IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.200 OF 2012

DAVID MAINA MIGWE.....APPELLANT

VERSUS

REPUBLIC OF KENYA.....RESPONDENT

[An Appeal from original conviction and sentence in Nyahururu S.P.M.CR.C.NO.52 of 2012 by Hon Hon. V. K. Kiptoon, Resident Magistrate, dated 24th October, 2012

JUDGMENT

The appellant was charged with the offence of **assault causing actual bodily harm** contrary to S**ection 251** of the **Penal Code.**

The particulars are that on the 24th day of December, 2011 at Kirima Village in Nyandarua North District, he assaulted MONICAH WAIRIMU NGECHU thereby occasioning her actual bodily harm.

The appellant was convicted and sentenced to serve a term of two (2) years imprisonment.

Being aggrieved by the decision of Hon. V. K. Kiptoon, Resident Magistrate, Nyahururu, the appellant preferred this appeal and listed nine (9) grounds of appeal in his Petition of Appeal.The grounds of appeal are as listed hereunder:

1) That he pleaded not guilty to the charge.

2) That the case was a setup by the complainant, her father and the police.

3) That he operates a shop and that is where the complainant came being under the influence of alcohol and started abusing him and his customers.

4) That on trying to calm the complainant, she started screaming to attract the public telling them that I had beaten her so that they could sympathize with her

5) That the appellant and complainant are neighbours and have had long standing differences because they share a common boundary of their shambas and were brought up together.

6) That he brought himself to court having had a police bond of Kshs.3000/= as he knew he had no case as they had talked at the A.P. Camp.

7) That the case was fabricated by the prosecution as he had not assaulted the complainant.

8) That he prays that the case be reviewed or sentence be set aside to justify his appeal

9) That during mitigation, the he was so confused, unwell and did know what was happening and that he learnt very late that he had been convicted.

At the hearing of the appeal, the appellant opted to abandon his appeal on conviction and chose to make oral submissions on sentence. The appellant submitted that he had not been given a chance to mitigate before sentence was passed. The appellant urged the court to allow the appeal and reduce the sentence.

The appeal was opposed by Learned Prosecuting Counsel for the State, Mr. Marete. Counsel referred the court to the Record of Appeal, in particular page 18. Counsel submitted that the appellant was given a chance to mitigate but did not do so. Counsel further submitted that the Penal Code provides a sentence of 5 years for the offence and that the trial magistrate exercised fair and proper discretion in sentencing the appellant to 2 years imprisonment. The court was urged not to interfere with the sentence.

After hearing the submissions of both the Appellant and counsel for the State, this court finds the following issues for determination:

1) mitigation

2) sentence

On the first issue, upon perusing the Record of Appeal at page 18, this court finds that the appellant was called upon to mitigate and the appellant stated that:

“.....No mitigation.....”

On the second issue, this court refers to the case of **Wanjema** V. **Republic**. (1971) E.A. 493.

An appellate court may interfere with the sentence if it is found to be harsh and excessive or where it is found that the trial magistrate took into account irrelevant or immaterial factors or overlooked important factors.

After perusing the record of appeal, this court finds that the trial magistrate did not overlook any important factor, to wit, mitigation before passing sentence.

This court concurs with the sentiments of counsel for the State that the sentence of two (2) years imposed is neither harsh nor excessive. It is the court's view that the sentence was appropriate in the circumstances of the case.

For the reasons stated above, this court finds no reasons to interfere with the sentence. The appeal is found lacking in merit and is hereby dismissed.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 21st day of June, 2013.

A. MSHILA

JUDGE