REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 317 OF 2013

REUBEN KOECH CHERESI …… APPELLANT

VERSUS

REPUBLIC …….....……..… RESPONDENT

(Appeal from a judgment of the Senior Principal Magistrate's Court at Nyahururu (P.O. Muholi) delivered on 28th October, 2013 in Criminal Case No. 1373 of 2013)

JUDGMENT

1. Reuben Koech Cheresi, the appellant herein was jointly charged with others, for assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars were that on the 12th day of August, 2013 at Rumuruti G.K. Prison within Laikipia County jointly assaulted David Mwangi Wanjiku thereby occasioning him actual bodily harm
2. Trial commenced before Resident Magistrate, P.O. Muholi on 22nd August, 2013. Upon the court stating the substance of the charge and the element thereof, a plea of not guilty was entered. On 28th October, 2013 the appellant expressed to the court his desire to change his plea. The facts were read and he was convicted on his own plea of guilty. He was sentenced to three years imprisonment. The term was to run consecutively with a previous sentence of 14 years for defilement.
3. Being dissatisfied with the sentence, the appellant preferred this appeal and advanced five grounds whose effect is that he expresses remorse for commission of the offence and prays that the two sentences run concurrently.
4. Mr. Nombi, learned state counsel opposed the appeal, arguing that the trial magistrate intention was to pass the maximum sentence. He however erroneously handed the appellant three years instead of the maximum five (5) years as provided in the Penal Code. Counsel prayed that the appeal be dismissed and the sentence be enhanced to five years as provided by Section 251 of the Penal Code.

ISSUES FOR DETERMINATION

5. As the appeal is on sentence alone, the only issue found for determination is whether the sentence was manifestly or grossly inadequate in the circumstances so as to warrant interference; or whether the sentence should run concurrently.

ANALYSIS

6. Before commencing with the hearing the appellant was cautioned that the there could be a

likelihood of the sentence being enhanced. Despite being cautioned the appellant made the election to continue with the hearing of the appeal.

7. The Appellant had been convicted on a charge of defilement and sentenced to a term of fourteen (14) years and then later convicted for assault and sentenced to a term of three (3) years imprisonment. His bone of contention was that the trial magistrate ought to have ordered the sentences to run concurrently as opposed to consecutively. All he wanted was that the sentences be allowed to run concurrently.
8. To the latter part the State was not opposed to the sentences running concurrently but still insisted that the sentence on assault be enhanced.
9. It is trite law that for the sentences to run concurrently it must be shown that the offences were committed at the same time and formed the same transaction.
10. This court has had the benefit of perusing the court record and notes that the offence of assault was committed whilst the appellant was already serving the sentence for defilement.
11. The trial court when passing sentence made this observation that the offence was committed whilst in a correctional facility and the appellant was already serving a different sentence for a different offence.
12. My understanding of the trial magistrate's above finding is that the offence of defilement was totally unrelated to the offence of assault so as to warrant an order that the sentences run concurrently.
13. As held in the case of **Republic** V. **Mohamed Ali Jamal,** (1948) EACA the Court of Appeal observed:

"..... It is well established that an appellate court should not interfere with the discretion exercised by a trial judge or magistrate except in such cases where it appears that in assessing sentence the judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive....."

14. The question is whether this sentence passed for the offence of assault is manifestly or grossly inadequate so as to warrant enhancement?
15. I am guided by the above decision and concur that the issue of sentencing is a discretion exercised by the court seized of the matter. I note that the Appellant had entered a plea of guilty and saved the court the much needed time; the trial court then took into consideration the mitigating circumstances before passing sentence. Taking the above factors into consideration may have been the reasons that the trial court was lenient and therefore imposed the three (3) year sentence.
16. Upon reading **Section 251** of the **Penal Code** this court notes that the sentence provided therein is five (5) years and the trial magistrate was indeed lenient in granting the three (3) year term.
17. This court reiterates that as an appellate court it will interfere with the sentence only when it is manifestly and grossly inadequate. In this instance it is this courts view that the sentence passed of three (3) years cannot be described as grossly and manifestly inadequate.
18. The next issue would be whether the trial magistrate acted on a wrong principle of law when issuing the order that the sentences run consecutively.
19. This court is satisfied that the two offences are totally unrelated as they were not committed at the same time and were not part and parcel of the same transaction.
20. It is my considered view that the trial court did not apply wrong principles of law when ordering that the sentences do run consecutively.

FINDINGS AND DETERMINATION

21. For the reasons set out above, this court is thus disinclined to interfere with the sentence imposed as there are no valid reasons for so doing.
22. The appeal is found to have no merit and is hereby dismissed.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 3rd day of February, 2015.

A. MSHILA

JUDGE