



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 55 OF 2019**

**EDWARD WANJALA NYONGESA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal against the original sentence in Criminal Case No. 477 of 2017 in the Senior Principal Magistrate's Court at Kimilili on 3/05/2019 – Hon. I. G. Ruhu (RM))**

**JUDGMENT**

1. The Appellant **Edward Wanjala Nyongesa** was initially charged with the offence of assault causing actual bodily harm contrary to **section 251** of the **Penal Code** and arraigned in court on 22<sup>nd</sup> June, 2017. Later on 2<sup>nd</sup> October, 2017, the charge sheet was amended and the Appellant charged with the offence of grievous harm contrary to **section 234** of the **Penal Code**. The Appellant pleaded not guilty to the amended charge and the matter proceeded to a full trial. At the end of the trial, the Appellant was found guilty and convicted as charged. He was consequently sentenced to serve four (4) years' imprisonment.
2. Being aggrieved with the imprisonment term, the Appellant preferred the instant appeal which is against sentence only. He avers that the trial court failed to consider his mitigation before imposing the sentence. He filed undated written submissions. In his mitigation, he prays for leniency and asks that the remainder of his prison term be converted to a non-custodial sentence. He states that he is remorseful and that he has reformed in the three (3) year period that he has so far spent in prison. That he has been able to learn various vocational trainings including masonry, and prays for a chance to get back to society.
3. The Appellant also states that he is a father and the only breadwinner for his children following the death of his wife. He prays for a chance to be able to provide for his children who he says are now suffering as orphans.
4. The State opposed the appeal through learned State Counsel Mr. Thuo who filed written submissions dated 8<sup>th</sup> July, 2021 on grounds that the sentence of four (4) years imposed upon the Appellant for the offence of assault does not exceed the maximum set out under **section 251** of the **Penal Code**. That the learned Trial Magistrate recorded and considered the Appellant's mitigation and passed the sentence that he deemed appropriate in the circumstances. He prayed that the conviction and sentence be left to remain undisturbed.
5. Whereas both the Appellant and State Counsel submitted as though the Appellant was convicted for the offence of assault under **section 251** of the **Penal Code**, the record does in fact indicate that the charge sheet was amended and that the Appellant was convicted on the amended charge of grievous harm contrary to **section 234** of the **Penal Code**. Upon conviction under **section 234**, one is liable to imprisonment for life. In the instant case, the Appellant was sentenced to imprisonment for a term of four (4) years, which was commensurate with the gravity of the offence with which he was charged. In his mitigation, the Appellant now seeks a non-custodial sentence for the remainder of his prison term.
6. In considering whether to impose a custodial or a non-custodial sentence, the court is required to consider a number of factors including the criminal history of the offender. While the trial court did not request for a pre-sentencing report, there is on record a Bail Assessment Report dated 6<sup>th</sup> July, 2017 which described the Appellant as an approachable and sociable person who maintains stable and working relationships with members of the community and his peers, and that prior to the incident in question, the Complainant and the Appellant enjoyed a cordial relationship.
7. The Probation Officer further noted that from the opinion of both parties, the matter pointed to a crime of passion. Further that the Appellant's wife who was at the center of the matter fled during the incident never to return to her matrimonial home and abandoned her three (3) year old child who was at the time in the custody of her grandmother.
8. At the Appellant's sentencing, the Prosecution told the court that he had no previous record and was to be treated as a first offender. The trial court did not however call for a pre-sentencing report. It consequently sentenced the Appellant to four (4) years' imprisonment, noting that it had considered the gravity of the offence. The Complainant in this case had sustained life threatening injuries. I do note however, in

his own words, that he was fully recovered even before the hearing commenced before the trial court.

9. Sentencing is an integral component of a fair trial as enshrined in **Article 25 (c)** of the **Constitution**. Speaking to this in **Caroly Owino Oluoch vs. Republic [2021] eKLR**, the Court of Appeal (Kiage, Sichale & Kantai, JJ.A.) opined thus:

**“In order to achieve just results in sentencing, it is crucial that the court considers, *inter alia*; the age of the offender, whether the accused was a first offender, whether the offender pleaded guilty, character and record of the offender, remorsefulness of the offender and the possibility of reform and social adaptation of the offender.”**

10. In the instant case, the Appellant did not plead guilty and in his defence denied stabbing anybody. In his mitigation before the trial court, he did not express remorse but only pleaded for leniency on the grounds that he was grieving his wife and had parents who fully depended on him. It is therefore evident that the learned Trial Magistrate took into account all factors present in meting out the four (4) years’ sentence. While not all offenders are deserving of jail time, the four (4) year imprisonment term imposed in the instant case was, all things considered, appropriate. The sentence was on no account excessive or harsh as alleged. This is especially so since the offence for which the Appellant was convicted attracts a term of life imprisonment. I note that the offender was released on cash bail and was therefore not in custody throughout the conduct of the trial court proceedings.

11. An appellate court will only interfere with the discretion of the trial court in sentencing if it is established that the trial court arrived at the sentence erroneously, or the sentence was excessive or illegal. None of the foregoing apply to this case.

12. Having carefully reviewed and evaluated the evidence tendered before the trial court as was my duty as the first appellate court, I have come to the conclusion, as did the trial court, that the term of four (4) years’ imprisonment was appropriate in the circumstances of this case. As such, the present appeal on sentence must fail and is hereby dismissed.

It is so ordered.

**DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2021.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**IN THE PRESENCE OF.....APPELLANT IN PERSON.**

**IN THE PRESENCE OF.....STATE COUNSEL.**