



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 16 OF 2007

(From Original Conviction and Sentence in Criminal Case No. 18 of 2007 of the Resident Magistrate's Court at kaloleni, Andayi Esq., Ag. Senior Resident Magistrate)

REPUBLIC RESPONDENT

- Versus -

MBAJI KOMBO MBAJI APPELLANT

J U D G M E N T

The appellant MBAJI KOMBO MBAJI was convicted on his own plea of guilty to a charge of accusing another to be a witch contrary to section 6 of the Witchcraft Act, Cap 67 of the Laws of Kenya. He was then sentenced by the Acting Resident Magistrate, Kaloleni, to serve five years imprisonment.

He has appealed to this court, and his grounds of appeal are –

1. That he is remorseful and begs for leniency from this Honourable Court.
2. That he pleaded guilty for the offence of accusing another to be a witch, hence he did not waste the court's time.
3. That he left behind a wife and children who solely depend on him
4. That the 5 years sentence is harsh as he ought to have been given a non-custodial sentence.
5. That the learned magistrate did not consider that the appellant was a first offender
6. That he prays that this sentence be reduced to enable him join his suffering family.

At the hearing of the appeal, the appellant appeared in person and Mr. Ondari appeared for the State. The appellant said he would rely on written submissions which he produced in court. Having perused those submissions, I find that they adopt the grounds of appeal on record with the addition of a new ground that he was mentally disturbed at the time of the offence, and he did not know what he was talking about. Mr. Ondari, for the State, said that on the face of it, the sentence seems to be harsh, otherwise left the matter to the court.

Having pleaded guilty, the appellant can only appeal against the sentence, but not the conviction. In so far as sentence is concerned, the appellant was sentenced to five years imprisonment. The issue now is whether this court can interfere with that sentence.

In REX v. MOHAMEDALI JAMAL (1948)15 EACA 126, the Court of Appeal for Eastern Africa had this to say on sentences -

“It is well established that an appellate court should not interfere with the discretion exercised by a trial judge or magistrate except in such cases where it appears that in assessing sentence the judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive.”

This decision has been followed in many subsequent cases. On the record before this court, before the learned trial magistrate sentenced the appellant, he said –

“Mitigation considered. Accused is a first offender and pleaded guilty to the charge. But this offence within the local community is serious because it leads to death of persons branded to be witches who are attacked and killed. A deterrent sentence is therefore called for. Accused is sentenced to serve five years imprisonment on Count II.”

Under section 6 of the Witchcraft Act, Cap 67 of the Laws of Kenya, the offence of accusing another of being a witch is punishable with imprisonment for a term not exceeding five years. Considering that the appellant had been mentally disturbed at the time of committing the offence, and that he was a first offender who pleaded guilty to the charge, I think that a sentence of five years imprisonment, which is the maximum term provided for under the law, was manifestly excessive in the circumstances. In my view, the maximum sentence should normally be reserved for those recidivists who prove incorrigible after variously serving some short sentences.

Being of that persuasion, I am therefore constrained to interfere with the five year imprisonment sentence which I hereby do. I accordingly reduce the sentence from five years to two years imprisonment. The appeal succeeds to that limited extent.

It is so ordered.

Dated and delivered at Mombasa this 13th day of May, 2008.

L. NJAGI

JUDGE