



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

CRIMINAL APPEAL 10 OF 2005

(From original conviction and sentence in Criminal Case No. 1059 of 2004 of the Principal Magistrate's Court at Garissa, D. Orimba, RM)

ELIAS ABDI OSMAN APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

ELIAS ABDI OSMAN, hereinafter referred to as "***the Appellant***" was charged with five counts of assault causing actual bodily harm contrary to Section 251 of the Penal Code. When arraigned in court on 18th November, 2004, the Appellant entered a plea of not guilty and his trial commenced in earnest before D. Orimba Esq, RM on 15th December, 2004. Midway through the trial and after the five Complainants had testified the Appellant changed his plea to one of guilty and was accordingly convicted. Upon conviction on his own plea of guilty, the Appellant was sentenced to 3 years imprisonment on each count. The Learned Magistrate further ordered that the sentences do run consecutively.

The Appellant was aggrieved by the sentence and hence lodged the instant Appeal limited to sentence only. When the appeal came up for hearing, the Appellant in support of the Appeal stated that he pleaded guilty to the charge, that the sentence imposed was harsh and excessive and that since his incarceration the victims of his acts have been compensated by his family.

In response, Mrs. Gakobo, Learned State Counsel submitted that the offence for which the Appellant was convicted carried a maximum sentence of 5 years. Though the sentence of 3 years imposed was legal, however the requirement that the sentences do run consecutively meant that the Appellant would serve a total of 15 years which would amount to an illegal sentence. Counsel further submitted that as the five counts emanated from the same transaction, the Learned Magistrate ought to have ordered that the sentences do run concurrently instead of consecutively.

Sentencing is a matter for the discretion of the trial Court. The discretion must, however, be exercised judicially. The trial Court must be guided by evidence and sound legal principles. It must take into account all relevant factors and exclude all extraneous factors. The Appellate Court may interfere with

the discretion of the sentencing court if it is shown that the sentence imposed is illegal, harsh and excessive, that the trial court acted upon wrong principle, took into account immaterial factors and overlooked some material factors. See generally WANJEMA VS REPUBLIC (1971) E.A. 993.

In the instant case, although Section 14 of the Criminal Procedure Code allows the sentencing Magistrate to order the sentences imposed either to run concurrently or consecutively, in so ordering the Learned Magistrate should have regard to the provisions of Sections 7 as well as 14(3) of the Criminal Procedure Code. In sentencing the appellant in the instant case it would appear that the Learned Magistrate was oblivious of the aforesaid provisions of the law. In the end he ended up imposing a sentence that was illegal.

It has been repeatedly said that where a person commits more than one offence at the same time and in the same transaction, concurrent sentences of imprisonment should be imposed. If there is any authority required for this obvious proposition of law to anyone who is minded to apply common sense to the issues at hand then See REPUBLIC VS SOWEDI MUKASA (1945) 13 EACA 97. Further concurrent sentences are exclusively awarded for related offences. See MUSA S/O BAKARI VS R (1968) HCD (TANZANIA) NO 239. In the instant case, the Complainants were assaulted by the appellant at the same time and at the same *locus in quo*. Accordingly the Learned Magistrate in sentencing the Appellant on each count ought to have ordered that the sentences imposed do run concurrently. To the extent that the Learned Magistrate erred as aforesaid, the intervention of this court to correct the error is well nigh.

As correctly submitted by the Learned State Counsel, the maximum jail term that can be imposed on a convict for the offence that the Appellant was charged with is 5 years. The Appellant herein was given 3 years on each of the five counts. I do not think that considering the circumstances in which the offence was committed and the victims involved, the sentence imposed was harsh and excessive. It was certainly well deserved. The Appellant assaulted innocent children with a hot rod. This was a beastly act. I would in the premises confirm the sentence of 3 years imposed on the appellant for each count. The only aspect of the sentence that I will correct is that instead of both sentences running consecutively they will now run concurrently. Accordingly it is the order of this court that the appellant shall serve three years imprisonment on each of the five counts. However the sentences shall run concurrently effective from 13th December, 2004 the date of the initial conviction and sentence.

Dated at Nairobi this 30th November, 2006.

.....

MAKHANDIA

JUDGE

Judgment read, signed and delivered in the presence of:-

Appellant

Mrs. Gakobo for State

Erick - Court clerk

.....

MAKHANDIA

JUDGE