REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISII

Criminal Appeal 137B of 2009

HENRY OGEGA MACHOKA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted by the Resident Magistrate,Keroka of assault causing actual bodily harm contrary to section 251 of the Penal Code and ordered to serve sentence of "1 ½ imprisonment." The order did not say whether this was 1 ½ days, 1 ½ months or

1 ½ years. However, the committal warrant signed by the Magistrate on the same day shows he was jailed for 1 ½ years. The appellant was aggrieved by the conviction and sentence and preferred this appeal. He however, abandoned appeal against conviction, and therefore all that there is to consider is the appeal against sentence. It was submitted on his behalf by Mr. Miyienda that the sentence was illegal. There was no elaboration. Mr. Kemo for the state asked the court to invoke its powers under under *section 362 of the Criminal Procedure Code* and correct the sentence.

The particulars of the charge were that on 13/7.2008 at Keroka Township in Masaba District within Nyanza province, the appellant unlawfully assaulted Francis Okundi and occasioned him actual bodily harm. The evidence that the court accepted was that on 13/7/2008 at about 3.30 p.m the complainant was going home when he found the appellant sitted on the way. The complainant apparently owed him 20/=. The appellant sought its immediate repayment. The complainant pleaded that he be given some time to pay. He took a few steps of his journey. The appellant hit him on the head from behind. He begun bleeding. He went to report to Keroka police station and was issued with P3(exhibit 1). He was treated at Keroka District Hospital and found to have a cut wound on the left occipital region of the head. The cut was stitched. It was found he had suffered harm.

The appellant was first offender and sought to be forgiven. He informed court he was sick. The court indicated it had taken into account the mitigation, but did not say it had considered fact that appellant was a first offender. It observed that the appellant had acted irresponsibly by assaulting the complainant over 20/=.

The principle is that an appellate court should not interfere with the discretion which the trial court

has exercised as to sentence unless it is evident that the court overlooked some material factor, took into consideration some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive or manifestly lenient in the circumstances of the case.(See *Republic .V. Albeid[1990] KLR 517).*

I accept the appellant acted irresponsibly in hitting the complainant on the head, and over a debt of only 20/=. However the injury occasioned was slight. The court was informed appellant was first offender but did not take that material fact into consideration. Generally, a sentence of imprisonment should not be imposed on a first offender except where the offence is particularly grave, aggravated or widespread in a particular area. This offence was not any of these. Under *section 24* of the *Penal Code*, a wide range of punishments has been provided. An offence under *section 251* of the *Penal Code* is a misdemeanour, and the court should, for such offence, look at imprisonment as a last option and not the first option. There should be recorded reasons why non-custodial sentence was not preferred.

I have said enough, I hope, to show that in the circumstances of the case, the sentence of 1 ½ years imposed was manifestly excessive. It is hereby set aside and reduced to the period already served. This means the appellant is ordered to be immediately released unless he is otherwise being lawfully held.

Dated, signed and delivered at Kisii this10th day of November,2009

A.O.MUCHELULE

JUDGE

10/11/2009

Before A.O.Muchelule-J

Court clerk-Mongare

Mr. Kemo for state

Appellant-absent

Mr. Rono-Appellant released on Presidential Amnesty.

A.O.MUCHELULE

JUDGE

10/11/2009