



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.10 OF 2000

(From Original Conviction and Sentence in Criminal Case no.1370 of 1999 of the Snr.
Resident Magistrate's Court at Kilifi –P.M. Mutani, SRM)

NASIBU ALI FONDO APPELLANT

versus

REPUBLIC RESPONDENT

J U D G E M E N T

Appellant was charged in two counts of assault causing actual bodily harm contrary to S.251 of the Penal Code. In count one he was charged in the on 23-11-99 at Prison Site in Kilifi District he assaulted DANIEL KARIUKI KIMANGA thereby occasioning him actual bodily harm and on count two of assaulting LINET MWANGEMI by occasioning her actual bodily harm. He pleaded guilty to both charges and was sentenced to 4 years imprisonment together with 5 strokes of the cane on count one and to serve 3 months imprisonment for 2nd count. Both sentences to run concurrently. He now appeals against sentence saying it was excessive and that he was drunk and was taken up by devil and that he was sickly Miss Kwena State Counsel thinks the sentence was excessive and that the appellant was remorseful and deserved a lesser sentence.

When called upon at his trial to mitigate after conviction accused only said he needed leniency because he was remorseful. The learned Senior Resident Magistrate took this into consideration but said he had attacked innocent people. He had in mind what appellant did which is contained in the statement of facts read to him at his trial. It was stated that he stormed into a house at 7.30 p.m. found the two complainants, a couple having supper. He threatened to cut them with a panga he had in his hands. He was pushed out. [There was no evidence that any excessive force was used on him]. He returned with a heavy stick and started beating the man. He disabled his knees by beating him on the knee with a heavy stick. When the wife came to rescue the husband she also was beaten on the face and she fell down” The man was actually admitted at Kilifi District Hospital for the injuries. The wife’s injury was haematoma on the forehead above right eye. This was harm. Whereas on the husband was fracture on the upper third left tibia. This was grievous harm and the doctor classified them as such.

This aspect of unprovoked violence against a couple in the quiet of their home was what influenced the Learned Magistrate to impose the sentence.

According to the evidence Count one should have been offence under grievous harm c/s to Section 234

of the Penal Code. So the prosecution leniently charged him under a lighter section 251 of the Penal Code but, this did not influence the trial magistrate neither has it influenced this court. Under Section 251 of the Penal Code the maximum sentence is 5 years with or without corporal punishment. He got 4 years and 4 strokes. Is this too excessive?

Normally sentence is almost exclusive jurisdiction of the trial court. It is a discretionary jurisdiction limited to the Statutory maximum relating to the particular offence. In the cases of **WANJEMA V. R. 1971 EA 493 and SHIAM V. R [1972]EA 557** AND even prosecution cannot interfere with that discretion.

Generally speaking the purpose of judicial sentencing is deterrence and rehabilitation and also incapacitation of offender. Sometimes the sentencing tribunal may lean on deterrence but the person judging him on appeal and looking at it in retrospect may be focused more on retribution or rehabilitation and obviously the two viewpoints are destined to clash. It is the more reason why the principle on appeal is that the Court on appeal shall not interfere with the discretion exercised by the trial Court in sentencing unless the trial court exercised its discretion on wrong principles or where a trial court has failed to consider a relevant factor or has over emphasized the appropriate factors and so an appellate court can only vary a sentence on appeal where those commissions and omissions are demonstrably present.

It is to the credit of the appellant that he pleaded guilty and that he appeared remorseful, but this would not be the only thing the Learned Magistrate properly looked at and considered. He noted as I do that this was unreasonable bloody attack occasioning grievous bodily harm, a fracture of Tibia, to a family in the solitude of their home. I feel like Senior the Resident Magistrate that the act called for deterrent sentence. I am not convinced that the Learned Senior Resident Magistrate erred and with respectful deference to the Learned State Counsel, I confirm the sentence imposed by the Learned Magistrate and dismiss the Appeal.

Right of Appeal to the Court of Appeal in 14 days.

Dated this 13th Day of October, 2000.

A.I. HAYANGA

JUDGE

Read in draft to Miss Kwena, State Counsel.

Appellant in person.

On this 13th Day of October, 2000.

A.I. HAYANGA

JUDGE