REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Criminal Appeal 52B of 2009

From original conviction and sentence in the Chief Magistrate's Court Kisii Criminal

Case No396 of 2009 by C.G.MBOGO (Ag. C.M.).

MOSES OKEMWA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant was convicted on own plea of guilty of assault causing actual bodily harm contrary to *section 251* of the Penal Code whose particulars were that on 13/2/2009 at Nyabururu village in Kisii Central District within Nyanza Province he unlawfully assaulted Agnes Mokaya thereby occasioning her actual bodily harm. In mitigation, he informed court he was 28 years and a waiter at Blue Nile Hotel at Nyangena. He said he was married with a single child but that his wife had run away. The prosecution had indicated he was a first offender. The court called for probation report. It was produced but was not fovourable. He was sentenced to serve 2 years imprisonment. He was aggrieved by the sentence and preferred his appeal.

In the Petition of Appeal, the appellant complained that the trial court had not considered he was a remorseful first offender, who was poor, from a broken family and was young and requiring support. He stated that the sentence was overly harsh and excessive in the circumstances. Mr. Kemo for the Republic opposed the appeal and submitted that it was merited, his probation report having been found to be unfavourable.

The trial court considered what the appellant stated in mitigation, and also that he was first offender who had pleaded guilty and that the complainant had not suffered life-threatening injuries. He asked for the probation report. It was not favourable. It said the appellant was a drunkard, a drug-addict who was a nuisance to his family and to the community at large.

Sentencing entails the exercise of a discretion by the trial court, and the appellate court can only interfere with that discretion if it is clear that the court overlooked some material factors, took into account some immaterial fact, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. (See *Wanjema .Republic [1971] EA 493)*

The facts narrated by the prosecution were that the complainant and the appellant lived together. In the probation report it became evident that the complainant was the appellant's grandmother. The court did not consider this relationship. The court should have considered that a crime committed as a result of a domestic quarrel will not usually attract a term in prison because it has been argued that since the parties are in a permanent relationship, imprisoning the offender may also in effect punish the complainant, or that imprisonment may not help such a relationship but instead complicate it further. (See *Juma .V. Republic [1972] EA 437).*

The appellant was a first offender. Generally, a sentence of imprisonment should not be imposed on such an offender unless the offence was particularly grave or aggravated in nature. This one was not as the complainant suffered a cut wound on the mid-forehead which presented no complications and amounted to harm. The court appreciated the injury was not life –threatening but failed to reflect this in the amount of sentence meted.

In the circumstances of this case, I consider the sentence of 2 years for the offence to have been manifestly excessive. It is hereby set aside. The appellant has been in custody nearly for seven months, which I consider sufficient punishment. The sentence is reduced to the one already served, which means the appellant is ordered released forthwith unless he is otherwise being lawfully held.

Dated, signed and delivered this 14th day of October, 2009

A.O.MUCHELULE

JUDGE

14/10/2009

Before A.O.Muchelule-Judge

Mongare-court clerk

Mr. Kemo for State

Appellant-present

COURT :Judgment in open court.

A.O. MUCHELULE

JUDGE

14/10/2009