



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 35 OF 2018

KEN AMBOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the sentence in the Principal Magistrate's Court at Wajir

Criminal Case No. 104 of 2018 delivered by Hon. Mugendi Nyaga (RM))

JUDGEMENT

1. The appellant was convicted and sentenced to serve 7 years for an offence of causing grievous harm contrary to section 234 of the Penal Code.

2. Particulars being that on 19/3/2018 at Wajir town Wajir East Sub-County, Wajir County he unlawfully caused grievous harm to Cristabel Antenya. He was found guilty, convicted and sentenced to serve 7 years imprisonment.

3. He lodged instant appeal and set out the following grounds: -

(1) That the charges preferred against him were fatally defective from the initial state which was contrary to the rule of law as stipulated in section 134(1) of the Criminal Procedure Code.

(2) That the learned trial magistrate erred in law and fact to convict him without considering that the prosecution's evidence adduced were not proved beyond reasonable doubts hence unsafe to warrant a conviction contrary to section 109 and 110 of the Evidence Act.

(3) That the learned trial magistrate erred in law and fact to convict him without considering that there was no eye witness to support the complainant's allegations.

(4) That the learned trial magistrate erred in law and facts when he failed to appreciate that the evidence adduced in court was manifestly contradictory, fabricated, inconsistent and glaring gaps revealed uncertainty and failing to give due consideration was to put his life at stake in contravention of section 163 of the Evidence.

(5) That the medical evidence was dubious.

4. When the matter came for hearing, he said that he had abandoned appeal on conviction but wanted court to reduce his sentence as he was a first offender and he is a young person. He said the sentence is harsh and excessive. He said he is repentant and remorseful.

5. The prosecution opposed the appeal on sentence as the maximum sentence is life and he was only awarded 7 years for a very serious offence.

6. In lower court mitigation the appellant stated as I quoted:

“Accused: I pray for leniency. Because of anger I committed the offence. I am a parent and a breadwinner. The court should take that into account. I pray for a non-custodial sentence. I am an ICT graduate. I am jobless. I have been attending interviews. I am yet to give back to the society. I am a 1st offender. I have never committed any other offence in my life.

People have mistakes. They learn from their mistakes. I have learnt from my mistakes. I urge the court to be lenient. I have 2 children. My mother also depends on me. For my family I ask the court to grant me non custodial sentence. I want to give back to the society. If I am jailed I will not be useful to the society. I admit I made a mistake. My wife is jobless. I do not know what my family is going through.”

7. While sentencing the accused the court stated as I quote:

“Court: I have considered the sentiments by the accused person and the accused person’s moving mitigation. The court notes that the offence committed was what is collectively referred to as gender based violence. The violence is rampant in the country in general and specifically in Wajir. This court has a duty to stop it. The actions by the accused person might have led to death of the complainant. As a matter of fact the accused person seems to have left the complainant to die. The actions by the accused person must be condemned in the strongest terms possible. The court observed that even animals do not visit such violence on their loved ones. That is assuming the accused person ever loved the complainant. The actions by the accused person left the complainant with both physical and emotional scars. She will live with scars for a long time. In light of the foregoing the court will impose both a deterrent and punitive sentence. This will deter the accused person and also punish him for this action. The court sentences the accused person to serve seven (7) years in jail. 14 days right of appeal explained.”

8. As to whether the sentence was excessive, I am alive to the general principle that the appellate court should only intervene in the sentence where the subordinate court disregarded a material fact, or considered irrelevant factor or that the sentence was manifestly harsh or excessive as to constitute an error of principle (see **Ogolla s/o Owuora v R [1954] EA 270 and Macharia v R [2003] 2 EA 559**).

9. While the evidence is that the assault was deliberate and the resultant injuries serious, the sentence of 7 years’ imprisonment was on the higher side given the age of the accused, the fact that he was a first offender and that he was remorseful.

10. I have also taken into account sentences imposed in similar circumstances and the need to ensure consistency in sentencing (see **Steven Omondi v Republic HB HCCRA No. 93 of 2014 [2014] e KLR, John Kasya & Another v Republic MKS HCCRA No. 169 & 182 of 2008 [2014] eKLR, Violet Mulayi v Republic KKG HCCRA No. 115 of 2005[2007] e KLR**).

11. I therefore set aside the sentence and substitute it with a sentence of 5 years’ imprisonment. Same to run from date of conviction, 18/5/018.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 18TH DAY OF FEBRUARY, 2020.

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C. KARIUKI

JUDGE