



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 39 OF 2017

KENNETH KIMEMIA KAMAU.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 167 of 2016 of the Senior Resident Magistrate's Court at Gichugu).

JUDGMENT

The appellant Kenneth Kimemia Kamau was charged with the offence of grievous harm contrary to section 234 of the Penal Code before the Senior Resident Magistrate – Gichugu court in Criminal Case No. 167 of 2016. After a full trial he was convicted and sentence to serve five years imprisonment.

The appellant, lodged an appeal against both the conviction and sentence. However when the appeal came up for hearing on 15/4/18, the appellant abandoned the appeal on conviction and argued the appeal on the sentence.

The appellant raised four grounds with regard to the appeal on sentence. The first ground is that he is serving a five year sentence with no option of a fine. That the charge calls for a less minimum sentence. That the sentence will prevent him from getting higher education and employment as he is a student at Kirinyaga University College pursuing a Diploma Course in Certified Public Accounting. He is also set to pursue a Parallel Certificate course in Computer Applications. That the prison custody is not conducive for learning.

The second ground is that he is a first offender and has never been involved in crime. That he acted in self defence after a normal quarrel which resulted into a fight. He pleads with the court for pardon and give him another chance.

The 3rd ground is that he is a family man.

That he has been in remand since May 2017 and has spent time in the dispensary. He has become born again and learnt Christian values and is now a new being ready to be re-integrated in the community.

The state through the State counsel Mr. Obiri submitted that the appellant was convicted of a serious offence which attracts a sentence of life imprisonment. The complainant lost one tooth. The sentence imposed was quite lenient. That the appellant is not remorseful as he says he acted in self defence. That the situation he finds himself in is not unique to him. That the duties he is undertaking in prison show he is undergoing correction. He urged the Court not to disturb the sentence.

I have considered the appeal on sentence. The law is well settled that an appellate court will only interfere with the sentence of the trial court if the court acted on wrong principles and failed to consider some relevant matters. This is based on the principle that sentencing is the discretion of the trial court.

In the case of *Republic –vs- Murimi Njiru(2015) eKLR* the court stated:

“The grounds upon which a sentence can be reviewed were set out in the case of BMN –VS- REPUBLIC [2014] eKLR the court held as follows:

The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of OGOLLA S/O OWUOR, [1954] EACA 270 wherein the predecessor of this Court stated:

The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”.

To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky [1912] CCA 28TLR 263)." See also In Omuse - v- R (Supra) while in the case of Shadrack Kipkoech Kogo – v- R., Eldoret Criminal Appeal No. 253 of 2003 the Court of Appeal stated thus:-

Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.

In the case of KENNETH KIMANI KAMUNYU -VS- REPUBLIC [2006] eKLR it is stated that an appellate Court can only interfere with the sentence if it is illegal or unlawful.

The above authorities demonstrate that sentence may only be reviewed on appeal where the appellant satisfies the court that the sentence was illegal, excessive or that the magistrate acted on the wrong principles or overlooked some material factors."

From the record of the lower court, the appellant in his mitigation stated that it was his first time to be found on the wrong side of the law. That he is a student. He prayed for a sentence that would enable him to go on with his studies. He also stated that the complainant forgave him.

The court allowed the complainant to address the court and he stated that the accused was no longer his friend, he has not forgiven him and had not compensated him. The appellant has not bothered to ensure his tooth was replaced and they had not reconciled.

The trial Magistrate considered the mitigation and found that the appellant was a 1st offender and deserves leniency. She noted that the offence was serious, a felony and an alternative sentence to imprisonment cannot be meted out.

I am of the view that the trial magistrate considered all the relevant matters when sentencing the appellant. The sentence cannot be faulted. The sentence passed was lenient as the law provides for a maximum sentence of life imprisonment. The appellant had not taken steps to remedy the wrong to the complainant before the sentence or to reconcile with him. Given those circumstances I am of the view that the trial magistrate did not act upon wrong principles nor did she overlook some material factors. That being the case this court would have no reason to alter the sentence. The only other consideration is whether the sentence itself was so excessive and as stated in the case of Kipkoech Kogo –v- R C. A which I have cited, such that the sentence is itself, manifestly excessive and therefore an error of principle must be inferred. For offence of grievous harm, the maximum sentence is life imprisonment. The appellant was sentenced to serve five years imprisonment. The sentence cannot be stated to be manifestly excessive. The sentence is lawful.

The appellant has stated what he is going through in the prison. As submitted by the Prosecuting Counsel the experience is not unique to the appellant. He is going through a reform process which is important for his own good.

The appellant is pleading for a non-custodial sentence. The offence he is charged with is a felony. The complainant sustained bodily injuries which resulted in grievous harm with loss of tooth. A custodial sentence was appropriate in the circumstances.

In conclusion, I am of the view that the appeal on the sentence is without merits. I dismiss the appeal and affirm the sentence by the trial magistrate.

Dated and delivered at Kerugoya this 12th day of July 2018.

L. W.GITARI

JUDGE