REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 73 of 2012

MARY MUTHONI WAMBUI...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from original conviction and sentence in criminal case No. 2141 of 2011 by Hon. Mayova RM, Nakuru dated 20th March, 2012)

JUDGMENT

The appellant was charged and convicted of the offence of malicious damage to property contrary to section 339(1) of the Penal Code and sentenced to four (4) years imprisonment.

Aggrieved by both the conviction and sentence the appellant filed an appeal to this court on six (6) grounds but later on abandoned the first five grounds retaining only ground six to the effect that the learned trial magistrate failed to take into account the circumstances of the case and her mitigation and consequently awarded an excessive sentence.

In arguing the appeal learned counsel for the appellant submitted that the appellant committed the offence in the heat of passion, after the complainant who was her lover jilted and rejected her; that the offence is a misdemeanor carrying a maximum of five (5) years imprisonment; that the trial court failed to consider the appellant\'s mitigation and consequently passed an excessive sentence.

Learned counsel for the respondent conceded that the trial court failed to consider the appellant\'s mitigation and imposed a harsh sentence.

I have considered the submissions by both counsel as well as the authorities cited by the counsel for the appellant.

For this court to interfere with the discretion exercised by a trial court in sentencing, it has to be satisfied that the court acted upon some wrong principle or overlooked some material factors as was held in the case of **Macharia** V. **Republic** (2003) KLR 115 where the Court of Appeal observed:-

"1. A court does not alter a sentence on the mere ground that if a member of the court had been trying the appellant they might have passed a

somewhat different sentence;

2. An appellate court will not ordinarily interfere with the discretion exercised by a trial judge unless it is evident that the judge acted upon some wrong principle or overlooked some material factors."

To determine whether the trial magistrate acted upon some wrong principle or overlooked some material factors, this court has to consider and re-evaluate the evidence adduced before the trial court in order to arrive at its own independence decision but bearing in mind that it neither saw nor heard the witnesses testify.

The evidence led before the trial court is to the effect that the appellant, Mary Muthoni Wambui, met the complainant on the 9th day of August, 2008 when she was attending school at St. Monicah High School in Lanet. Because the complainant wanted to marry her, she left school and started living together. About two years later, the complainant got a sponsor and went back to school (Egerton University). Three months later, the complainant stopped going home and became violent to her. She also claimed that the complainant had beaten and chased her away before she committed the offence.

P.W.1, Pius Kimotho Kamau, confirmed that the appellant was his lover but denied having beaten her up. P.W.4, PC Patrick Makau, after carrying investigation into the matter charged the appellant with the offence herein.

Upon consideration of this evidence, the trial magistrate found that it proved the offence beyond any reasonable doubt upon convicting the appellant sentenced her to four years imprisonment, as explained earlier.

It is this sentence that the appellant has challeged on the ground that it was harsh and excessive.

I reiterate that for this court to interfere with the sentence imposed by the trial court it has to be satisfied that the court acted upon some wrong principle or overlooked some material factors.

It is common ground that the complainant and the appellant were lovers and living in the same house. It is also apparent that the appellant committed the offence following differences with the complainant.

Counsel for the appellant submitted that the appellant was pregnant when she committed the offence. He suggested that as both the appellant and complainant were lovers, it was probable that the complainant was responsible for the pregnancy. He urged the court to find that the offence was committed out of rage, having been jilted after dropping out of school. He also contended that the sentence imposed was excessive given that the appellant was a first offender and remorseful.

When the appellant appeared before this court on 24th September, 2012 (about 14 months from the time the offence was committed) she had a one week old baby. Given the fact that the offence was committed more than a year before the child was born, it is improbable that the appellant was pregnant when she committed the offence. Be that as it may, there was no justification for the appellant to resort to the kind of violence which resulted in the complainant losing several household goods. However, in passing the sentence, the learned trial magistrate ought to have considered the circumstances of the case, namely the disapointment of the appellant having left school to live with the complainant only for the latter to turn hostile.

The learned trial magistrate erroneously observed that the appellant was not remorseful. This is what he observed while passing the sentence:

"I have considered what the accused said in mitigation. However, the offence herein and the circumstances are quite serious. The accused\'s behaviour was not only unlawful but quite unacceptable. She does not exhibit any remorse. A punitive and deterrent sentence will be suitable."

That was clearly a misdirection as the appellant In her mitigation pleaded for forgiveness and for a non-custodial sentence. She said:

"(Naomba Msamaha) I plead for forgiveness or a non -custodial sentence as I wish to go to school".

Apart from being remorseful, it was established that the appellant was a first offender. It is my view that if the trial court had considered these facts, it would not have passed the sentence it passed. These were material facts that the trial court overlooked.

The appellant is now a mother of a one week old baby and given the fact that she has now served five months of the sentence imposed on her, a custodial sentence would not be appropriate.

For the foregoing reasons I set aside the sentence and order that a probation report be filed within 14 days to enable the court consider the most appropriate sentence.

Mention on 19th October, 2012

Dated, Signed and Delivered at Nakuru this 28th day of September, 2012.

W. OUKO
JUDGE