

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 85 of 2005

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No. 316 of 2005 – A. B. Mongare (Mrs) [R.M.]

LAWI ODANGA ELISHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Lawi Odanga Elisha was charged with grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that on the 16th of August 2004 at Kampi ya Moto area in Nakuru District, the appellant unlawfully did grievous harm to Kevin Odanga. The appellant pleaded guilty to the charge and was convicted on his own plea of guilty. He was sentenced to serve five years imprisonment with hard labour. The appellant was aggrieved by the sentence that was imposed upon him and has appealed to this court.

At the hearing of the appeal, the appellant told the court that he had not intended to injure the complainant who is his son. He stated that he was disciplining the complainant after he had arrived late in the house. He submitted that as he was canning the complainant, the complainant slipped and fell into a charcoal stove which burnt his hand. The appellant pleaded to this court to exercise mercy on him and reduce the term of imprisonment he was sentenced to serve. Mr. Mugambi for the State opposed the appeal. He submitted that the appellant was sentenced to serve five years imprisonment whilst the maximum sentence that could have been imposed was life imprisonment. He submitted that the sentence was fair in the circumstances and should not be interfered with by this court. He further submitted that the trial magistrate had properly exercised her discretion when she sentenced the appellant to serve the said term in prison.

I have carefully considered the facts of this case. The appellant is not appealing against conviction. He is appealing against sentence. The complainant is a son to the appellant. He was 4^{1/2} years at the time he was assaulted by the appellant. The appellant has told this court that the complainant accidentally fell on a charcoal stove when he was disciplining him for coming home late. It is clear from the circumstances of this case that the appellant had no right to assault the complainant. The complainant was too young to comprehend that he was being disciplined for an alleged indiscretion that he had allegedly committed. It is clear that the appellant intended to harm the complainant and the resultant injury that he sustained was as a direct consequence of the decision made by the appellant to assault the complainant.

The appellant wants this court to review the sentence that was imposed upon him by the trial magistrate. In sentencing an accused person, the trial magistrate is exercising judicial discretion. For an appellant to succeed in his appeal on sentence he must establish that the trial magistrate wrongly exercised his discretion when sentencing him. He must establish that the trial magistrate applied the wrong principles of the law or sentenced him to an illegal sentence. In the present appeal, the appellant is making no such allegation that the trial magistrate wrongly exercised her judicial discretion. Having carefully considered the facts of this case, I find nothing to fault the trial magistrate when he sentenced the appellant to serve the said custodial term in prison. The complainant in this case would be scarred for

life as a result of the burns that he sustained when the appellant assaulted him. The P3 form which was filled by the doctor who examined the complainant indicates that the complainant was maimed as a result of the injuries that he sustained when he was assaulted by the appellant.

In the circumstances of this case, I am not prepared to interfere with the exercise of discretion by the trial magistrate when she sentenced the appellant to the said term in prison. In my opinion the said sentence perfectly fitted the crime committed. The appeal by the appellant against sentence lack merit and it is hereby dismissed. The conviction and sentence of the trial magistrate is hereby confirmed.

It is so ordered.

DATED at NAKURU this 29th day of November, 2006.

L. KIMARU

JUDGE