



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MOMBASA**  
**CRIMINAL REVISION NO 1 OF 2001**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**KUTBUDDIN MOHAMMEDALI .....ACCUSED**

(From Original Conviction and Sentence in Criminal Case No 3766 of 2000

of Chief Magistrate's Court at Mombasa F N Muchemi, SPM)

**JUDGEMENT**

Accused Kutbuddin Mohammedali was charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code in that on 31.10.2000 at about 12.30 pm at Kibokoni Old Town in Mombasa District of the Coast Province he unlawfully assaulted Mohammed Hussein Jagani thereby occasioning him actual bodily harm. On second count he was charged with similar offence in that he unlawfully assaulted Mohamed Jaffer Jagani thereby occasioning him actual bodily harm.

The facts as stated by the prosecutor were that on 31.10.2000 accused person went to both complainant's office who are both practicing auctioneers and had earlier on attached appellant's goods in pursuance of a court order. Accused demanded to know why his goods were attached. After he was given an explanation, he went away only to return armed with a stick which he used to hit the first complainant and then the second one. Both sustained injuries on their heads and faces. Appellant was restrained by some people who heard the complainants calling for help.

The appellant ran away but was later arrested. The complainants reported the matter to the police. They were referred to hospital and treated and they filled P3 form and upon that they were discharged but appellant charged with the offences as stated above.

Appellant pleaded guilty to the 2 charges and was sentenced to a fine of Kshs 5000/= on each count or 2 months imprisonment in default but the state now wants this sentence revised and enhanced and Commissioner Khaminwa ordered that both accused and prosecutor appear before Court and address the Court. This is what the Principal State Counsel Mr Gumo for prosecution and Mr Abubakar counsel for respondent accused did. In his address Mr Gumo reiterated what is stated in the application that the sentence was too lenient but Mr Abubakar on his part said that the Court has no jurisdiction in this case to entertain the application since the sentence was proper as first it conforms with section 26(3) (ii) of the Penal Code, secondly, that section 251 provides for maximum sentence and not minimum sentence. He said the Attorney General should have appealed against sentence instead of relying on section 364(5) of the Criminal Procedure Code.

Under section 364 of the Criminal Procedure Code this Court has jurisdiction to enhance sentence. He also said that the complainant had agreed with the accused that the sentence would not be heard. There is no doubt that the Court has jurisdiction to enhance sentence on revision. Section 364(1) of the Criminal Procedure Code provides thus:-

“364(1) In the case of proceeding in subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –

(a) in the case of conviction, exercise any of the powers conferred on it as a Court of Appeal by sections 354,

357 and 358, and may enhance the sentence;

(b) in the case of any other order than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court, the accused has committed than might have been inflicted by the

Court which imposed the sentence.

(4) .....

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

Under sections 354, 357 and 358 the High Court’s jurisdiction on appeal is stated and for like application section 354 of Criminal Procedure Code provides as follows: - (in part)

(3) The Court may then if it considers that there is no sufficient ground for interfering dismiss the appeal or may

(c) In an appeal against sentence increase or reduce the sentence or alter the nature of the sentence.

(6) Nothing in subsection (1) shall empower the High

Court to impose a greater sentence than might have been imposed by the Court which tried the case. Section 364

(2) of Criminal Procedure.

The sentence under section 251 of the Penal Code is stated thus:

“Section 251 – any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for 5 years with or without corporal punishment.” Was a fine of Kshs 5,000/= on each count or 2 months in default imprisonment adequate?

It is lawful to impose a fine in lieu of imprisonment or in addition to a custodial sentence. Section 26(3) of Penal Code allows that. The principle the Court applies on appeal is that normally sentence is a discretionary exercise by the trial court. The purpose of sentence is usually to disapprove or denounce unlawful conduct as a deterrent to deter offender from committing offence, to separate offenders from

society if necessary to assist in rehabilitation of offenders, and in retribution by providing for reparation for harm done to victims in particular and to society in general.

It is also seen as promoting a source of responsibility in offenders. A Court on appeal will only interfere with trial court's discretion where the sentence was imposed against legal principles, or where relevant factors were not considered or irrelevant and or extraneous matters considered or normally where the sentence is manifestly excessive in view of the circumstances of the case the Court will interfere. It is not enough in the circumstances of any case that the appellate court feels it would have itself given a more improved sentence than the trial court imposed. In this case the Attorney General feels the sentence was too lenient, but is it so manifestly low that it amounted to exercise of wrong principle? Before this Court reviews sentence imposed by the trial court "this court must be satisfied that there exists to a sufficient extent circumstances entitling it to vary the order of the Court below." Is it shown that she acted upon wrong principle? Overlooked material factors or that sentence was too excessive in the circumstances?

I have looked at these principles and I see that the circumstances accused acted under were brutal and provocative particularly as it was in defiance of a court order and against an act all together lawful. Accused staged an exhibition of a regime where law and order is relegated to the back-seat while force and terror hold sway.

I have considered this anxiously but I feel this conduct called for stiffer sentence, to deter and to uphold law and order. I think this would be in consonance with the reasons set out above as basis for sentencing. I review the sentence imposed by the Chief Magistrate and set it aside and instead impose a custodial sentence of 2 years imprisonment with four strokes of the cane on each count to run concurrently, or 15,000/= fine on each count in the alternative to 2 years imprisonment but with 4 strokes of the cane to be awarded whichever the case.

Dated and delivered at Mombasa this 23<sup>rd</sup> day of October, 2001

**A.I. HAYANGA**

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**JUDGE**