REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 155 of 2006

CHRISPHINE MWANGANYI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

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JUDGEMENT

The Appellant Chrisphine Mwanganyi filed this appeal against his conviction and sentence before the learned Resident Magistrate Wundanyi. In this appeal the Appellant appeared in person whilst Mr. Monda learned State Counsel appeared for the Respondent State.

The Appellant had been charged in the lower court with the offence of Assault causing Grevious Bodily harm contrary to section 234 Penal Code. The prosecution case is that on 12th January 2005 at Wundanyi Location within Taita Taveta District the Appellant attacked the complainant one Kombe Wakiti with an iron bar and caused his four front teeth to fall out. PW2 Peter Njumwa witnessed the attack and PW3 Mwangolo Chigulu the clinical officer-in-charge at Wesu District Hospital also gave evidence of the injuries sustained by the complainant including the loss of four teeth which injuries he classified as grevious harm. At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He elected to keep silent in defence. The trial magistrate proceeded to write his judgement in which he convicted the Appellant and sentenced him to serve seven (7) years in prison. The Appellant being dissatisfied with that judgement filed the present appeal.

This being a court of first appeal I am mindful of my obligation to review and re-evaluate the evidence adduced in the lower court. I am also mindful of the fact that I neither saw nor heard the witnesses testify [see Ajode –vs- Rep Crim App 187 of 2004].

From the submissions filed by the Appellant in support of this appeal, his only ground is that the sentence was excessive. The Appellant appears to have no issue with his conviction. In his submissions the Appellant writes thus:-

"*My lordships I am very remorseful and sorry for my deeds and all I am asking from the Honourable High Court of Appeal is only to review my* sentence *which is prejudicely harsh and excessive*".

The Appellant goes on to state facts in mitigation such as that he has a family to care for and that he has embraced Christianity whilst in prison. However the point of appeal is ***not*** the time to issue mitigation against sentence. The record clearly indicates that upon his conviction the Appellant was allowed an opportunity to mitigate in the lower court. In mitigation the Appellant said –

"*My mother depend on me. My mother is sickly. I have a wife with four children. I ask forgiveness. 35 years*".

It is therefore clear that Appellant did mitigate and this mitigation was taken into account before sentencing. S. 234 of the Penal Code under which the Appellant was charged provides:-

"*Any person who unlawfully does harm to another is guilty of a felony and is liable to imprisonment for life*".

The maximum sentence provided for by law is life imprisonment. The trial magistrate did not impose this maximum. He imposed the much lower sentence of 7 years. I am mindful of the fact that sentencing is the prerogative of the trial magistrate and will depend on the circumstances of each individual case. In this case the attack on the complainant was totally unprovoked. In my view this sentence is lawful and is neither harsh nor excessive. Given the circumstances for the reasons stated above I have no inclination to interfere with the same. As such I dismiss this appeal and uphold the sentence of seven (7) years in prison.

Dated and delivered in Mombasa this 5th day of August 2009.

M. ODERO

JUDGE

Read in open court in the presence of:

Mr. Monda for State

Appellant in person

M. ODERO

JUDGE

5/8/2009