REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 517 of 2006

OSMAN IBRAHIM ……..……..……..APPELLANT

-AND-

REPUBLIC …….....…….....…..RESPONDENT

(An appeal from sentence imposed by Resident Magistrate

D.A. Orimba on 7th April, 2004 in Criminal Case No. 397 of 2006

at Garissa Law Courts)

JUDGEMENT

The appellant herein was charged with the offence of assault causing actual bodily harm contrary to s.251 of the Penal Code (Cap.63, Laws of Kenya). The particulars were that, on 28th March, 2006 at G.K. Prison Garissa, within North Eastern Province, the appellant assaulted one ***George Kinyua***, thereby occasioning him actual bodily harm.

When the charge was "read over and explained to the accused in Kisomali/Kiswahili the language understood by the accused", he replied: "It is true." The prosecution then read out the facts, as follows.

On the material date, the accused was an inmate at Garissa G.K. Prison, and was in the company of the complainant, taking lunch. The accused asked for a spoon from the complainant, but this led to disagreement, and a fight broke out, in the course of which the appellant herein hit the complainant in the mouth, by hand. The complainant was taken to the hospital, as he bled profusely, and his injury was classified as harm. A P3 medical-reporting form was produced as evidence confirming the injury suffered by the complainant.

After the appellant acknowledged the correctness of the foregoing facts, the learned Magistrate entered a plea of guilty. The Court considered the appellant's past record – he was already serving sentence for an escape from lawful custody, and had two previous records – and the mitigation proffered, and sentenced him to five years' imprisonment.

In his petition of appeal the appellant left doubts as to whether he was challenging only sentence (as he could properly do, under the law), or *both* conviction and sentence (as he was not entitled to do, since he had pleaded guilty).

The appellant contended that the Magistrate's Court had been partial in favour of the prosecution; that

the "evidence" adduced could not properly lead to a conviction; that the Court had failed to consider his "submission, mitigation and defence"; that the sentence awarded was harsh; that he was a father of three children who depended upon him.

When this matter came up before the Court on appeal, and learned respondent's counsel, ***Mrs. Kagiri*** sought to know the essential claim on appeal, the appellant now responded: "I pleaded guilty. I am only opposing sentence."

Mrs. Kagiri contested the appeal on that basis, and urged that the five-year jail term imposed fell within the period defined by law, even though it was a maximum sentence. Counsel noted that the sentence awarded was entirely fair, considering that the appellant had previous criminal records. At the time of imposing sentence, counsel urged, there was nothing to show remorsefulness on the part of the appellant, and so the term of imprisonment meted out was entirely in order. Counsel saw no good reason for interfering with the sentence in question.

There are many authorities on the sentencing discretion by a trial Court. In ***Wanjema v. Republic*** [1971] E.A. 493, for instance, ***Trevelyan, J*** thus held (at p.494):

"**A sentence must in the end, depend on the facts of its own particular case... An appellate court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this court's interference ...No account was taken, as it should have been, of the fact that the appellant pleaded guilty: *Skone* (1967), 51 Cr. App. R. 165; *Godfrey* (1967), 51 Cr. App. R. 449. (This admits of no doubt because the Magistrate awarded the maximum sentence to this first offender; which of itself is unusual)...."**

Essentially, the learned Judge in the foregoing case was calling for a *realistic* and *practical* approach in the imposition of penalties; and this Court, faced with a like situation recently held, in ***Yussuf Dahar Arog v. Republic,*** Nairobi High Ct. Cr. App. No. 110 of 2006:

"***Such is, of course, a maximum sentence and, within that constraint, the Court has a wide discretion which is exercised on judicial principles. Such principles would, I believe, take into account the ordinary span of life of a human being; the general circumstances surrounding the commission of the offence; the possibility that the culprit may reform and become a law-abiding member of the community; the goals of peace and mutual tolerance and accommodation among people – those who are injured, and those who have occasioned injury."***

Although in the instant case the applicant is not a first offender, I would be inclined to apply the foregoing principles to him, in particular as he had pleaded guilty and had not over-engaged the Court's time improperly in a long trial; and I would hold that a maximum sentence for him was not appropriate. I will reduce the appellant's term of imprisonment from five years to three-and-a-half years.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 1st day of October, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Mrs. Kagiri

Appellant in person