REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 66 OF 2016

ABDIKADIR HASSAN DAHIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Wajir SPM Criminal Case No. 281 of 2014 – L. Kassan PM)

JUDGMENT

The appellant was charged in the Principal Magistrates court at Wajir with three counts. Count 1 was for assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that on 29th July 2014 at Hodhan location in Wajir East District within Wajir county unlawfully assaulted Zeinab Hassan thereby occasioning her actual bodily harm.

Count 2 was also for assault causing bodily harm.

The particulars of the offence were that on the 28th July 2014 at the same place unlawfully and willfully assaulted Fatuma Madey thereby occasioning her actual bodily harm.

Count 3 was refusing to be taken finger prints contrary to section 55 (5) of the National Police Service Act Chapter 11 of 2011. The particulars of the offence were that on 29th July 2014 at Wajir Police Station in Wajir East District within Wajir County refused to be taken finger prints for the purposes of prosecution.

He was brought before the court on 30th July 2014, and was recorded as having pleaded guilty to all the 3 counts. He was convicted on all the three counts and sentenced to serve 3 years imprisonment on count 1, 3 years imprisonment on count 2, and 1 year imprisonment on count 3. The sentences were ordered to run consecutively. The trial court further ordered that the appellant should be not released until he served his full sentence.

The appellant has now come to this court on appeal on several grounds. Most of the grounds are related to sentence. However ground 6 and 7 are related to the conviction as he said that he was intimidated to plead guilty and in addition, the elements of the charge was defective.

The appellant also filed written submissions, in which he emphasized that this was a family matter and that the magistrate should have taken this into account. He also complained that the court was wrong in allowing the complainants to address the court.

At the hearing of the appeal, the appellant relied on his written submissions. He however added that he had been in custody for 4 years now and that he had learnt his lesson. He stated that his children were

missing him and that he wanted to participate in the forthcoming general elections.

Learned Prosecuting Counsel Mr. Okemwa, submitted that the appellant pleaded guilty to the charges and the mother and sister who were complainants, addressed the trial court and stated that they did not want him to be forgiven. Counsel submitted that the conviction was proper but felt sentence could be reconsidered by this counsel also felt that count 3 did not contain the penalty section.

I have considered the appeal, submissions of the appellant and the prosecuting counsel. I have also perused the record of the trial court. I was informed by the appellant that complainants were in court during the hearing of the appeal.

The appellant pleaded guilty to the 3 counts on which he was charged. The facts were summarized by the prosecutor and he admitted the same. The record is clear on that. In my view therefore the conviction on count 1 and count 2 was proper. With regard to count 3, as a prosecuting counsel has said, the punishment section for the offence was not cited in the charge sheet. For a person to be charged with a criminal case, the act complained of has to be defined as a criminal offence and a punishment thereto provided by written law. In my view the failure of the prosecution to mention the punishment section in the charge sheet meant that the appellant did know what he was pleading to and its consequences. We cannot thus say that the charge as drafted disclosed an offence, under count 3. I will thus acquit him on count 3.

With regard to sentence, the learned trial magistrate handed down the 3 years imprisonment for each of count 1 and count 2. The maximum sentence for the offence of assault causing actual bodily harm under section 251 of the Penal Code is 5 years imprisonment. The magistrate ordered that the sentence do run consecutively and that the accused should not released until he served his full sentence.

From the record, in my view, the magistrate was influenced in sentencing by the statements made by complainants. In count 1 the mother of the appellant stated that she did not want to forgive her son who had broken her arm and put her life in danger. The complainant in count 2 who was the appellants sister said that the appellant should be jailed as she had suffered enough under him.

Sentencing is an exercise of discretion of a trial court. However in my view the sentence imposed herein was on the higher side. I appreciate that under section 329 (C) of the Criminal Procedure Code (Cap. 75) the trial court may receive a victim impact statement or report. However the sentence in my view should have been made to run concurrently.

As such I will set aside the sentence and order that the sentences of 3 years imprisonment for count 1 and count 2 do run concurrently.

To conclude I quash the conviction of the trial court on count 3 and set aside the sentence of 1 year imprisonment therein. I uphold the conviction on count 1 and 2 but order that the sentence of 3 years imprisonment on count 1, and 3 years imprisonment on count 2 do run concurrently. The appellant will thus serve 3 years imprisonment from the date on which he was sentenced by the trial court.

It is so ordered.

Dated and delivered at Garissa this 6th day of April 2017

GEORGE DULU

JUDGE