



KTL.NO.495/2019

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 112 OF 2015

MUSYOKA MUTEMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 433 of 2014 by Hon. G. W. Kirugumi R M on 08/10/15)

J U D G M E N T

1. **Musyoka Mutemi**, the Appellant, was arraigned in Court and charged with the offence of **Grievous Harm** contrary to **Section 234** of the **Penal Code**. Particulars of the offence were that on the **29th** day of **June, 2014** at **Ngieni Sub-Location, Mutyangome Location of Mwingi East District** within **Kitui County** unlawfully assaulted **Muendo Musyoka** thereby occasioning him actual bodily harm.
2. After full trial he was sentenced to serve **five (5) years imprisonment**.
3. Aggrieved, he appealed against the conviction and sentence. However, at the hearing of the Appeal he abandoned the Appeal against the conviction and opted to mitigate on sentence on grounds that: He was a first offender, the sole breadwinner of the family of both young and his aged parents; he has learnt lessons and he needs to seek medical attention.
4. At the hearing the Appellant urged that he has served three (3) years out of the five (5) years he was sentenced to serve. That both his parents died while he was in prison. That he is sick and pleads for leniency.
5. The State through learned State Counsel, **Mr. Mamba** opposed the Appeal. He argued that the Appellant has a problem with his deteriorating health but failed to furnish the Court with evidence therefore could still serve the remaining part of the sentence.
6. In a rejoinder the Appellant stated that his medical records are held by the Prisons Authority.
7. My duty as a first Appellate Court is to re-consider what transpired at trial and come up with my own conclusion. (**See Okeno vs. Republic (1972) EA 32**).
8. The Appellant was initially charged with a holding charge of **Assault Causing Actual Bodily Harm** contrary to **Section 251** of the **Penal Code** which was substituted with the charge of **Causing Grievous Harm**. The P3 form adduced in evidence showed that the Complainant lost a left incisor tooth and had a left painful cheek.
9. In the case of **Bernard Kimani Gacheru vs. Republic, Criminal Appeal No. 188 of 2000** the Court of Appeal stated that:

“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. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”
10. Looking at the nature of injury sustained and the fact that the Complainant may seek a civil remedy against the Appellant, and further

considering the Appellant's evident state of health even if he did not adduce documentary evidence to prove his averments, this is a case that calls for interference of the sentence meted out.

11. The Appellant was incarcerated from the **24th** day of **November, 2015**. He has been in custody for three (3) years and two (2) months. In the premises I set aside the sentence imposed and substitute it with the term served. Therefore the Appellant shall be set free forthwith unless otherwise lawfully held.

12. It is so ordered.

Dated, Signed and Delivered at Kitui this 5th day of February, 2019.

L. N. MUTENDE

JUDGE