

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 254 OF 2010

WYCLIFFE ANYANGO MALENYA APPELLANT

V E R S U S

REPUBLIC RESPONDENT

J U D G M E N T

The appellant was charged with **assault causing actual bodily harm** contrary to **Section 251** of the **Penal Code**. The particulars of the offence were that on 19th November 2010 at Ebukambali village in Khwisero District the appellant unlawfully assaulted Prisca Amisi thereby occasioning her actual bodily harm. When the appellant was arraigned before the trial magistrate's court, he pleaded guilty to the charge and was duly convicted. He was sentenced to serve five (5) years imprisonment. The appellant was aggrieved by the sentence, and duly appealed to this court.

In his petition of appeal the appellant essentially pleaded with this court to exercise leniency on him. He states that he was remorseful. He is of the view that the custodial sentence that was imposed upon him was harsh in the circumstances. He urged the court to review his punishment and sentence him to serve a non-custodial sentence. During the hearing of the appeal, the appellant reiterated the contents of the petition of appeal. The State left the issue of sentence to the court.

This court has carefully considered the facts of this case. The appellant, without any justification, assaulted his 11 year old daughter. It was apparent that the appellant was drunk at the time. The victim's mother died a year prior to the incident. The appellant was therefore the sole custodian of the victim. According to the P3 form which was produced in evidence by the prosecution, the victim suffered injuries on her head and on her torso. She also suffered bruised wounds on her upper limbs. Before the appellant was sentenced, the trial magistrate ordered for a victim impact assessment report to be prepared. According to the said report, the victim was so traumatised to the extent that she no longer wished to live with the appellant. She now lives with her maternal grandmother. Taking into consideration the entire circumstances of this case, it is clear that the appellant deserved to be sentenced to serve a custodial sentence.

The sentence that was imposed was lawful. However, this court noted that the appellant is a first offender. The sentence that was imposed is the maximum that is allowed by the law. This court is of the view that the sentence of five (5) years imprisonment for a first offender was harsh and excessive in the circumstances. This court will partially allow the appeal. The sentence imposed by the trial magistrate is hereby set aside. It is substituted by a sentence of this court. The appellant is sentenced to serve two (2) years imprisonment. The said sentence shall take effect from the date the appellant was convicted by the trial magistrate. It is so ordered.

DATED AT KAKAMEGA THIS 19TH DAY OF MAY 2011

**L. KIMARU
J U D G E**