



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT KITUI

#### CRIMINAL APPEAL NO. 34 OF 2018

**JOSPHAT MUSYOKA MWANZWII.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from Original Sentence in **Kyuso Principal Magistrate's Court Criminal Case No. 66 of 2014** by **Hon. E. M. Mutunga (RM)** on 24/02/15)*

### J U D G M E N T

1. **Josphat Musyoka Mwanzwii**, the Appellant, was charged with two (2) Counts of **Grievous Harm** contrary to **Section 234** of the **Penal Code**.
2. Facts of the case were that on the **23<sup>rd</sup>** day of **February, 2014**, elders of Anzauni were having a clan meeting to raise money for payment of school fees for one **Muthambe's** children. PW1, **Mati Mwange**, the Clan Chairman notified people who were not invited to leave. The Appellant who was one of the intruders removed a knife and stabbed PW1 on the abdomen and PW2, **Joseph Wambua** as well. They were treated at **Kyuso District Hospital**. The Appellant was arrested and charged.
3. Upon being put on his defence the Appellant stated that when the Chairman asked people without the invitation letter to leave, he (Appellant) was kicked and beaten until he became unconscious. While on the ground he remembered the knife he had which he took and used to cut the Complainants then escaped.
4. The learned Magistrate considered evidence adduced, found the Appellant guilty, convicted and sentenced him to **five (5) years imprisonment** on each Count.
5. Aggrieved, the Appellant appeals against the sentence on the grounds that: He has reformed and gained ideas that will enable him to build the Nation; at the age of 68 years he has health problems and is the sole breadwinner of his family.
6. At the hearing of the Appeal, the Appellant urged that he has served four (4) years imprisonment therefore he prayed to be released as his mother had died, his children dropped out of school and generally his home was in a state of disorder.
7. In response the State through **Mr. Mamba**, learned State Counsel agreed that indeed the Appellant was an elderly man. However, he urged that there was no evidence that he was remorseful or that his state of health was deteriorating.
8. I have considered what is on record in the Lower Court.
9. In the case of **Bernard Kimani Gacheru vs. Republic, Criminal Appeal No. 188 of 2000** the Court of Appeal stated thus:  
  
*“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. **Section 14(1)** of the **Criminal Procedure Code** provides thus:

***“(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.”***

11. In the case of **Peter Mbugua Kabiu vs. Republic (2016) eKLR** the Court of Appeal stated as follows:

***“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.”***

12. After sentencing the learned trial Magistrate fell into error by not directing how the sentence imposed on the two (2) Counts were to be served. It is apparent that the offences herein were committed in a single transaction therefore it should have been directed for the sentences to run concurrently.

13. The Appellant has been incarcerated for the last 4½ years. That being the case, I set aside the sentence imposed and substitute it with the term already served. He shall be released forthwith unless otherwise lawfully held.

14. It is so ordered.

**Dated, Signed and Delivered at Kitui this 7<sup>th</sup> day of May, 2019.**

**L. N. MUTENDE**

**JUDGE**