. 313 of 2011 [L. N. KINIALE, DMII (PROF)])

DAVID SWAKA MWINAMI..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged in the lower court with assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of charge were that on the 20th August 2011 at Eshirula village, Wambulische Sub-location, Kisa Central Location in Khwisero District within kakamega County assaulted Stephen Mwinami Mandara thereby occasioning him actual bodily harm. He was convicted on his own plea of guilty and sentenced to serve 2 years imprisonment.

He has now appealed to this court against sentence only. He stated in the grounds of appeal that he was also convicted in Butere criminal case No. 314 of 2011 and sentenced to serve eight (8) years imprisonment for breaking into a building and committing a felony. He has asked for leniency and requested that the two sentences run concurrently or that he be given a non-custodial sentence or an option of fine.

The learned Prosecuting Counsel Ms Opiyo, submitted that the appellant was properly convicted on his own plea of guilty and sentenced to two (2) years imprisonment. Counsel left the issue of sentence to the discretion of the court.

The appeal herein arises from file No. 313 of 2011 from the subordinate court at Butere. That is the file I have. I do not have file No. 314 of 2011 from the subordinate court. The appellant herein was convicted on his own plea of guilty to the offence of assault causing actual bodily harm. Having perused the record, I am of the view that his plea of guilty was unequivocal. He was therefore properly convicted on his own plea of guilty.

He was sentenced to serve two (2) years imprisonment. He was not a first offender, as the prosecutor indicated that he had committed similar offences in criminal case No. 560/10 and was convicted on three counts.

The maximum sentence for the offence of assault causing actual bodily harm is five (5) years imprisonment. The appellant, not being a first offender, cannot say that the sentence of 2 years imprisonment was harsh and excessive. Therefore there is no basis for interfering with the length of the sentence.

With regard to his request that the sentence herein be made to run concurrent with that in criminal case No. 314/11, that is not practicable. Firstly, I do not have that file with me. Secondly, that was a completely separate trial for an offence whose circumstances were totally different from the present. In my view, it would be wrong to make the sentences in the two cases to run concurrently. In case the appellant wants to appeal against the sentence in that case, he is free to do so.

In conclusion, I find no merits in the appeal. The appeal is dismissed.

Dated at Kakamega this 29th day of January, 2014

George Dulu

JUDGE