



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.108 OF 2000

(From Original Conviction and Sentence in Criminal Case No.208 of 2000 of the Resident Magistrate's Court at Voi –E.N. Maina, SRM)

WILLIAM MAKUNDI APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G E M E N T

The appellant herein was charged with grievous harm contrary to section 234 of the Penal Code in that on 6-2-2000 at about 1 p.m. at Ghazi Trading Centre in Taita Taveta District within the Coast Province he unlawfully did grievous harm to Naomi Mwadime. On 2-3-2000 when he was arraigned in Court he pleaded guilty and when the facts were set out he admitted them to be true upon which the learned Senior Resident Magistrate entered plea of guilty, and sentenced him to 3 years imprisonment. He now appeals but his appeal is procedurally ambiguous in that having pleaded guilty he can only appeal against sentence now and the only grounds of appeal are there contained in the Petition filed by his counsel Mr. Odiaga who did not appear at the appeal hearing. The grounds attacked the conviction as to say that the plea was not unequivocal, but when he opted to argue his appeal himself the appellant effectively abandoned the written grounds and argued against sentence although he did not appeal against it, but the State Counsel not objecting the Court allowed appellant to argue the ground relating to sentence. The totality of the abandoned grounds still had vestiges of sentence and so he was allowed to state this on his advocates grounds 1 and 2 of the appeal. He said the Learned Magistrate did not give effect to his mitigation and that the sentence of 3 years was excessive, besides he has two children who now suffer by his absence, but Miss Kwena State Counsel opposed this saying the sentence was lenient considering the nature of the crime and the Statutory maximum of life imprisonment and corporal punishment provided by the Code.

As a matter of law, this court sitting on appeal would not normally interfere with the discretion of the trial magistrate in his award of sentence unless the same was done without regard to known laid down principles and or is excessively high or too low as to itself be an exercise of wrong principle.

The record shows that the mitigation stated by the appellant was sketchy and in fact did not amount to mitigation at all. He said “He was my wife, we differed when she got married to another man.” If this was mitigation then the appellant would be saying that he was not blameworthy when he beat his wife for that reason but there is no such defence in law. The other was that he was a first offender, but the learned

Magistrate appropriately took this in consideration.

The crime was brutal, he beat up a defenseless woman with blows and sticks for asking him for her ID from him. He caused her to sustain a fracture on her elbow and a cut wound on the head. These were deadly injuries. In fact he could have been charged with attempted murder.

I find the sentence awarded too low in the circumstances but because enhancement is not asked for, I shall leave it as such.

Appeal is dismissed.

Right of appeal to Court of Appeal in 14 days.

Dated this 11th Day of October, 2000.

A.I. HAYANGA

JUDGE