



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

H.C.CRA.A. NO. 4 "B" OF 2016

DERRICK TECHERA.....2ND APPELLANT

BENSON AURA NDENYOHA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence by C.A.S. Mutai, P.M.

in Butere P.M.C. Criminal case No. 356 of 2014 dated 29.12.2015)

JUDGMENT

The two appellants herein were convicted of 6 counts of assault causing actual bodily harm contrary to section 251 of the penal code (the 1st appellant is reported to have passed away in prison). Each of them was sentenced to serve two (2) years imprisonment on each of the counts. There was no order that the sentences were to run concurrently. Consequently each appellant was to serve 12 years imprisonment. The appellants were aggrieved by the said sentences. They have filed their now consolidated appeals whereby they are challenging the sentences on the grounds that:

(1)The trial court did not consider their mitigation;

(2) The trial court handed them very harsh sentences;

The appellants are seeking for orders that the sentences be ordered to run concurrently.

The state opposed the appeal but only relied on the record of the lower court.

In his petition the 2nd appellant Derick stated that he is very remorseful and that he prays for leniency. He reiterated the same in his written submissions. He submitted that the sentence of 12 years imprisonment is very harsh as he was a first offender. He faulted the trial court for not having considered his mitigation.

The 3rd appellant Patrick Okwiri Anziya similarly in his petition of appeal stated that he was remorseful and prayed for leniency. He filed written submissions in this appeal in which he tended to challenge the conviction. However the appeal as framed is only challenging the sentence and not the conviction. The court will thereby disregard the submissions challenging the conviction.

The appellants were found guilty of attacking the complainants with pangas and injuring them. The complainants in count 1 and 2 were on the way from attending a funeral night vigil when they were attacked. The said complainants then raised alarm. The complainants in count 3 – 6 went to attend to the alarm. They were also attacked with pangas and injured. According to the P3 forms produced during the trial the complainants variously received cut wounds on the heads and limbs.

Sentencing is essentially a discretion of the trial court. A trial court should look at the facts and the circumstances of the case before settling for a particular sentence. The Court of Appeal in *Shadrack Kipchoge Kogo Vs Republic*, Eldoret Criminal Appeal No.253 of 2013 (cited in *Arthur Muya Muriuki Vs Republic* (2015) ECLR held that:

“ Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence,

the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred.”

In their mitigation the appellants had variously said that they were sorry. The offence of assault causing actual bodily harm under section 251 of the penal code is a misdemeanor whose maximum sentence is 5 years imprisonment. The appellants were each sentenced to 2 years imprisonment on each of the counts. Section 14 of the criminal procedure code provides that where the accused is convicted of two or more offences and sentenced to two or more terms of imprisonment, the court should state whether the sentences are to run concurrently or consecutively. In this case the trial court did not comply with that provision.

The general rule is that concurrent sentences rather than consecutive sentences should be imposed for offences committed in the same transaction. In ***Ondieki Vs Republic*** (1981) KLR 430 the High Court held that:

“The practice is that if a person commits more than one offence at the same time and in the same transaction save in exceptional circumstances the sentence imposed is concurrent sentence: Republic Vs Sawedi Mukasa s/o Abdalla Ali Gwanda (1964) 13 EACA 97 (CA-K)”.

In the case before the trial magistrate the offences were committed in the same transaction. The sentences therefore ought to have run concurrently, unless there were exceptional circumstances.

The 3rd appellant was said to have had one previous conviction which had been committed when he was below the age of 18 years. The 2nd appellant was a first offender.

There were no exceptional circumstances to warrant consecutive sentences. The trial court in the circumstances failed to consider the proper principles for sentencing by not making for an order for the sentences to run concurrently.

The appellants were sentenced on the 29/12/2015 in which case they have by now completed their two years' sentences. I accordingly order that the appellants be set at liberty forthwith unless lawfully held.

Delivered, dated and signed in open court at Kakamega this 19th day of September, 2018.

J. NJAGI.

JUDGE.

In the presence of:-

Appellants.....appearing in person.

Miss Ombega.....for the state.

George.....court Assistant.

14 days Right of Appeal.