



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, KIAGE & GATEMBU, JJA.)

CRIMINAL APPEAL NO. 647 OF 2010

BETWEEN

JOHN MUTINDA MUTUA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Conviction and Sentence of the High Court of Kenya at Nairobi (J. N. Khaminwa, J.) dated 7th July, 2010

in

H.C.CR. A. NO. 327 OF 2008)

JUDGMENT OF THE COURT

The appellant, **John Mutinda Mutua**, was charged in the lower court at Makadara, Nairobi with the offence of causing grievous harm contrary to **section 234** of the Penal Code. The particulars of the offence were that on 9th January, 2008 at Mlolongo, Embakasi the appellant unlawfully did grievous harm to **Beatrice Kavinya Mutambuki**.

The brief background of the case was that the complainant (**Beatrice**) used to operate a shop with her lover of 3 years, the appellant, as partners at a place called Mlolongo. They also rented two houses in the same area. On the material day, the complainant and the appellant went to the shop. The appellant then told her that they proceed to one of the rented houses. When they sat down, the appellant asked the complainant for money, adding that if she died, other people would enjoy it, anyway. Seemingly, she did not give him the money; the appellant then locked the door, picked up a stick and proceeded to attack the complainant until she fell unconscious. She ended up in hospital. The matter was reported to the police. The complainant was issued with a P3 form which **Dr. Zaphaniah Kamau** (PW4) completed, certifying that the complainant sustained injuries on the head and a fractured left hand. The injury was classified as grievous harm. The appellant was arraigned in court as stated earlier. After the trial he was found guilty as charged. He was heard in mitigation after which the trial magistrate ordered the appellant to serve 20 years in prison.

Being dissatisfied with that sentence, the appellant moved to the High Court (**Khaminwa, J.**) pleading for

leniency on the grounds that he was married to the complainant; he fought with her and that resulted into his imprisonment; that that had affected their children; he was remorseful and repentant. Having been the family's bread winner, the appellant begged the High Court to substitute the prison term with a non-custodial sentence. At the end of the hearing of the appeal, the learned judge concluded:

“Upon hearing the facts of this case and knowing the injuries he caused to the other person, I find that the appellant is not a person to be treated with mercy. In the circumstances a period of 20 years imprisonment cannot be said to be excessive.”

With that, the appeal to the High Court was dismissed as being devoid of merit.

The appellant was again dissatisfied with that decision and has lodged the present appeal before us by way of filing “MITIGATION” containing five grounds:

- “1. That I was convicted to twenty years imprisonment (sic).***
- 2. That I was the sole breadwinner of my family of school-going children who were (sic) since then dropped out of school and risk becoming destitute due to my incarceration.***
- 3. That the same was a domestic duel between the appellant and wife who has since then abandoned them and abandoned with the appellant's property and remained.***
- 4. That I have since suffered enough over the four years that I have been behind bars and so earnestly and honestly feel remorseful for the offence which has resulted to substantial depravity to my young children and octogenarian parents as well as other dependants in the family.***
- 5. That in the circumstances of this case the sentence of 20 years as meted out against me was manifestly harsh and excessive and kindly humbly and prayerfully pray and without prejudice that the same be favourable (sic) reviewed with a view to ameliorate and alleviate the situation and kindly pray so.***

REASONS WHEREFORE I pray that may this appeal be allowed, conviction imposed to be quashed and the sentence imposed set aside.”

What we glean from the foregoing as the thrust of this appeal is that it is mainly against sentence. The appellant pleads that it is manifestly harsh and excessive and so desires that we reduce it, with the resultant effect that he is released to rejoin his family. The prayer to quash conviction is not borne out in the said mitigation.

At the hearing of the appeal the appellant reiterated what has been set out above.

On her part ***Mrs. G. Murungi***, Senior Assistant Director of Public Prosecutions referred to section 361 of the Criminal Procedure Code and stated that severity of sentence was a matter of fact and not law. The appellant had come here praying that we mitigate the severity of sentence by reducing it, and thus allowing him to go home.

This Court can only hear an appeal based on points of law and not facts. The two lower courts had found and confirmed the fact of imprisonment for 20 years against the appellant and thus we have no jurisdiction to entertain this appeal on the basis of severity of sentence. Had he appealed on the ground that the High Court had enhanced the sentence or that the trial court did not have the power to pass the said sentence, only then could we have entertained this appeal and not otherwise, the learned counsel concluded.

The appellant repeated that in spite of the state of the law, we should accede to his prayer.

This being a second appeal we are bound by the principle that has been set down in many cases, including that of **Njoroge v Republic [1982] KLR 388** in that:

“On a second appeal, the Court of Appeal is only concerned with points of law. In such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on evidence.”

The **Njoroge** case (above) propounds provisions of section 361(1) of the Criminal Procedure Code: -

“361(1). A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –

- a. ***on a matter of fact, and severity of sentence is a matter of fact; or***
- b. ***against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass the sentence.”***

Basically, this Court will only hear an appeal like this one on points of law only. It will consider and is bound by concurrent findings of fact by the trial court as well as the first appellate court, the High Court, unless it is shown that such finding or findings were not based on evidence.

In this appeal, the ground raised before us is on severity of sentence which s.361(1)(a) of the Criminal Procedure Code describes as a matter of fact which we cannot entertain. But section 361(1)(b) permits us to entertain a ground of appeal touching on sentence if the High Court enhanced it or the trial court did not have power to pass it.

Section 7 of the Criminal Procedure Code states as follows regarding sentences which a subordinate court may pass:

“7(1) A subordinate court of the first class held by –

- a. ***a chief magistrate, a senior principal magistrate, a principal magistrate or senior resident magistrate may pass any sentence authorized by law for any offence triable by that court;***
- b. ***a resident magistrate may pass any sentence authorized by law for an offence under section 278, 308(1) or 322 of the Penal Code or under the Sexual Offences Act, 2006.***

(2)(5)

The charge that the appellant faced fell under section 234 of the Penal Code which provides that on conviction, one is liable to imprisonment for life. In the FIRST SCHEDULE to the Criminal Procedure Code, a case based on a charge under s. 234 of the Penal Code can only be heard by a subordinate court of the first class, that is to say, one presided over by either a chief magistrate, a senior principal magistrate, a principal magistrate, a senior resident magistrate or a resident magistrate. The lower court record shows that the appellant’s case was heard by **Hon. A. O. Ademba**, Resident Magistrate. He passed the sentence of 20 years imprisonment to be served by the appellant. The learned Judge of High Court did not have her attention drawn to the fact of jurisdiction that **Hon. Odemba**, a resident magistrate was not competent to pass a sentence of 20 years imprisonment or she did not herself address it. She proceeded and confirmed the sentence.

In our appreciation of s. 361(1)(a) of the Criminal Procedure Code we find that **Hon. Ademba**, Resident Magistrate had no power under s.7 of the Criminal Procedure Code to pass the sentence beyond the maximum of seven (7) years. And with this, it bears a reminder that in any court the presiding judicial

officer must always first ascertain whether he/she has the jurisdiction to entertain the case before court and in a criminal case, what sentence to pass. Jurisdiction is central to any proceedings before a court. It is conferred by law. Without it, no judicial officer should embark on entertaining a given case because the proceedings will be rendered a nullity and if a sentence is beyond one's power, it will be illegal. The Director of Public Prosecutions should also bear this in mind in deciding the courts before which to lay charges.

In this appeal the trial magistrate had no power to pass a sentence of 20 years in prison – only a maximum of 7 years. Although this Court has no jurisdiction where severity of a sentence is the basis of appeal, it has such jurisdiction under s.361(1)(b) of the Criminal Procedure Code where the magistrate who passed the sentence had no power to do so. We appreciate that the appellant did not make that his ground of appeal. However, we cannot close our eyes to the fact that the resident magistrate passed a sentence beyond his power. It was an illegal sentence for an offence that was nonetheless pretty serious. However, for the ends of justice to be met in this particular case, we order that the lower court sentence be set aside and substituted with one of seven years.

Accordingly we allow this appeal and direct that the term of 7 years do run from the date of arrest on 23rd January, 2008 in accordance with the Prison Service Procedures.

Dated and delivered at Nairobi this 14th day of February, 2014

J.W. MWERA

.....

JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

/jkc.