



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**HCCR MISCELLANOUS CASE NO. 25 OF 2018**

**(FORMERLY CHUKA CMCR NO.63 OF 2017)**

REPUBLIC.....RESPONDENT

VERSUS

JAMES KIBAARA KINYUA.....APPLICANT

**R U L I N G**

1. **JAMES KIBAARA KINYUA**, the applicant was charged and convicted for assaulting Dorris Igonji Murungi on 23<sup>rd</sup> December, 2016 contrary to **Section 251** of the **Penal Code**. He was sentenced to serve 1 year imprisonment.

2. He has now moved this court for revision of sentence under **Sections 362 & 364** of **Criminal Procedure Code** contending that the sentence meted out against was a bit harsh . He has averred that he was found guilty of a mis demeanor and should have been given an option of fine or non custodial sentence.

3. The cited law under which the applicant was convicted and sentenced provides for a maximum sentence of five years. The applicant herein as observed was sentenced to serve 1 year imprisonment by the trial court. This court has been told to interfere with the exercise of the lower court's discretion on the basis that the sentence was harsh. I have called for the lower court's file and have perused through the proceedings. I have looked at the nature of injuries suffered by the complainant and noted that they were minor soft tissue. I also noted from the exhibits 1, 2 and 3 that the complainant had reported that she had been raped but medical examination was negative. She later during the trial denied having reported having been raped. That denial in my view is inconsistent with the report made at Magutuni Police Post and appears to suggest that there was more in the case than the report made to the police and the attendant prosecution of the applicant. However this is now immaterial in this application.

4. I have also noted that the applicant was a first offender with a family to fend for. These two aspects are relevant factors which should have been considered in determining appropriate sentence of course commensurate with the offence. Of course slapping another person is an offence and amounts to an assault especially when the victim is a woman and vulnerable to an assailant who is a man. The trial court however should have taken all factors into consideration and hand out a sentence commensurate with the offence. This court has also looked at the probation report dated 4<sup>th</sup> October, 2018 which of course was not part of the consideration during the sentence at the trial court. A custodial sentence of 1 year in the circumstances appears rather harsh.

5. In the premises, this court under **Section 364 (1) (b)** of the **Criminal Procedure Code** hereby sets aside the sentence of 1 year and in its place sentence the applicant to 3 months in jail and thereafter 3 months Community Service to be identified and supervised by the Probation Officer near the place where the applicant comes from. The Probation Officer shall identify a public facility within Sub-County where the applicant comes from and supervise Community Service and a report filed in this court upon finishing the term I have given here (3 months). In default of Service to the Community, the applicant shall be arrested and taken back to prison to finish the remaining term in prison.

**Dated, signed and delivered at Chuka this 8<sup>th</sup> day of October, 2018.**

**R. K. LIMO**

**JUDGE**

**8/10/2018**

Ruling dated, signed and delivered in the open court in presence of Machirah for state.

**R.K. LIMO**

**JUDGE**

**8/10/2018**