



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL APPEAL NO 13 OF 2020**

**MUSA MUNYENDO MUNYENDO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an Appeal from the Judgment of Hon F. M. Rashid (SRM)**

**delivered at Winam in the Senior Principal Magistrate's Court in**

**Criminal Case No 296 of 2020 on 18<sup>th</sup> May 2020)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant was convicted on his own plea of guilty for the offence of causing grievous harm contrary to Section 234 of the Penal Code Cap 63 (Laws of Kenya) and sentenced to six (6) years imprisonment.
2. Being dissatisfied with the said Judgement, on 28<sup>th</sup> May 2020, he lodged the Appeal herein. In his Petition of Appeal dated 23<sup>rd</sup> May 2020, he set out five (5) grounds of appeal challenging the conviction. His Written Submissions were dated 6<sup>th</sup> April 2021 and filed on 14<sup>th</sup> April 2021 while those of the State were dated and filed on 15<sup>th</sup> April 2021.
3. Both parties relied on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

**LEGAL ANALYSIS**

4. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the Learned Trial Magistrate in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

**“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”**

6. Having said so, the aforesaid scenario and case are not applicable in the circumstances of the case herein as the Appellant pleaded guilty to the Charge. From the Appellant's Grounds of Appeal and his Written Submissions together with the State's Written Submissions, it appeared to this court that the issues that have been placed before it for determination were:-

- a. Whether or not the proceedings for the plea taking were irregular and/or unprocedural; and**
- b. Whether or not the Prosecution had proved its case beyond reasonable doubt.**

7. As these two (2) issues were related, this court dealt with them together.

8. The Appellant submitted that the Charge Sheet did not indicate the time he committed the offence and that he was not identified as the person who assaulted the Complainant herein. In this regard, he placed reliance on the cases of **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984)KLR** where the Court of Appeal held that identification at night time had to be absolutely water tight.

9. He further indicated that the Trial Court did not indicate the language of choice used during trial. In this regard, he placed reliance on the cases of **Munyasia Mutisya vs Republic [2015] eKLR** where the appellate court therein faulted the trial court for not having indicated the language that was used by the court.

10. He further relied on Section 107 of the Evidence Act Cap 80 (Laws of Kenya) in arguing that he assumed no burden to prove his innocence but rather the burden lay with the Prosecution which he said adduced contradictory evidence. He averred that the Prosecution failed to prove the charge.

11. He also argued that the exhibits that were adduced in court were not properly scrutinised and that since no expert was called to prove that the grievous harm was actually committed and how the harm was classified, it raised a lot of doubt.

12. It was his further submission that the Learned Trial Magistrate erred in not having explained the seriousness of the offence.

13. On its part, the State opposed the Appellant's Appeal on the grounds that he pleaded guilty to the Charge, that the charge was read to him in Kiswahili, a language that he understood, that he was informed of the seriousness of the offence, that the plea of guilty was unequivocal and that the exhibits that were adduced in court showed the nature of harm to have been grievous harm.

14. A perusal of the Charge showed that the particulars of the offence were that on the 3<sup>rd</sup> day of May 2020 at Kibos area within Kisumu Central Subcounty within Kisumu County, unlawfully did grievous harm to Damaris Nabwire Wanyama ( hereinafter referred to as the "Complainant").

15. This court also perused the proceedings and noted that when the Learned Trial Magistrate asked him how he wished to plead, the Appellant pleaded "Guilty" whereupon the said Learned Trial Magistrate entered a plea of guilty. The proceedings were clear that he pleaded in Kiswahili language as he stated "Ni kweli."

16. The proceedings further showed that the Learned Trial Magistrate then explained to him the seriousness of the case and the Appellant reiterated that he was guilty.

17. The Prosecution then read the facts of the case detailing what transpired on the material date of 3<sup>rd</sup> May 2020 and adduced in evidence the P3 Form and Treatment Notes and when asked if the facts were correct, the Appellant stated that the facts were correct and admitted that he committed the offence. It was then that he was convicted on his own plea of guilty. In his mitigation, he asked for forgiveness and contended that he would never repeat the offence again.

18. It was evident from the P3 Form that the Complainant sustained a swollen face and presented with raccoon eyes. She also had bruises on the left arm. The probable type of weapon was shown as blunt (blows). Dr Ombok of Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) assessed the degree of injury as grievous harm. The Treatment Notes from the said hospital showed that a CT scan was requested and there was suspicion of fracture of the mandible.

19. A careful analysis of the proceedings in court showed that the same were conducted procedurally and that there was no irregularity. As the State correctly stated, the Appellant pleaded guilty to the Charge on his own volition even after being warned of the seriousness of the offence. There was no ambiguity in the manner he pleaded to the Charge. The plea was that the plea of guilty was unequivocal. The proceedings were conducted in a language that he understood. If he did not understand Kiswahili, he would not have communicated with the Trial Court in the manner that he did leading to his conviction. The court was satisfied that the documentary evidence that was adduced proved a case of grievous harm.

20. Once the Appellant pleaded guilty to the Charge and admitted to the facts of the case, the Prosecution was discharged from adducing any further evidence to prove its case. The legal and evidentiary burden would have been on the Prosecution as envisaged in Sections 107 and 108 of the Evidence Act if the Appellant had pleaded not guilty to the charge or if he pleaded guilty to the charge but denied the facts to the case. Having pleaded to the Charge and admitting the facts of the case, the Learned Trial Magistrate had no option but to convict him in accordance with the law.

21. This court thus came to the firm conclusion that the Learned Trial Magistrate did not err as the Appellant had contended and/or misdirected herself in arriving at the conclusion that she did.

22. Once he pleaded to the charge, the Appellant could only appeal against the legality of the sentence only. Section 348 of the Criminal Procedure Code Cap 75 (Laws of Kenya) states 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 or legality of the sentence."**

23. Having said so, this court noted that the Appellant did not appeal against the legality or otherwise of the sentence that was imposed on him. Although he did not submit on the excessiveness of the sentence, this court found it prudent to address its mind to the severity of the

sentence to save the court resources of hearing another appeal on sentence only.

24. Indeed, although this court bore at the back of its mind that the legal system in Kenya is adversarial, it nonetheless recognised that the High Court has both original and appellate powers when hearing an appeal to review the sentence that has been imposed after a conviction.

25. Notably, Section 354 (1)(a)(ii) of the Criminal Procedure Code states that:-

**“The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may in an appeal from a conviction alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence”**

26. Despite having been convicted for grievous harm on his wife which amounted to gender based violence, he ought to have benefitted from a slightly lower sentence because he saved the Trial Court the resources of going through the rigmaroles of conducting a full trial. This is irrespective of the fact that the maximum sentence is life imprisonment and the sentence of six (6) years was not too excessive.

27. For the avoidance of doubt, this court opted not to get a Probation Report for the reason that the violence was meted upon a wife by her husband and gender based violence must be shunned at at costs.

### **DISPOSITION**

28. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was lodged on 23<sup>rd</sup> May 2020 was not merited and the same be and is hereby dismissed. The conviction and sentence be and are hereby upheld as they were both safe.

29. However, pursuant to its appellate powers, this court hereby sets aside and/or vacates the sentence of six (6) years that was imposed on the Appellant and replaces the same with a sentence of four (4) years.

30. It is hereby directed that any time he spent in custody before he was convicted, it at all shall be taken into consideration at the time of computation of his sentence in accordance with Section 333(2) of the Criminal Procedure Code.

31. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF JANUARY, 2022**

**J. KAMAU**

**JUDGE**