



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAPENGURIA**

**CRIMINAL CASE NO. 11 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MUSA LOTOLIM CHAKARTIN.....1<sup>ST</sup> ACCUSED**

**CHRISTOPHER TERER CHAKARTIN.....2<sup>ND</sup> ACCUSED**

**CHACHA SILINYANG KODOMUK.....3<sup>RD</sup> ACCUSED**

**WILSON LEMTUKEL.....4<sup>TH</sup> ACCUSED**

**LISORENG CHAKARTIN.....5<sup>TH</sup> ACCUSED**

**SIMON MUKERENG KODOMUK.....6<sup>TH</sup> ACCUSED**

**KEDINGURA LOMWAI.....7<sup>TH</sup> ACCUSED**

**JACKSON LOMWAI.....8<sup>TH</sup> ACCUSED**

**SAMUEL LOMWAI.....9<sup>TH</sup> ACCUSED**

**JUDGEMENT ON SENTENCE**

The issue before me is one of the appropriate sentence to be imposed upon Musa Lotolim Chakartin(1<sup>st</sup> accused), Wilson Lemtukei(4<sup>th</sup> accused), Simon Mukereng Kodomuk(6<sup>th</sup> accused),Kedingura Lomwai(7<sup>th</sup> accused), Jackson Lomwai(8<sup>th</sup> accused) and Samuel Lomwai(9<sup>th</sup> accused); following their conviction in respect of the offence of assault contrary to section 250 of the Penal Code (Cap 63) Laws of Kenya.

Mr. Makori, counsel for the prosecution, informed the court that all the accused may be treated as first offenders. He also informed the court that the circumstances surrounding the commission of the offence were grave. He therefore urged the court to impose the maximum sentence, although the offence carries a lenient sentence. Such a sentence will also act as a deterrent to potential offenders.

Ms Chebet for the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and the 6<sup>th</sup> accused persons pleaded for lenience for her clients.

In respect of the 1<sup>st</sup> accused, she informed the court that he is a 1<sup>st</sup> offender and a father of nine children with two wives. He is also the sole bread winner of his families.

In respect of 4<sup>th</sup> accused, counsel informed the court her client is a first offender and a father of four children with one wife. He is also the sole bread winner of his family.

Furthermore, in respect of the 6<sup>th</sup> accused, counsel informed the court as follows. The 6<sup>th</sup> accused is a first offender. He is also married with three children and one wife. Additionally, the 6<sup>th</sup> accused is the sole bread winner of his family.

Furthermore, Ms Chebet who held brief for Mr. Chebii for the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> accused persons mitigated on their behalf.

In respect of the 7<sup>th</sup> accused, Ms. Chebet informed the court as follows. The accused is married with eight children and one wife.

Additionally, counsel pleaded for lenience.

As regards, the 8<sup>th</sup> accused person, counsel informed the court as follows. He is married with eight children and two wives; all of whom depend upon him.

In respect of the 9<sup>th</sup> accused person, counsel informed the court as follows. The accused is married with one wife and five children, who solely depend upon.

In addition to praying for a lenient sentence, counsel has also prayed that a non-custodial sentence including the imposition of a monetary fine be imposed.

I have considered the mitigation of all the accused. I find that all the accused are first offenders. I also find that all the accused are the sole bread winners of their families including their wives and children.

Furthermore, I find that the all the accused were in pre-trial custody for about six months. They were also in custody for over six days following their conviction for the offence of common assault, which periods I am mandatorily required to take into account by section 233 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya.

Furthermore, I find that it is not the role of the prosecutor to inform the court that a deterrent sentence is called for; in order to deter both the accused and potential offenders. This finding springs from the adversarial system of the trial process. Under this system, the role of the prosecutor is first and foremost to inform the court whether the accused is a first offender or not. He may also inform the court the surrounding circumstances that he desires the court to take into account. It is then up to the court to find and impose the appropriate sentence; because sentencing is a matter for the discretion of the court.

The foregoing is clear from the decision of the High Court in *Shiani v Republic* [1972] EA 557 in which that court observed that:

*“It is not the function of a prosecutor, as this court has more than once said, to tell the court his views. He is required simply to put the facts before the court. The court must decide how it views the case.”*

Furthermore, in *Bernard Kimani Gacheru v. Republic*, [2002] e-KLR the Court observed that stated:

*“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case.”*

In addition to the foregoing the Judiciary Policy Guidelines on sentencing set out the prosecution’s duty in the pre-sentencing hearing follows. First, the prosecution is to bring to the attention of the court the aggravating and mitigating circumstances including previous convictions. Second, he is to submit to the court on the relevant provisions of the law including the statutory penalty that is provided for the offence in respect of which the accused has been convicted. Third, the prosecutor may draw the attention of the court to any other issue that would impact upon the sentence. In addition, the court should reject any prejudicial statements made by the prosecution.

Consequently, I have rejected the call by the prosecutor to impose the maximum sentence to act as a deterrent to both potential offenders and the accused.

On the other hand, unlike the prosecutor, counsel for accused is at liberty to urge the court to impose a lenient or non-custodial sentence.

In the premises, I find that the appropriate sentence is a fine of a sentence of shillings seven thousand shillings for each accused and in default to serve three months (3) imprisonment.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAPENGURIA THIS 12TH DAY OF MAY 2021.**

**J M BWONWONG’A**

**JUDGE**

In the presence of

Mr. Juma, court assistant

Mr Makori for the Republic

Messrs Chebet Ngetich Fancy for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> accused

Messrs Chebet holding brief for Messrs Chebii Cherop for the 3<sup>rd</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> accused.