



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL CASE NO. 8 OF 2015

[being an appeal from the sentence in Sirisia PMCC Criminal case no. 608 of 2013 by F. Kyambia (PM) delivered on 16.01.2015]

BONFACE ROTICH MONOO.....1st APPELLANT

WISLEY WABWENI MOREI2ND APPELLANT

TIMOTHY NDIWA JUMA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. **BONFACE ROTICH MONOO** (the appellant) **WISLEY WABWENI MOREI** and **TIMOTHY NDIWA JUMA** were convicted for a charge of assault causing actual bodily harm contrary to Section 251 of the Penal Code having assaulted **CALEB CHEPKOI** on 04.09.2013 at **CHEMEGOTOI** village in **CHESIKAKI** location within Bungoma County. They were sentenced to serve 5 years on that count.

2. 1st appellant was also convicted for the offence of obstructing a police officer in the course of duty contrary to Section 103 (9) of the National Police Service Act No. 11 A of 2011 and sentenced to serve 3 years imprisonment.

The sentences were to run consecutively.

3. A brief background to the matter is that the complainant **CALEB (PW1)** had been called by one **WESLEY WAMBWENI** to solve a boundary dispute. However the exercise did not take place, and the appellant who was armed with a panga cut him at the back of his head and he lost consciousness. The other appellants joined in the assault.

The medical findings described the injury as a deep cut caused by a sharp object. The wound was stitched and the degree of injury was classified as harm.

4. When **CPL. KENNETH KINYUA (PW4)** who was assigned to investigate the matter he went to the appellants home, the 1st appellant armed himself with a panga and refused to open the door. However since the officers were armed, they managed to subdue him.

5. The appellants abandoned their appeal on conviction and opted to appeal only on sentence. Mr. Mukisu on behalf of the appellants submitted that the sentence was very harsh and excessive bearing in mind

that they were first offenders and were thus entitled to a non- custodial sentence.

6. He urged the court to consider that the appellants and the victim hailed from the same village and were related.

7. Counsel also pointed out that the trial Magistrate did not say why a custodial sentence was the best option – merely saying that the wound he saw was so grievous and meted the maximum sentence for assault. He urged the court to pay need to Section 26 of the Criminal Procedure Code and reduce the sentence.

He also pointed out that the appellants had already served 2 years 6 months in prison and that was sufficient punishment.

8. As regards the 1st appellant who was also convicted for obstructing police officers in the course of their duties and given a 3 year sentence to run consecutively to the 5 year sentence, Mr. Mukisu argues that a total of 8 years imprisonment is rather harsh and he ought to be given a non-custodial sentence on this count, or at least reduce the period to what he has already served, and at worst order that the sentence should run concurrently.

9. **MR. AKELLO** on behalf of the State conceded that since the appellants were first offenders, a 5 year sentence for assault is rather harsh. However he was opposed to a non-custodial and urged the court to reduce the sentence. He was agreeable to the sentence being served by 1st appellant separately to run concurrently.

10. In meting out the sentence the trial Magistrate stated he had an opportunity to see the injury inflicted on the complainant and it was grievous so under the circumstances he meted the custodial sentence.

11. Indeed the aspect of observation by the trial Magistrate regarding the injury was rather misplaced, perhaps a misapplication of the term “**grievous**” because the medical report was quiet clear that the injury was assessed as harm.

12. The Judiciary's sentencing policy guidelines place a duty on the court to bear in mind the high rates of recidivism associated with imprisonment and seek to impose a sentence geared towards steering the offender from crime. The court must also consider the gravity of the offence, and the criminal history of the offender.

13. The principles under pinning the sentencing process include proportionality- the sentence meted must be proportionate to the offenders behavior. However I also recognize that the objective of sentencing is for retribution to punish the offender for his conduct and deter the offender from subsequently committing a similar offence.

I take into consideration all these factors and I am of the opinion that indeed the 5 year sentence was too harsh and I reduce it to the period already served for the 1st count.

14. As for the 2nd count for which 1st appellant was convicted for , I must point out that a very worrying culture is taking root in Kenya where there is total disregard for authority. Indeed police officers have paid a high price in the course of their duties and for one to arm themselves in a bid to obstruct police officers cannot be condoned or looked at with rose coloured lenses. In my view the 3 years sentence was well deserved but ought to run concurrently with the term already served.

It is to that extent that the appeal succeeds.

DELIVERED and DATED this 15th day of June, 2017 at BUNGOMA.

H. A OMONDI

JUDGE.