



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO 5 OF 2020

BENARD LETIKIL LEMERIA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the original sentence of Hon V.O. Amboko, RM, dated 14th November 2019 in Criminal Case No 471 of 2019 in the Senior Principal Magistrate's Court at Kabarnet, Republic v Benard Letikil Lemeria)

JUDGMENT

In his petition to this court the appellant has appealed against his sentence of five years' imprisonment in respect of the offence of grievous harm contrary to section 234 of the Penal Code (Cap 63) Laws of Kenya.

In his mitigation in this court, the appellant has submitted as follows. He is a first offender. He is remorseful. He was living with his aged mother and pregnant wife, who were dependent upon him as he was the sole bread winner.

Furthermore, he has stated that he has acquired a number of skills while in prison including attaining grade 3 in carpentry and joinery. He has also attained grade 2 in upholstery. Additionally, he is now a pastor having attained and has been awarded a certificate in Bible studies.

The appellant has also stated that his health has deteriorated due to harsh conditions in prison. He also fears that he might contract corona in prison. The appellant has urged the court to release him so that he can apply the skills he has acquired for the benefit of his family and the public.

Mr. Mong'are for the respondent, urged the court to exercise its discretion in the matter.

In sentencing the appellant, the trial court took into account that the appellant was a repeat offender and had to be sentenced to 5 years' imprisonment in order to protect the public.

The appellant had two previous convictions. One of the previous convictions was in respect of assault, which I find is relevant to the instant conviction for grievous harm.

This is a first appeal. I have re-assessed the sentence in the light of the applicable law. As a result, I find that the appellant was arrested on 6/6/2019 and was convicted and sentenced on 14th November 2019, which translates to a period of about six (6) months in pre-trial custody. He also has been in custody as a convict from 14th November 2019 to date, which translates to a period of slightly one year.

I find that the trial court took into account by back dating the sentence to run from the time he was remanded. This approach by the trial court is wrong in law for the simple reason that as at that time he had not been convicted. The trial court ought only to have taken into account that the appellant had been in custody for that period and the give credit to the appellant in terms of section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya.

A sentence cannot be made to operative retrospectively. Even penal statutes have to operate prospectively. See *Patel v. R (1968) EA 97*

Sentencing is a matter of discretion of the trial court. I find that that court exercised its discretion properly in sentencing the appellant to five (5) years' imprisonment in the light of the fact that the appellant was a repeat offender, and one of the two previous conviction was relevant and very recent.

However, there is one issue that has raised concern namely the imposition of a five-year sentence upon the appellant on the basis that he was a repeater offender. This was in relation to the sentence of one and half years' which was imposed upon the appellant on 12/7/17 following

his conviction in respect of the offence of assault; which is one of the two previous convictions. It creates the impression that the appellant was being punished twice for the same offence. The principle of double jeopardy is recognized in section 138 of the Criminal Procedure Code (Cap 75) Laws of Kenya. That principle prohibits double punishment and in terms it reads as follows:

“a person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of that offence shall, while the conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts for the same offence.”

The foregoing provisions of the law have been constitutionalized in article 50 (2) (o) of the 2010 Constitution of Kenya.

The issue raised by the imposition of the five-year sentence on the basis of the relevance and recent previous conviction is whether this is contrary to the provisions of section 138 of the Criminal Procedure Code, *supra*, and article 50 (2) (o) of the 2010 Constitution of Kenya.

Upon consideration of the matter, I find that the main purpose of the criminal law is to protect society from the injurious activities and omissions of its criminals.

Furthermore, I find that the imposition of such sentences on that basis has been practised over the years without any principled objection. The said practice has acquired constitutional status. I therefore find that it is an academically attractive issue that lacks merit.

In the premises, the appellant’s appeal fails and is hereby dismissed in its entirety

Judgment dated, signed and delivered in open court at Kabarnet this 9th day of February 2021.

J M BWONWONG’A

JUDGE

In the presence of:

Mr. Kemboi Court Assistant.

Appellant present in person.

Mr. Mong’are for the Respondent.