**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL NO. 62 OF 2018**

**FESTUS YEGON.....APPELLANT**

**VERSUS**

**REPUBLIC.....DEFENDANT**

***(Being an appeal from the sentence in Criminal Case No. 2506 of 2018 at the***

***Senior Principal Magistrate's Court, Kapsabet (Hon. P. Wasike, RM)***

***dated 9 August 2018)***

**JUDGMENT**

**[1]** The Appellant, **Festus Yegon,** was initially charged before the lower court with of the offence of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code**, **Chapter 63** of the **Laws of Kenya**. The particulars of the charge were that on the **27th day of June 2018** at Chemamul Location within Nandi County, he unlawfully assaulted **Elkana Serem** by hitting him with a stick on the head, thereby occasioning him actual bodily harm. He denied those allegations; and, as the complainant was still admitted in hospital at the time of plea, the facts were deferred for the exact condition of the complainant to be ascertained. The Appellant was in the meantime granted a bond of **Kshs. 100,000/**= with one surely in like sum.

**[2]** Thereafter, on the **19 July 2018**, the Charge of assault was substituted with grievous harm, contrary to **section 234** of the **Penal Code.** The Charge as substituted was again read over and explained to the accused person and he maintained his plea of not guilty. The matter was then fixed for hearing on **4 October 2018**. However, when he attended court for mention on **27 July 2018**, he, of his own volition, opted for a change of plea to one of guilty. The matter was stood over to **2 August 2018** when the Charge of grievous harm was again read over and explained to the Appellant in Kiswahili language; and he admitted the same along with the facts in support. The Appellant was, thus, convicted on his own plea of guilty and was, on **9 August 2018**, sentenced to serve 6 years' imprisonment.

**[3]** Being aggrieved by the sentence, the Appellant promptly lodged this appeal on **20 August 2018** raising the following grounds:

> **[a]** That the learned trial magistrate erred in law and in fact in disbelieving that he was a first offender and was extremely remorseful;
>
> **[b]** That the learned trial magistrate erred in law and in fact in not including the option of fine in lieu of custodial sentence, yet the offence has the option of fine;
>
> **[c]** That the learned trial magistrate erred in law and in fact in not taking into account that there was amicable reconciliation with the victim; and that the same ought to have been taken into account before the sentencing;

**[4]** Accordingly, the Appellant prayed that, whereas his conviction was lawful, the sentence ought to be set aside on the grounds that it is illegal. He further prayed that a re-trial be ordered before a different magistrate. With the leave of the Court **(Hon. Githinji, J.)** the Appellant filed what he termed Amended Mitigation Appeal Grounds on the **25 October 2018** to the effect that:

> **[a]** He pleaded guilty to the offence and is extremely remorseful to the Court and the complainant and has since learnt a lesson in prison that criminal offences are bad;
>
> **[b]** He beseeches the Court to grant him a second opportunity for a Probation Report to be filed so that his custodial sentence can be substituted with probation;

**[c]** He be given an option of fine in lieu of the custodial sentence.

**[5]** The Appellant urged his appeal by way of written submissions filed herein on **3 December 2018**. He expressed remorse for the offence and stated that he was drunk at the time. He reiterated his stance that his appeal is only against sentence and urged the Court to consider the mitigating circumstances pleaded by him and vary the sentence to a non-custodial one upon calling for a fresh probation officer's report.

**[6]** The appeal was opposed by Learned Counsel for the State, **Ms. Mumu.** She pointed out that **Section 234** of the **Penal Code** provides for life imprisonment and therefore sought to persuade the Court that the sentence passed on the Appellant was very lenient. Counsel also urged the Court to note that the learned trial magistrate called for a Probation Officer's Report before sentencing the Appellant; and therefore, that his appeal is lacking in merit and ought to be dismissed.

**[7]** I have carefully considered the appeal, the grounds relied on by the Appellant as well as the submissions made herein in respect thereof. It is manifest, not only from the lower court record, but also from this appeal that the Appellant's plea of guilty was unequivocal; and that the learned trial magistrate complied well with the provisions of **Section 207** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya,** as well as the steps enunciated in the case of **Adan vs. Republic [1973] EA 445**. Indeed, the Appellant was categorical that his appeal is confined to the sentence of 6 years' imprisonment imposed on him by the lower court. That is as it should be, for **Section 348** of the **Criminal Procedure Code, Chapter 75** of **the Laws of Kenya** is explicit that:

> **"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence."**

**[8]** And, with regard to the provision aforestated, it was held in **Olel v Republic [1989] KLR 444**, that:

> **"Having considered the submissions by both learned counsel on the interpretation of section 348 ... we have come to the conclusion that where the plea is clearly an unequivocal plea of guilty, an appeal against conviction cannot lie. The section itself is quite clear on that and permits of no confusion or difficulty in its interpretation. It does not merely limit the right of appeal but bars it completely in cases of an unequivocal plea of guilt. That is the fact of what the marginal note also states..."**

**[9]** It is trite law that an appellate court will only interfere with a sentence if certain factors, clearly spelt out in the case of ***Ogalo s/o Owuora vs. Republic [1954] 21 EACA 270,*** exist. In the stated case the court held:

> **"The principles upon which an appellate court will act in exercising its jurisdiction to review sentence are fairly established. The court does not alter a sentence on the mere ground than if the member of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in *James v Republic [1950] 18 EACA 147*, it is evident that the judge has acted upon some wrong principle or overlooked some material factor. To this we would also add a third criterion namely that the sentence is manifestly excessive in view of the circumstances of the case."**

**[10] With the foregoing principles in mind, I have looked at Section 234** of the **Penal Code**, pursuant to which the sentence of 6 years' imprisonment was imposed by the lower court. It provides that:

**"Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."**

**[11]** A perusal of the lower court record shows that the complainant suffered severe injuries and had to be transferred from **Kapsabet County Hospital** to **Moi Teaching and Referral Hospital** for more specialized management. The medical report dated **29 June 2018** that was presented before the lower court revealed the following in connection with the complainant's injuries:

**[a]** There were hyperdense lesions within the right and left parietal lobes, especially on the left side;

**[b]** There was a lesion on the right occipital region of the head, indicative of perilesional oedema;

**[c]** The density of the lesion was consistent with fresh blood.

**[12]** Thus, the impression formed by the Consultant Radiologist, **Dr. Kiyeng**, who prepared the aforementioned report was that the features noted were indicative of intracerebral haemorrhage, especially on the left side; though there was no evidence of skull fracture. The Discharge Summary prepared at **Kapsabet County Referral Hospital** also showed that the complainant required further management after discharge in the form of speech therapy and physiotherapy. By **12 July 2018** when the P3 Form was filled, the complainant was still experiencing weakness on both his upper and lower limbs as well as difficulty in swallowing.

**[13]** Thus taking into account the nature and extent of the complainant's injuries, it cannot be said that the sentence passed by the lower court was disproportionate. It is noteworthy that the learned trial magistrate did call for a Probation Officer's Report and that it was found to be unfavourable to the Appellant. It is also evident that the learned trial magistrate took into account all the relevant factors brought to his attention, including the fact that the complainant's condition had significantly improved; and that he was able to talk by the time the sentence was passed. He also took into consideration what the Appellant had to say in mitigation. In the circumstances, and since the offence of grievous harm carries up to life imprisonment, it cannot be said that the sentence of 6 years' imprisonment without the option of fine is illegal as was urged by the Appellant. To the contrary, it was lenient granted the gravity of the offence.

**[14]** Thus, there being no demonstration that the trial court acted on some wrong principle, or that it overlooked some material factor; or

even that the sentence is manifestly excessive, I would uphold the sentence of 6 years' imprisonment imposed on the Appellant and accordingly dismiss his appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF JANUARY, 2020**

**OLGA SEWE**

**JUDGE**