



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CORAM: F. AZANGALALA J.**  
**CRIMINAL APPEAL NO. 33 OF 2011**

**BETWEEN**

**SAMMY KIPNGETICH.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*[Being an Appeal from the Judgment of the Principal Magistrate  
{ D. K. Kemei} dated 25/10/2010 – in Eld. CMC.CRC. No. 5246 of 2010]*

**JUDGMENT**

**Sammy Kipngetich Kirwa**, the appellant, was charged in the Chief Magistrate's Court at Eldoret with the offence of Grievous Harm contrary to section 234 of the Penal code. It was alleged that the appellant on the 20<sup>th</sup> October, 2010 at Ngara Falls village in Wareng district within the Rift Valley Province did grievous harm to **Kirwa Sang**. The appellant appeared before **D.K. Kemei**, Principal Magistrate and pleaded guilty to the charge. The prosecution then stated the facts of the case and the appellant was invited to admit, dispute or explain those facts and he informed the learned Principal Magistrate that the facts were correct. The learned Principal Magistrate then convicted the appellant on his own plea. He then received the prosecutor's statement on sentence and the appellant's mitigation followed with the sentence of five (5) years imprisonment.

The appellant was dissatisfied and has appealed to this court on the main grounds that his fair-trial rights under Section 72 (3) of the Constitution were breached and that he took his plea when he was sick.

When the appeal came up before me for hearing on 7<sup>th</sup> April, 2004, the appellant was not represented and submitted that the Complainant, who is his father, had forgiven him and now sought the forgiveness of the court. **Mr. Oluoch**, the learned Senior Deputy Prosecution Counsel, who represented the state, supported the appellant's conviction and sentence and urged that his appeal be dismissed.

I have considered the record and re-evaluated the proceedings before the learned Principal Magistrate. The charge sheet indicates that the appellant was arrested on 22<sup>nd</sup> October, 2010, and

arraigned before the Principal Magistrate on 25<sup>th</sup> of the same month. Prima facie therefore, he was held by the police for 2 days before he was arraigned before the learned Principal Magistrate. However, the record does not show that the appellant complained about breach of his fair-trial rights then or his state of health. The appellant has also not produced any medical evidence to support his allegation of sickness. He has also not demonstrated that the alleged infringement of his fair trial rights under the Constitution was trial related. In the premises, I am not persuaded that his fair trial rights were infringed. The appeal on conviction is therefore without merit and is dismissed.

With regard to sentence, I note that the appellant in mitigation prayed to be pardoned. That was considered by the learned Principal Magistrate. The learned Principal Magistrate however, does not seem to have considered that the appellant was a first offender and had pleaded guilty at the very first opportunity. He also took into account that the offence was prevalent when he imposed a 5 year imprisonment. The prosecution had not given statistics of the offence in the area. The facts of the case were infact peculiar as the appellant had done grievous harm to his father. I find it difficult to appreciate how this offence would be prevalent in the area. In those premises, I have come to the conclusion that the learned Principal Magistrate may not have appreciated the appellant's circumstances. I therefore find that the sentence of five years imprisonment, though legal, was excessive in the circumstances of the appellant. I will therefore interfere with the same. The sentence is reduced to three (3) years. The effect is that the appeal against sentence is allowed. The sentence of five years imprisonment is hereby set aside and is substituted with a sentence of imprisonment for three (3) years from the date of the appellant's conviction by the trial court.

The appeal against conviction is otherwise dismissed.

**DATED AND DELIVERED AT ELDORET THIS 19<sup>TH</sup> DAY OF MAY 2011.**

**F. AZANGALALA  
JUDGE.**

***Read in the presence of:-***

- (i) **Sammy Kipngetich Kirwa**, the appellant in person
- (ii) **Mr. Chirchir** holding brief for **Mr. Oluoch**, Senior Deputy  
Prosecution Counsel for the State.

**F. AZANGALALA  
JUDGE.**