REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 63 OF 2014

MWENDWA MALONZA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(*From the decision in Mwingi S.R.M. Criminal Case No. 29 of 2014 dated 25/06/2014 – M. W. MURAGE Ag. SRM*)

JUDGMENT

The appellant was charged in the subordinate court with assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that on 11th January 2014 at Miambani in Mwingi District of Kitui County assaulted Joseph Ngui thereby occasioning him actual bodily harm. He initially pleaded guilty to the charge. When the facts were explained to him he did not agree with the same. A plea of not guilty was thus entered. The appellant was then released on bond of Kshs. 40,000/=. The case proceeded to hearing on 5th of March 2014. It continued on 16th June 2014. Two witnesses testified.

On the 16th June 2014, the appellant did not cross examine PW2 but asked that the charge be read to him. When it was read to him in Kiswahili, he stated that it was true. A plea of guilty was thus entered. The prosecutor said that the facts were as per the evidence already presented in court. The appellant was thus convicted.

With regard to sentence the learned magistrate asked for a CSO report. When the CSO report was brought it was not favourable to the appellant. He was then sentenced to serve 3 years imprisonment.

He has now come to this court on appeal challenging both conviction and sentence. He stated that he was convicted wrongly while he had a mental problem. That the magistrate did not consider his defence. That he was the sole bread winner of his siblings and their mother. That he was a first offender. That the magistrate did not take into account that he had pleaded guilty to the charge. In effect the appeal is against both conviction and sentence.

At the hearing of the appeal, the appellant submitted that the trial court handed down a harsh sentence while he had pleaded guilty. He submitted that he was sick when he committed the offence, and that was the reason why even the complainant had wanted to withdraw the case against him. The only problem he had was he did not have money for compensating the complainant. Therefore he was now asking the court for leniency.

The Learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel argued that the appellant was convicted on his own plea of guilty. According to counsel this appeal court could only deal with severity to the offence. Counsel submitted that it was not true that the appellant was not given a chance to defend himself. There was also no evidence that he was mentally unwell. Counsel submitted also that the appellant had not explained in what specific respect the sentence was excessive.

In response to the prosecuting counsels' submission the appellant stated that the request to withdraw the case was on record. About his sickness he said the prison officer informed the court but it was not recorded. The appellant maintained that it was sickness that made him attack the complainant.

I have perused the record of the lower court as well as the sentence. In my view the appellant pleaded guilty after two witnesses had already testified. There is no evidence on record that he was either coerced or sick. The evidence on record is that he was a smoker of bhang. That he was a threat in the local community. The record in my view shows that the appellant voluntarily pleaded guilty. He was convicted. In my view the conviction was proper.

With regard to sentence he was sentenced to serve 3 years imprisonment. The record shows that he was allowed to say something in mitigation. It is in mitigation that the appellant said that he was sick at the time of offence. That he stayed in Waita for long under treatment. He also said that he knew the complainant. It was after this mitigation that the learned magistrate deferred sentence and asked for a CSO report. The CSO report however, indicated that the appellant had a history of criminal conviction and of peddling cannabis sativa. That he was often intoxicated with alcohol and violent.

In my view therefore the sentence of 3 years imprisonment was appropriate in the circumstances. I find no fault on the part of the learned magistrate in sentencing the appellant to serve 3 years imprisonment.

To conclude, I find that the appeal lacks merit. I dismiss the appeal and uphold both the conviction and the sentence of the trial court.

Dated and delivered at Garissa this 4th day of March 2015

GEORGE DULU

JUDGE