



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

Criminal Appeal 538 of 2004

(From Original Conviction and Sentence in Criminal Case No. 2417 of 2003 of the Senior Resident Magistrate's Court at Githunguri- Lucy Mutai SRM).

KENNETH KIMANI KAMUNYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of grievous harm contrary to Section 234 of the Penal Code before the Senior Resident Magistrate's Court at Githunguri. He was convicted of the offence following a full trial. Upon conviction, he was sentenced to serve 5 years imprisonment. The appellant was aggrieved by the conviction and sentence. He then lodged the instant appeal. At the hearing of the appeal, the appellant through Njiru Boniface, learned counsel abandoned the appeal against the conviction and proceeded with the appeal against the sentence.

The appellant complains in grounds 7 and 8 of the petition of appeal thus:

"7. THAT the learned trial magistrate erred in law and fact by sentencing the appellant for 5 years imprisonment without an option of a fine.

8. THAT the learned trial Magistrate erred in law and fact by failing to appreciate that the accused was a first offender and while sentencing she was supposed to be lenient.

In support of the above grounds, learned counsel for the appellant submitted that it was wrong for the magistrate to have sentenced the appellant to imprisonment for a term of 5 years without an option of a fine. That the appellant was a civil servant. Indeed was an Assistant Chief at the time of the incident. He was in the process of enforcing the law when the incident happened. That the appellant had been in custody for one year and eight months. He was a first offender. Counsel further submitted that taking into account the circumstances of the incident and the fact that the complainant sustained the injuries as she attempted to run away, the sentence imposed was manifestly excessive. Finally counsel submitted that the appellant had since received a letter terminating his employment yet he had a family of six children who solely depended on him.

Mr. Warui learned state counsel for the Respondent conceded to the appeal but elected to leave everything else to court.

The principles upon which an appellate court acts when dealing with appeals on sentence have long been settled. In the case of SAYEKA VS. REPUBLIC (1989) KLR 306, it was held inter alia:

“..... The appellate court will not ordinarily interfere with the discretion exercised by the lower court unless it is evident that the lower court has acted upon some wrong principles or overlooked some material factors or the sentence is manifestly excessive in the circumstances of the case.....” Further in the case of STEPHEN ONDIEKI NYAKUNDI VS. REPUBLIC, CA NO. 91 OF 2005 (UNREPORTED) the Court of Appeal held “that the court can only interfere with the sentence if it is shown to be unlawful.....”

In the instant case, the sentence imposed was five (5) years imprisonment. However, the offence carries a maximum sentence of life imprisonment. The sentence though legal appears to be excessive considering the circumstances under which the offence was committed. The appellant was an Assistant Chief out to enforce the law when the incident happened. He did not deliberately cause the complainant to fracture his leg. It was an accident. I have considered the sentencing notes of the trial magistrate. It would appear that the magistrate took into account extraneous matters in arriving at the sentence. The appellant has so far served about one year and eight months of his prison term. His services have since been terminated. To my mind the appellant has been sufficiently punished. Considering the mitigating circumstances put forward by the appellant’s counsel, and since the state counsel has conceded to the appeal on sentence, I am of the considered opinion that the sentence already served meets the end of justice.

Accordingly I allow the appeal on sentence, set aside the sentence of 5 years imprisonment and substitute thereof with the sentence already served by the appellant. The result is that the appellant shall be released forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 25th day of July 2006.

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MAKHANDIA

JUDGE