



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 92 OF 2015

MUSYOKA MUTAMBUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 1186 of 2010 by M. W. Murage R M on 18/08/15)

J U D G M E N T

1. **Musyoka Mutambuki**, 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 **19th** day of **December, 2010** at **Waita Village** in **Waita Location** within **Mwingi Central District** of **Kitui County**, unlawfully did grievous harm to **Mbuvi Mutambuki**.
2. After denying the charge he was taken through full trial, convicted and sentenced to serve **five (5) years imprisonment**.
3. Aggrieved by the decision of the Court, he appealed against the conviction and sentence. At the hearing of the Appeal, however, he abandoned the Appeal against the conviction and opted to mitigate on sentence.
4. In his mitigation he stated that the issue was a disagreement regarding a family dispute. That he is a young man and a father of six, a family that solely depends on him. He prayed for reduction of the sentence to a term already served.
5. In response the State through learned Counsel **Mr. Mamba** opposed the Appeal. He argued that the Complainant was his brother whom he left for dead and that the sentence meted out was lenient.
6. The principle upon which an Appellate Court will interfere with the sentence meted out by the Lower Court was enunciated in the case of **Ogolla s/o Owour vs. Republic (1954) EACA 270** where the Court stated that:

“(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. The Appellant was charged with the offence that attracts sentence of upto life imprisonment. The learned trial Magistrate prior to sentencing him asked for a social report that was prepared by the Probation Officer. In sentencing him the Court took into consideration circumstances in which the offence was committed, the fact that the Appellant was a first offender and the findings of the Probation Officer.
8. The Complainant herein is the Appellant's sibling. As a result of the assault the CT-Scan done revealed a parietal depressed skull. The depressed skull fracture needed elevation. He underwent surgery at Kenya National Hospital.
9. In his report the Probation officer noted the impact the assault had on the person of the Complainant. The grievous harm caused him psychological and mental dysfunction.
10. From the foregoing, I find the learned trial Magistrate having exercised her direction having taken into account relevant factors. She applied a correct principle by meting out a sentence that was not excessive.
11. In the premises I find the Appeal unmeritorious. Accordingly I dismiss it.
12. It is so ordered.

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

L. N. MUTENDE

JUDGE