

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 101 of 2007

JOHN NYAMAWI GIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, John Nyamawi Giri, was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars were that the appellant on 7th June 2007, at about 11.30 p.m., at Majengo village, Mariakani Location in Kaloleni District within Coast Province, unlawfully assaulted Asha Nyevu Hamisi thereby occasioning her actual bodily harm. The appellant appeared before F. W. Andayi, then an Ag. Senior Resident Magistrate, on 13th June 2007 and pleaded guilty to the offence. The prosecution then stated the facts of the case and the appellant was invited to react to the same whereupon he informed the court that the facts were correct. The Learned Ag. Senior Resident Magistrate then convicted the appellant on his own plea of guilty. The prosecutor then informed the court that the appellant was a first offender. In mitigation, the appellant stated that he was, at the time of commission of the offence, extremely angry when he found the complainant in his house with another man in an act of compromise. He further stated that he had children and was an orphan and had left the children with his grand parents.

The Learned Ag. Senior Resident Magistrate, after taking into account the appellant's mitigation, noted that the appellant committed a barbaric act and may have intended to seriously injure if not kill the complainant. He then sentenced the appellant to four (4) years imprisonment. The appellant was dissatisfied with the sentence and has appealed to this court against the same on the main ground that the sentence is excessive considering the circumstances of the case. In his statement on mitigation before me, the appellant gave more details of his personal circumstances. He said that the complainant is his wife and mother of his children and did not intend to cause harm to her. He also said he was under the influence of alcohol when he committed the offence.

Mr. Onserio, Learned State Counsel who represented the Republic, submitted that the assault upon the complainant was aggravated and further that the appellant attacked the complainant with an iron bar and inflicted a cut on her skull. It was further his view that the appellant aimed to injure the vital organs of the complainant. The Learned State Counsel therefore supported the sentence imposed upon the appellant.

I have considered the record and re-evaluated the proceedings which took place before the Learned Ag. Senior Resident Magistrate. The appellant was a first offender and pleaded guilty at the very first opportunity. He now says the complainant is his wife and he was at the time under the influence of drink. If indeed the complainant is his wife and the appellant found her in compromising circumstances with another man in his house, I would conclude that although the Learned Ag. Senior Resident Magistrate stated that he had taken into account the appellant's mitigation before imposing the four year imprisonment term, he did not, with ill due respect to him, fully appreciate the appellant's circumstances. The maximum sentence under Section 251 of the Penal Code is five (5) years. In imposing a prison term of four years upon the appellant, the Learned Ag. Senior Resident Magistrate treated him as one of the worst offenders under the section. The complainant suffered a cut on the scalp and sustained bruises on the face. Those injuries do not suggest a barbaric attack or the worst form of assault.

In the premises, I have come to the conclusion that the sentence of four years imposed upon the appellant was in the circumstances of the appellant excessive. I will therefore interfere with the same. The sentence is reduced to the period already served. The effect is that the appeal against sentence is allowed. The sentence of four (4) years imprisonment is hereby set aside and substituted with the period already served. The appellant should be released from prison forthwith unless he is held for some other lawful cause.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF MAY 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

The Appellant and Mr. Onserio for the Republic.

F. AZANGALALA

JUDGE

11TH MAY 2009