REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Case 219 of 2004

REPUBLIC …………………………..……………….. PROSECUTOR

- Versus -

KITSAO MASHA MWAGONA ……………..………….. ACCUSED

Coram: Before Hon. Justice L. Njagi

Ms. Mwaniki for the Respondent

Appellant in Person

Court clerk – Kinyua

J U D G M E N T

The appellant in this case was charged with causing grievous harm contrary to section 234 of the Penal Code. The case went for a full trial at the end of which the accused was found guilty as charged and sentenced to six years imprisonment.

He now appeals to this court against sentence. At the hearing of the appeal, he appeared in person while Mrs. Mwangi appeared for the Republic. In his written submissions to the court, he said he was very sorry, quite remorseful and indeed got rehabilitated over the period during which he was in prison. He requested this court to consider his mitigation in the lower court, and to further consider that a sentence of six years was harsh and excessive. Although he did not plead guilty in the lower court, he asked this court, as a first appellate court, to consider the "one third rule" for a first offender. In his oral submission, he added that he was the sole bread winner in his family, and that he had no parents. He thereupon urged the court to release him, taking into account the period he had already served.

Mrs. Mwangi supported the sentence of 6 years imprisonment, submitting that the offence carries a maximum sentence of life imprisonment. As a result of the appellant's misconduct, the complainant was left with permanent scars and a permanent disability. She further submitted that the learned trial magistrate considered the appellant's mitigation in the lower court, including the reports on community service orders, which reports were on two occasions found to be misleading. It was then that the appellant was sentenced to six years imprisonment. Mrs. Mwangi thereupon asked that the appeal against sentence be dismissed.

In reply, the appellant said that he left it to the court.

I have considered the appellant's grounds of appeal against sentence, his submissions, as well those of counsel for the Republic. The court record shows that in mitigation, the appellant said, through his lawyer, that he was a first offender, and that this was a family dispute over ownership of coconut trees. The appellant and the complainant were relatives, and the appellant was remorseful. He regretted that he allowed his emotions to take over, but it was not his wish or intention to break the law. He was 44 years old, married with 9 children, all of who were dependent on him. The youngest one was three weeks old.

The response of the learned trial magistrate to this mitigation was as follows-

"**Accused's mitigation noted and that he is a first offender and remorseful. They are also family**

members."

This shows explicitly that the learned trial magistrate did take into account the appellant's mitigation. And before she went on transfer, she referred the matter to the Chief Magistrate for a community service order.

The learned Chief magistrate accordingly referred the matter to the Community Service Officer for the latter's report. After the first report was presented, the Chief Magistrate was not satisfied that a full investigation had been done. She ordered for a secord report. The second report did not add much to the first one, but reiterated that the family of the appellant and the complainant had sat and agreed to forgive the appellant. As some of the family members had adduced evidence which had bee discredited by the trial magistrate, the Chief Magistrate decided to summon the complainant himself. When he appeared before the court, the complainant denied that as family members, they had even sat down and agreed to forgive the appellant. The Chief Magistrate found this surprising in view of the Community Service Officer's two reports. She took into account that state of affairs and that the maximum sentence for a charge of grievous harm was life imprisonment. She also considered that as a result of this vicious and brutal attack on the complainant, the facial injury had left a scar that was clearly visible. Indeed, according to the evidence of PW4, the clinical officer, because of the healing of the wound with granular formation, the complainant will not be able to open his mouth to its maximum for the rest of his life. Yet, there was no good reason for that attack.

For these reasons, the Chief Magistrate formed the opinion that a deterrent sentence was called for and considering the maximum penalty for that offence, she sentenced the appellant to six years imprisonment. I find that both the trial and the sentencing magistrates took into account all that there was to be considered. All the matters that the appellant is urging the court to consider were taken into account. In the circumstances, I don't see that there is anything that warrants interference with the sentence meted out. I find no merit in the appeal against sentence and the same is accordingly dismissed.

Dated and delivered at Mombasa this 4th day of September, 2006.

L. NJAGI

JUDGE