



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 278 of 2011

JOSEPH SIRERE TIMAIYO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against sentence imposed by Hon. C.A. Nyakundi, RM Narok Law Courts on 15/11/2011)

JUDGMENT

The appellant herein, Joseph Sirere Timaiyo, was convicted for the offence of unlawfully causing grievous harm to Shabara Ole Manyara contrary to **Section 234** of the **Penal Code**. Upon conviction he was sentenced to serve seven (7) years imprisonment.

Aggrieved by the sentence, the appellant has preferred an appeal to this court on the grounds that the learned trial magistrate failed to consider his mitigation and consequently imposed a harsh and excessive sentence.

The appellants grounds of mitigation are that he is a father of seven children who are currently attending school and require his financial support. He also provides financial support to his wife who is paralyzed and require regular treatment. He is 51 years old and the trial court did not consider a noncustodial sentence in the circumstances.

Mr. Marete, learned counsel for the respondent opposed the appeal. He stated that the appellant had the intention to cause grievous harm and the sentence therefor was fair.

Under **Section 234** of the **Penal Code** any person found guilty of the offence of causing grievous harm “*is liable to imprisonment for life*”. This has been interpreted to mean that the prescribed sentence is only the maximum penalty. See **Opaya v Uganda (1967) E.A. 752**.

In this case, the trial court exercised its discretion and imposed a sentence of seven years imprisonment. Before passing the sentence the trial court considered the appellant's mitigation and observed as follows:-

“I have considered the mitigation, and I have also considered that accused is a first offender. However the offence is serious and ought to be discouraged”

The trial magistrate applied his mind carefully in reaching his decision. He considered the appellant's grounds of mitigation and the seriousness of the offence before imposing the sentence. Having perused the medical report and the proceedings of the lower court which state the injuries sustained, I do agree

with the trial magistrate that the offence is serious.

For this court to interfere with the discretion exercised by the trial court in sentencing, it has to be satisfied that the court acted upon some wrong principle or overlooked some material factors. The appellant was treated as a first offender. I take his mitigation into account that he has a family who depend on him. I also do take into account that the complainant was his own brother and this dispute arose over land issues which is unfortunate. Having taken all these facts into account and in exercise of this court's discretion, I hereby set aside the sentence of seven (7) years imprisonment and substitute it with five (5) years imprisonment. It is so ordered.

DATED and DELIVERED this 23rd day of November, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

The Appellant – in person

Mr. Marete for Respondent.

Kennedy – Court Clerk