REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

MISC. CRIMINAL APPLICATION NO. 188 OF 2018

(Original Conviction and Sentence of the Kitale

Chief Magistrate's Court Criminal case No. 4417 of 2017)

EDWARD SHIBIRA LUSIALULA.....APPLICANT

VESUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Edward Shibira Lusialula was convicted of the charge of causing grievous harm contrary to **Section 234 of the Penal code**. The trial court held that the Prosecution had established to the required standard of Proof that the Applicant unlawfully caused grievous harm to Samuel Wanjala (Complainant) by biting and amputating the Complainant's index finger. He was sentenced to serve five (5) years imprisonment. The sentence was meted out on 2nd October 2018.

Although the Applicant made an application to this court for extension of time to appeal out of time, this court in exercise of Jurisdiction Under **Article 165** of the Constitution and **Section 362** of Criminal Procedure Code, and in the interest of justice, allow the Applicant to mitigate his sentence. The Applicant told the court that he had been sufficiently punished taking into consideration the offence that he had committed. He was married with three children. He pleaded with the court to favourably consider his application for review of sentence so that he can be released to take care of his family.

This court has carefully considered the Applicant's plea for reduction of custodial sentence. This court will not interfere with the sentencing discretion of the trial unless certain factors come to the fore. In **Shadrack kipkoech Kogo –Vs- R Eldoret Criminal Appeal No. 253 of 2003,** the Court of Appeal held thus:

"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court take into account an irrelevant factor that the wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle and must be interfered with (See also Sayaka –Vs- R [1989] KLR 306)."

In the present application, it was clear to the court that the custodial sentence meted on the Applicant was not proportional to the crime committed. As observed by the court in **the Australian case of R –Vs- Scott (2005) NSWCCA 152 (Howe,** Grove and Barr JJ:

"There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed …."

Upon reviewing the evidence that was adduced before the trial court, including the medical report that was adduced into evidence to support the charge, this court formed the view that the custodial sentence of five (5) years that was imposed on the Applicant was harsh and excess in the circumstances. Yes, the crime committed by the Applicant deserves a custodial sentence. However, the custodial sentence imposed was not proportional to the crime committed. This court noted that the Applicant is remorseful for the offence that he committed. He has learned his lesson during the period of his incarceration. He is ready to return back to the society.

The Applicant has already served a period of two and a half years of the term of imprisonment that was imposed by the trial court. This court forms the view that the Applicant has been sufficiently punished. The Applicant's sentence is commuted to the period served. He is ordered released from Prison and set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT KITALE THIS 10TH DAY OF MAY, 2021.

L. KIMARU

JUDGE