



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 22 OF 2014

EMMANUEL KIPKEMBOI LAMAI.....APELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Resident Magistrate Honourable B. Limo in Kapsabet Criminal Case No. 3544 of 2013, dated 19th December, 2013)

JUDGMENT

1. The appellant was charged in two counts with the offence of assault causing assault actual bodily harm contrary to *Section 251* of the *Penal Code*.
2. In the first count, it was alleged that on 12th December, 2013 at Merekei village Keptei location in Nandi County, the appellant unlawfully assaulted *Simion Kipkosgei Segi* by cutting him with a slasher on the left leg and stabbing him on the right hand with a spear occasioning him actual bodily harm.
3. In the second count, the particulars thereof were that on the same date and place, the appellant unlawfully assaulted *Naomi Segi* by hitting her on the back with a slasher thereby occasioning her actual bodily harm.
4. When the appellant was arraigned before the Principle Magistrate's Court at Kapsabet on 16th December, 2013, he pleaded guilty to both charges. He was consequently convicted on his own plea of guilty and was sentenced to three years imprisonment in each count. The sentences were ordered to run consecutively.
5. The appellant was dissatisfied with the sentence imposed on him by the learned trial magistrate. He filed the instant appeal seeking for review and reduction of the sentence on grounds that he was a first offender; that he was remorseful and apologetic for having committed the offence; that drug abuse and bad company which he now promised to shun influenced him to commit the offences and that he was the sole breadwinner for his elderly parents.
6. At the hearing of the appeal, the appellant appeared in person and urged the court to allow the appeal and set aside the sentence. He submitted that he had learnt his lesson in prison and that he was now ready to be a responsible citizen. He also submitted that the sentence was illegal as the sentence in each count was to run consecutively instead of concurrently.

7. The state contests the appeal. Learned prosecuting counsel *Ms Muthui* in opposing the appeal submitted that the appellant intentionally assaulted the complainants inflicting on them serious multiple injuries; that the sentence was lawful and ought to be upheld.

8. I have considered the appeal, the submissions made by the appellant and the state and the record of the lower court. It is trite that sentencing is at the discretion of the trial court but that discretion being a judicial one must be exercised in accordance with the law.

9. A look at the facts supporting the two charges which the appellant admitted as correct hence his conviction shows that the two offences were committed in the course of the same transaction. That is why they were charged in one charge sheet. And though I agree with *Ms Muthui* that the sentence imposed by the trial court in each count was lawful considering the provisions of *Section 251* of the *Penal Code*, the trial court in exercising its discretion should have taken into account that the offences with which the appellant stood convicted were founded on the same facts and ought to have ordered that the sentences in both counts should run concurrently.

The trial court therefore erred by holding that the sentences should run consecutively.

10. I agree with this court's holding in *Odero V Republic (1984) KLR 621* that “ *in cases where a person has been charged with and convicted of two or more counts involving the same transaction, the practice is to direct that the sentences should run concurrently. The three counts for which the appellant was convicted were a series of offences founded on the same facts and committed in the course of the same transaction which was why the counts were joined in one charge as envisaged by the Criminal Procedure Code (cap 75) section 135(1). The trial magistrate therefore erred in ordering the sentences to run consecutively*”.

11. In view of the foregoing, I am satisfied that the appellant's appeal is merited. It is hereby allowed but only with respect to the order requiring that the sentences imposed on both counts should run consecutively. I find no reason to interfere with the term of imprisonment imposed in each count. Considering the circumstances surrounding the commission of the offence and the way the appellant ruthlessly attacked the complainants for no apparent reason, i am not persuaded that the sentence imposed in each count was harsh or manifestly excessive.

12. Consequently, under the powers conferred on this court by *Section 354* of the *Criminal Procedure Code*, I set aside the impugned trial court's order and substitute it with an order that the sentences handed down on the appellant shall run concurrently.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 6th day of July, 2016

In the presence of:

The appellant in person

Ms Mwaniki for the state

Ms Naomi Chonde Court Clerk