



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 195 OF 2012

ELKANA KIPROTICH KIPTOO..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence in Criminal Case No. 676 of 2012
Republic vs Elkana Kiprotich Kitoo in the Resident Magistrate's Court at Iten by N. Moseti , Resident
Magistrate dated 4th December 2012)*

JUDGMENT

1. On 4th December 2012, the appellant was convicted on his own plea of guilty for assault causing actual bodily harm contrary to section 251 of the Penal Code. The offence was committed on 8th November 2012 at Sinon village, Elgeyo Marakwet County.
2. The facts read in court were straightforward: on the material day, the complainant was in the kitchen with his wife. Suddenly, the appellant, who is their son, entered the kitchen. He was drunk. His younger brother Kevin later came into the kitchen. He was crying. The appellant asked him why he was crying. He had a swollen hand. The young boy said that the complainant had beaten him. On hearing that, the appellant went out. He returned with a stick and hit the complainant thrice on the head.
3. The matter was reported to the police. The appellant was arrested on the same day. The complainant was admitted at Kapsowar Medical Clinic for treatment. He was issued with a P3 form. The P3 form was filled on 28th November 2012 at Kapsowar District Hospital. It showed that the complainant had an injury on the head which was stitched and dressed. The degree of injury was assessed as harm.
4. When those facts were read out to the appellant, he confirmed them to be true. He was a first offender. In mitigation, he pleaded for leniency. He stated that his wife had given birth and he was the sole bread winner. The learned trial Magistrate called for a pre-sentence report. The report was not favourable. The learned trial Magistrate found that offence called for a deterrent sentence. He sentenced the appellant to jail for three years.
5. The appellant was aggrieved by the sentence. He lodged an appeal to the High Court on 31st December 2012. In a synopsis, the appellant's case is that the sentence was manifestly excessive. The appeal is contested by the State.
6. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. See *Njoroge v Republic* [1987] KLR 99, *Okeno v Republic* [1972] EA 32,

Kariuki Karanja v Republic [1986] KLR 190.

7. The appellant's plea of guilty was unequivocal. The appellant assaulted his father. The pre-sentence report indicated that his family was bitter about the incident and was unwilling to reconcile with the appellant. The report stated that the appellant was aggressive when drunk. I have noted that the appellant was a first offender and pleaded for leniency. He took plea on 19th November 2012. He was placed in custody. The pre-sentence report was not ready until 18th December 2012 when the appellant was sentenced. True, the learned trial Magistrate considered the nature of the offence. That may have called for a deterrent sentence.
8. Section 251 of the penal Code provides for a sentence of up to five years. Considering all the circumstances of the case, the sentence of three years was punitive. See Orwochi v Republic [1976-80] 1 KLR 1638 and Marando v Republic [1976-80] 1 KLR 1639 where sentences of *four* years for *manslaughter* were held to be manifestly excessive. I think the principle to be distilled from these cases is that sentencing must take into account the unique circumstances of each case. The appellant was drunk when he assaulted his father. The pre-sentence report stated he was born in 1989 and sat his primary school examination in 2008. He never proceeded with education due to financial difficulties. The report stated that he is married with two children and that he does odd jobs and small-scale farming. He told the trial Court that his wife had recently given birth. Despite the recommendation in the pre-sentence report, there was need to promote reconciliation in the family. The appellant had pleaded guilty and pleaded for leniency. This is a case where justice needed to be tempered with a little mercy.
9. For all of those reasons this appeal is allowed. The sentence passed against the appellant is set aside. The appellant has been in custody for nearly one year. The sentence is reduced to the period already served. The appellant shall be set free forthwith unless held for some other lawful cause.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 2nd day of December 2013

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

Mr.....for the appellant.

Mr.....for the State.

Mr. P. Ekitela, Court Clerk.