REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 84 OF 2013

DONALD MUKAKA MUKATALA ….....APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

(Appeal arising *from original conviction and sentencing of the Principal Magistrate Court – Masenop –in Cr. No. 476 of 2013 – Hon. M.V. Nyigei – Resident Magistrate)*

J U D G M E N T

INTRODUCTION

This is an appeal challenging the custodial sentence imposed on the appellant by the Resident Magistrate at Maseno on 20/6/2013. The issues for determination in the appeal are whether the impugned sentence was cruel and whether this court should interfere with it. After receiving the lower court record and hearing the parties the court finds that the appeal has merits.

BACKGROUND

The appellant was charged before the Maseno Resident magistrate with the offence of creating disturbance in a manner likely to cause a breach of the peace contrary to Section 95(1) (6) of the penal code. The charge was in two counts.

The particulars of the offence in the first count was that on 8/5/2013 at 10.00am at Emasire Sub-location in Emuhaya District the appellant created a disturbance in a manner likely to cause a breach of peace by threatening and chasing Irene Mukaka while armed with a panga.

The particulars of the second count were that on 30/5/2013 at 12.37pm in Emasire sub-location in Emuhaya District the appellant created disturbance in a manner likely to cause a breach of peace by threatening and chasing Irene Mukaka from her home while armed with a panga.

The appellant pleaded guilty to the two counts charged and admitted the facts which were read to

the court by the prosecution. The prosecutor had no record of previous conviction for the appellant and as such asked the court to treat the appellant as a first offender during sentencing.

In his mitigation the appellant prayed for forgiveness because the dispute arose from the sale of land which he had already reported to the D.C. Before sentencing the trial court called for a probation officer's report which was filed by Mr. Marindi on 17/6/2013. The probation officers report was negative on non-custodial sentence. It recommended for a custodial sentence that would deter the appellant.

On 20/6/2013, the trial court considered the appellants mitigation and the probation officer's report and sentenced the appellant to three years imprisonment on each of the two counts but directed that the two sentences should run concurrently. The appellant was aggrieved and brought this appeal.

GROUNDS OF APPEAL

1. THAT the learned trial erred by passing a cruel of sentence.
2. THAT the learned trial magistrate erred in both law and facts by not ordering fine as the sentence.

The appeal was heard on 17/10/13. The gravamen of the appellant's case is that the prison sentence awarded to him was too long in the circumstances considering such mitigation factors including his advanced age and family commitment as a widower. He offered to do community service in exchange of the custodial sentence.

Mr. Magoma learned state counsel for the state opposed the appeal. In his brief submissions he urged that the appellant is estopped from appealing because he had pleaded guilty to the charges. The counsel relied on the Court of Appeal decision in **CR.A 96 OF 2002 – BOIT vs REPUBLIC [2002] KLR P.15.**

On the issue of the sentence the learned state counsel appreciated the appellants old age and left the matter to the court to decide.

ANALYSIS AND DETERMINATION

The appeal as earlier stated challenges the sentence and not the conviction. The state did not oppose the request by the appellant to have the sentence interfered with by this court. The issues for determination is whether the appeal had met the threshold for the interference of sentence by an appellate court.

The Court of appeal set out the threshold for determining whether an appellate court can interfere with a sentence imposed by the trial court in

CRA. 166 OF 2008 KYALO vs R [2009] KLR pg 325. In the said decision the Court of Appeal held that a sentence made without considering a relevant factor or by considering irrelevant fact is open to review on appeal. The Court of Appeal went ahead and identified relevant factors for consideration in sentencing as those facts that mitigate for a more lenient sentence like the appellant being a first offender.

In the present appeal it is clear that the court considered and relied heavily on the probation report in awarding the custodial sentence and ignored the mitigating statement by the prosecutor and the appellant. The court did not consider that the appellant was a first offender as stated by the prosecutor but instead considered the probation officer's report on the character of the appellant which could not be tested by cross examination from the appellant. The court also did not consider the mitigation statement by the appellant which indicated that the offence arose from the sale of a family land by the complaint. To that extent and in view of the Court of Appeal decision in **KYALO vs REPUBLIC** this court finds that the trial magistrate court fell into error when it failed to consider relevant mitigating factors but instead considered irrelevant factors while passing out the impugned sentence. As this court had held in **KISUMU HCCRA.8 of 2013 SIMON OUMA OMOLLO vs REPUBLIC** (unreported) once the trial court decides not to order non-custodial sentence, the court is barred from considering the probation

officer's report while imposing the custodial sentence. The reason for the foregoing view is to avoid prejudicing the accused person with uncontested report on his character which mainly emanates from the complainant and his family.

DISPOSITION

Consequently the court is satisfied that the appeal has merits and it is allowed by reducing the sentence to six (6) months prison term for each of the two counts. The sentences are to run concurrently.

Signed dated and delivered this 22nd day of November 2013

ONESMUS MAKAU

JUDGE