



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.13 OF 2018

(Being an appeal from the decision and sentence by Hon. S. Mokuia (CM) in Kericho S. O. No.86 of 2016)

NIXON KIBET BORE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was charged in the subordinate court at Kericho with assault causing actual bodily harm contrary to section 251 of the Penal Code, The particulars of the offence being that on 25th July 2018 at Kiptaldal village, Waldai location in Belgut sub-county, within Kericho County unlawfully assaulted Daniel Koech thereby occasioning him actual bodily harm.

2. He was recorded as having pleaded guilty to the charge and was sentenced to serve five (5) years imprisonment. He has now come to this court on appeal on the following grounds-

- 1. That the sentence of 5 years imprisonment be replaced by a non-custodial sentence.**
- 2. That the complainant wanted to withdraw the case but he came late after the appellant had pleaded guilty.**
- 3. That he was the sole breadwinner in his family of 7 children.**
- 4. That he was a first offender and regretted committing the offence.**
- 5. That he was not given a chance to explain himself during plea.**

3. The appellant also filed written submissions, which I have perused and considered. At the hearing of the appeal, the appellant relied on the written submissions and elected not to highlight the same.

4. Mr. Ayodo the learned Assistant Director of Public Prosecutions opposed the appeal and submitted that the plea of guilty was unequivocal. The appellant was also given a chance to mitigate but he elected to keep quiet. Since the sentence was the legal sentence, the appeal should be dismissed as the mitigation in this appellate court is an afterthought.

5. In response, the appellant reiterated that the complainant was willing to forgive him before he appealed.

6. I have perused the record of the trial court and considered the grounds of appeal and submissions of the appellant and the State. In my view, the conviction of the appellant on a plea of guilty was proper, as the plea was unequivocal.

7. On sentence, the appellant was a first offender, as the prosecution said so. The appellant in mitigation said nothing, and was imprisoned for 5 years. He has now raised several mitigating factors in his grounds of appeal, which he should have raised in the trial court. In my view, those mitigation grounds not having been raised at the trial court should not on a general rule be raised on appeal, as they are not new developments.

8. However, though sentencing is an exercise of discretion by a trial court, I note that the trial court did not in sentencing even take into account that the appellant pleaded guilty and did not waste court's time, and secondly, that he was a first offender. That omission in my view influenced the trial court in handing down the maximum sentence of 5 years imprisonment. I appreciate that the appellant displayed a lot of violence on his father by cutting him with a machete on his head therefore a non-custodial sentence cannot be appropriate. Though a non-custodial sentence is not appropriate, I am of the view that a sentence of 3 years imprisonment would be adequate punishment, seeing that the

appellant was a first offender and pleaded guilty to the charge.

9. I thus will allow this appeal only on account of sentence. I uphold the conviction. With regard to sentence, I set aside sentence imposed by the trial court and instead order that the appellant will serve three (3) years imprisonment from the date he was sentenced by the trial court.

Dated and Delivered at Kericho this 10th December 2019.

George Dulu

JUDGE