



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CRIMINAL APPEAL NO. 55 OF 2014**

**SAMUEL NJIRU WANGUCWI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(An appeal from the conviction and sentence of the principal Magistrate's Court (D. Nyaboke) at Wanguru, Criminal Case No. 353 of 2014 dated 30<sup>th</sup> September, 2014)*

**JUDGMENT**

1. **SAMUEL NJIRU WANGUCWI**, the appellant herein was charged with an offence of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code** before **Wanguru Principal Magistrate's Court Criminal Case No. 353 of 2014** where he was found guilty after trial, convicted and sentenced to serve two (2) years imprisonment. The particulars of the charge were that on 17<sup>th</sup> June, 2014 at Mutithi village Kirinyaga County, he unlawfully assaulted **Pauline Muthoni Mbatia** occasioning her actual bodily harm.
2. Upon conviction and sentence the Appellant felt aggrieved and preferred this appeal against both conviction and sentence raising five grounds as follows:
  - (i) *That the learned trial magistrate erred by failing to consider inconsistencies and contradictions in the prosecution's case.*
  - (ii) *That the learned trial magistrate failed in law and fact in failing to consider the relationship between the appellant and the complainant in the case.*
  - (iii) *That the learned trial magistrate erred in law and fact in failing to consider the extent of injuries sustained by the complainant and the fact that he was a first offender.*
  - (iv) *That the sentence was harsh and excessive in the circumstances.*
  - (v) *That the learned trial magistrate erred in law and fact in failing to consider a non-custodial sentence for the appellant.*
3. At the hearing of this appeal the Appellant's learned counsel abandoned the appeal on conviction and proceeded only on sentence arguing grounds 2, 3, 4 and 5 together. Mr. Maina faulted the learned trial magistrate for not taking into consideration the relationship between the Appellant and the Complainant.
4. The Appellant also contended that the Complainant's extent of injuries suffered could not have attracted the sentence of two (2) years imprisonment contending that the same was harsh and

- excessive. He submitted that the Complainant was his former spouse and the trial court should have considered it as a mitigating circumstance given that he was a first offender.
5. He relied on the authority in the case of **MUSA KIBET TOROITICH -VS- R [2015] eKLR and JOHN MURIMI KIHORU & ANOR [2014] eKLR** in persuading this Court to alter the sentence to a non-custodial one.
  6. Mr. Sitati, learned state counsel for the Respondent opposed the appeal on both conviction and sentence submitting that the witnesses called proved beyond reasonable doubt that the Appellant had committed the offence for which he was convicted.
  7. On the sentence he submitted that the law prescribes five (5) years imprisonment and the learned trial magistrate was lenient enough to hand the Appellant two years imprisonment. He supported both the conviction and sentence handed to the Appellant by the trial court.
  8. I have considered the appeal and submissions made by both sides. As I have already stated above the Appellant is no longer challenging the conviction. His remaining challenge is the sentence. This being an appellate court, in ordinary circumstances, it rarely interferes with a discretionary issue such as sentencing. This Court is guided by the decision in the case of **MACHARIA -VS- REPUBLIC [2003] E.A.** where the Court of Appeal made the following observations:  
  

***“The court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge had acted upon some wrong principles or overlooked some material factors.....the sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender.....”***
  9. The Appellant did not do himself any favour at the trial court as he chose to be silent on being called upon to mitigate after conviction. He showed no remorsefulness for the offence he had committed and the learned trial magistrate cannot really be faulted for handing two years imprisonment to the Appellant. At the hearing of this appeal, the Appellant submitted that the Complainant was his ex-wife and that the court should have considered it as a mitigating factor. Of course the fact that the Complainant was his former spouse should not under any circumstances be an excuse to assault her but I agree that it should have been a mitigating factor. In addition to this given that the Appellant was a first offender and given the nature of injuries inflicted, the trial court does appear to have gone a little overboard when it handed the Appellant two years imprisonment.
  10. This Court however, is cognisant of what the learned trial court took into account in deciding that the Appellant deserved a deterrent sentence. He assaulted the Complainant needlessly and without any provocation and given that he chose silence when given a chance to mitigate and at least show some remorsefulness, he deserved a custodial sentence to make him reflect on the offence he had committed and reform.
  11. In view of the foregoing, I am inclined to invoke my powers under **Section 354 (3)** of the **Criminal Procedure Code** and reduce the jail term from two years to twelve (12) months imprisonment. The time the Appellant may have spent in serving his jail term inclusive of the time he was out on bond shall be commuted accordingly to ensure that he serves the twelve months imprisonment. It is so ordered.

***Dated and delivered at Kerugoya this 14<sup>th</sup> day of October, 2015.***

**R. K. LIMO**

**JUDGE**

14.10.2015

Before Hon. Justice R. Limo

Court Assistant Willy Mwangi

Appellant present.

Interpretation English/Kikuyu

Omayo for State present

Samuel Njiru Wangucwi present in person.

**COURT:** Judgment signed, dated and delivered in the open Court in the presence of the appellant in person and Mr. Omayo for the respondent.

R. K. LIMO

JUDGE

14.10.2015