



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Criminal Appeal 216 of 2009

REPUBLIC.....APPLICANT

VERSUS

MAURICE OTIENO NYAMGWE.....RESPONDENT

JUDGMENT

(Being an appeal from the original conviction and sentence of the SRM's court at Homabay in Criminal case No.1459 of 2009, Hon. C.A.S. Mutai, (SRM) dated and delivered on the 14.10.2009)

This is one of those rare occasions when the state through the Attorney General takes out an appeal against the decision of the learned magistrate following a criminal trial. In this appeal which is essentially on sentence, the state is complaining that the sentence of a fine of kshs.35,000/- in default 4 months imprisonment meted out on the respondent by the trial court on an offence of grievous harm was manifestly lenient bearing in mind the gravity of the injuries visited upon the complainant by the respondent.

On or about the 14th of October, 2009, the respondent was arraigned before the Senior Resident magistrate court at Homa Bay on one count of Grievous Harm, contrary to section 234 of the penal code. The particulars of the charge were that on 25th September, 2009 at Ugoro village in Gwasi East Location in Suba District within Nyanza province the appellant did grievous harm to **Getrude Akinyi Odere** by fracturing her right arm using a stick.

The appellant pleaded guilty to the charge and a plea of guilty was accordingly recorded against him. The facts of the offence as related by the prosecutor were as follows:

“On the 25th September, 2009 the complainant Getrude Akinyi Odere was at her home at around 10.00a.m. when the accused Maurice Otieno approached the complainant. The complainant asked him why he has (sic) destroyed her fence allowing the complainant's livestock to get into the accused piece of land. They had a very bitter exchanges. (sic) The accused picked a stick and he hit the complainant on the right hand and she sustained serious injuries. The complainant

screamed for help and members of the public responded they later took her to the village elder. She was later taken to the hospital and a P3 form which was filled for her and the injuries were classified as grievous”.

When asked to comment on the facts as narrated by the prosecutor, the appellant stated that the facts were correct, whereupon the learned magistrate convicted the appellant on his own plea of guilty. The prosecutor thereafter stated that the appellant was a first offender. In mitigation the appellant stated that he was sorry. His wife was indisposed and he wished to compensate the complainant with Kshs.10,000/-.

The learned magistrate having considered the facts of the case and the mitigation by the respondent, sentenced him thus **“....Accused to pay a fine of kshs.35,000/- in default to serve 4 months imprisonment. Should the fine be paid kshs.10,000/- shall be compensation to the complainant under section 175 of the criminal procedure code...”** The default sentence in my view was illegal. It out to have been 6 months.

As already stated the state was aggrieved by this sentence and hence the appeal. In support of the appeal, **Mr. Gitonga** submitted that the sentence imposed was manifestly lenient considering that the offence attracts life imprisonment. He urged me to review the sentence upwards so as to reflect the gravity of the offence committed.

On his part, the respondent urged the court to forgive him. He had reformed after serving the default sentence of 4 months in prison.

I have considered the appellant’s plea for enhancement of sentence and I have carefully considered the respondent’s submissions in rebuttal, but what has emerged is that even with those submissions in perspective, I think that the sentence imposed in the circumstances of this case was if anything manifestly lenient, taking into account the range of sentence for the offence. The sentence attracts a life sentence. The complainant’s right upper limb was fractured as a result of the assault by the respondent. That sentence in my view must have been informed or influenced by the respondent’s offer to compensate the complainant with kshs.10,000/- . That was an irrelevant and or extraneous consideration. As it turned out however, the respondent never even paid the compensation he had offered. Instead he served the default sentence.

I have also taken into account the holding in the case of **REPUBLIC V. JAGANI & ANOR(2001) KLR 590** to the effect that this court can interfere with a sentence passed by the trial court in exercise of its discretion only where such sentence is against legal principles or when relevant factors were not considered or irrelevant or extraneous matters considered or normally where the sentence is manifestly excessive in the circumstances of the case. The grounds raised in this appeal clearly fall under two of this exceptions to warrant interference by the court. Legal principles on sentencing were not applied and the trial court considered irrelevant and or extraneous matters in arriving at the suitable sentence. Accordingly the sentence imposed must be interfered with.

In the result, I allow the appeal on sentence. I will set aside the sentence imposed of a fine of Kshs.35,000/- in default to serve 4 months imprisonment. In substitution I order that the respondent serves two (2) years imprisonment. In computing the prison term to be served as aforesaid by the respondent, the 4 months already served by the respondent shall be taken into account.

JUDGMENT dated, signed and delivered in Kisii this 30th June, 2010.

M.A. MAKHANDIA

JUDGE.