



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 35 OF 2017

KYALO SAMMY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Sentence in Mutomo Senior Principal Magistrate's Court

Criminal Case No. 107 of 2017 by Z. J. Nyakundi S P M on 26/07/17)

J U D G M E N T

1. **Kyalo Sammy**, the Appellant, was charged with the offence of **Grievous Harm** contrary to **Section 234** of the **Penal Code**. Particulars of the offence were that on the **28th** day of **February, 2017** at **10.00 p.m.** at **Kathungu Village, Ikanga Location** in **Mutomo Sub-County** within **Kitui County**, unlawfully did grievous harm to **Mwende Kyalo**.

2. He denied the charge and after being taken through full trial he was convicted and sentenced to serve **seven (7) years imprisonment**.

3. Aggrieved by the conviction and sentence he appealed. At the hearing of the Appeal, he abandoned the Appeal on conviction

and only mitigated on sentence.

4. In his mitigation he stated that he is the only breadwinner of his family of three who need his support. That he is remorseful as he has reformed spiritually and mentally through prison rehabilitation programmes and he is ready to go back to the society to help in rebuilding the county economy.

5. In response the State through learned Counsel, **Mr. Mamba** opposed the Appeal. He stated that the Complainant was the Appellant's wife and the Court meted out a lenient sentence.

6. The principle upon which the Appellate Court may exercise its discretion of interfering with a sentence meted out by a trial Court was stated in the case of **Ogolla s/o Owour vs. Republic (1954) EACA 270** thus:

“(i) The Court does not alter a sentence on the mere ground that if the member of the Court had been trying the Appellant, he might have passed a somewhat different sentence, and it would not ordinarily interfere with the discretion exercised by the trial Magistrate unless it is evident that the Magistrate acted upon some wrong principles or overlooked some material factors.”

7. This is a case where the Appellant battered the Complainant, his wife until she became unconscious. She remained in that state for a period of seven (7) days. She sustained serious injuries thus:- Bruises on the right cheek and forehead. The left cheek and right ear had a cut wound on the right ear, swelling of the chest and a cut wound measuring **10 x 1 cm** on the middle lower arm. Both knees were bruised. The weapon used was stated to be sharp.

8. In sentencing the Appellant the Court took into consideration all these circumstances.

9. The offence the Appellant faced attracts up to life imprisonment. The learned Magistrate exercised his discretion correctly as he applied the correct principle of law. However I do note that the time the Appellant spent in custody prior to being sentenced was not taken into consideration. In the premises I set aside the sentence imposed and substitute it with **five (5) years imprisonment**, effective from the date of conviction by the Lower Court.

10. It is so ordered.

Dated, Signed and Delivered at Kitui this 19th day of September, 2018.

L. N. MUTENDE

JUDGE