REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL NO. E013 OF 2021

(CORAM: F.M. GIKONYO J.)

(From the sentence of Hon. A.N. Sisenda (R.M) in Narok

CMCR No. E621 of 2021on 16th July 2021)

VICKY CHELANGAT.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

[1]. The appellant was charged with two counts;

[2]. Count I: Assault causing bodily harm contrary to Section 251 of Penal Code. It is alleged that on 3rd June 2021 at around 2200hrs at Sekenani Trading Centre in Narok West Sub County within Narok County the appellant willfully and unlawfully assaulted FANCY CHEPNGETICH by occasioning her bodily harm.

[3]. Count II: Cruelty to a child contrary to Section 127 (1) (a) of the Children Act No. 8 of 2001. It is alleged that 3rd June 2021 at around 2200hrs at Sekenani Trading Centre in Narok West Sub County within Narok County being a mother of FANCY CHEPNGETICH a child aged 9 years willfully and unlawfully assaulted the said FANCY CHEPNGETICH by beating her on the head and biting her both shoulders occasioning her bodily injury.

[4]. The appellant was convicted on her own plea of guilty and sentenced to serve imprisonment for one year in count I and 4 years' imprisonment in count II. Sentence to run concurrently.

[5]. Being dissatisfied with the said conviction and sentence she preferred an appeal as set out in her grounds of appeal in her mitigation of appeal:

i. The Appellant stated that she pleaded guilty.

ii. That the applicant was convicted on a plea that was not unequivocal.

iii. That the conducted the proceedings in a language that was unknown to the appellant

iv. That the facts did not disclose the offence of assault causing actual bodily harm.

v. That the sentence was harsh and manifestly excessive.

vi. That the trial court erred in law in entering a plea of guilty without having regard to the mandatory provisions of the proviso to section 25 (2) of the criminal procedure and evidence code.

vii. That the trial court erred in law in not bringing to the attention of the appellant the statutory defence in assault causing bodily harm.

viii. That she prays to be supplied with the trial court certified proceedings to raise more grounds.

ix. That she prays to be present during the hearing of this appeal.

[6]. Ultimately, she prayed that this appeal be allowed; conviction and sentence be set aside and quashed, and an order for probation or reduce the sentence as it is too harsh and excessive in all circumstances.

[7]. On 07/12/2021 parties agreed to canvass this appeal by way of filing written submissions. From the record only the respondent filed.

[8]. On 7/12/2021 the Appellant orally submitted to this court that her prayer before this court is for reduction of sentence.

Respondent's submission

[9]. Mr. Karanja, the prosecution counsel, submitted for the state that, on 7th June 2021, the charges were read out to the accused in a language she understood; that is Kiswahili language. Upon being asked to respond, the appellant stated 'Ni Kweli'. The trial court recorded the exact words that the appellant said in reply. The appellant responded to the second count as well stated 'Ni Kweli' and her answer was recorded in the language used.

[10]. Facts were read out to the appellant on 18th June 2021, to which the appellant replied 'facts are ture''. Except, it is however not indicated in which language the appellant answered to the facts. Her response is recorded in English unlike the first time when the matter came up for plea. However, there is no indication from the record that this is the language the appellant can speak and understand.

[11]. The prosecution argued that this does not mean that the appellant did not know what was going on in the trial as she was asked to give her mitigation and she stated that she did not have anything to say.

[12]. The prosecution submitted that the appellant had a lot of time to reconsider the plea that she had taken. When the prosecutor read out the facts, she still affirmed her earlier plea. Plea was taken on 7th June 2021 and facts were read on 18th June 2021. The prosecution contends that the actions of the appellant therefore were not of someone who did not understand what they were doing. However, the prosecution stated that the trial court did observe some of the requirements set out and not all. The respondent relied on the cases of ***Adan V Republic [1973] EA 445 At 446, Charles Nyaga Mwiti V Republic [2020] eKLR, Simon Gitau Kinene V Republic [2016] eKLR, Mose V R [2002] 1 EA, 163 and George Wambugu Thumbi V Republic Criminal Appeal 1 Of 2018[2019] eKLR.***

[13]. The prosecution submitted that the facts as read out disclosed all the ingredients of the offence of assault. The ingredients of the offence of assault were clearly set out in the facts; the appellant used her hands in punching the victim, she bit her and used a panga to cut her on the head. The injuries suffered by the victim have been corroborated by the p3 form produced as **P Exh 1.** The medical officer classified the injuries as harm. The facts reveal that the assault occurred in the presence of her other children and who took care of their sister by giving her first aid. The facts also reveal that in the morning a neighbour Cheptoo came to find out why she heard screams during the night emanating from the homestead. Upon seeing the injuries on the child, she rushed her to hospital.

[14]. The prosecution submitted that the sentence passed by the court was well within the limits set by the law as the highest sentence for both offences is 5 years. For assault one would be liable to imprisonment for 5 years. For the offence of cruelty to a child one is liable to a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding 5 years or both. On her mitigation on 18th June 2021, the appellant stated that she had nothing to say. The trial court requested for a pre-sentence report and children officer's report for consideration before sentencing. On 16th July 2021, the trial court considered the two reports as well as the demeanor of the appellant. The appellant was not remorseful.

[15]. The prosecution submitted that for the sentence passed by the lower court to be overturned, the appellant has to show that the sentence was illegal or the court acted ultra vires in passing the sentence.

[16]. The prosecution submitted that no material has been placed before the honourable court that would lead to interference with the exercise of discretion by the lower court.

[17]. The prosecution submitted that the plea of the appellant was properly taken and thus the sentence passed was also proper.

[18]. The prosecution submitted that if the court finds that the plea was not proper, this court should order for a retrial. The prosecution relied on the cases of ***Christopher Mutie Musyyoki V Republic [2019] eKLR, Ahmed Sumar V R [1964] EA 483.***

[19]. In conclusion the prosecution submitted that no prejudice will be suffered by the appellant if a re-trial is ordered since the amount of time that has passed since she pleaded guilty is less than a year; plea was taken on 7th June 2021. The prosecution was not afforded to call its witnesses due to the appellant pleading guilty and the victim in this case deserves justice.

ANALYSIS AND DETERMINATION.

[20]. Where a plea is unequivocal, an appeal against conviction does not lie, except on the extent and legality of sentence (**See section 348 of the Criminal Procedure Code, and Olel v Republic [1989] KLR 444).**

[21]. Thus, section 348 of the CPC applies where the plea of guilt is valid and unequivocal.

[22]. My view is that an accused who pleads guilty to the charge is also entitled to opportunity for a full and fair trial; hence, the legal requirements in section 207 of the CPC, and the case of Adan vs. Republic; that, the trial court, conducting a trial upon regular proceedings, after due appearance of the accused, established the language the accused understands, read all essential elements of the offence to, in the language the accused understood, recorded the plea in as much as possible in the exact words used by the accused in reply to the charge, and also read the facts of the case in the language the accused understood, and so also recorded his reply. This process and procedure of taking plea which was aptly prescribed in the case Adan vs. R underpins a system of jurisprudence geared towards securing fair trial. See **Adan vs. Republic:**

> **i. The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands**
>
> **ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;**
>
> **iii. The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**
>
> **iv. If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;**
>
> **v. If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.**

[23]. What then, were the circumstances in the present case and was that procedure followed?

[24]. The appellant was arraigned before the chief Magistrate's Court at Narok on 7th June 2021. The record shows that the substance of the charge(s) and every element thereof was stated by the court to the appellant in the language that she understood. On being asked whether she admits or denies the truth of the charge(s) she replied in Kiswahili '***Ni Kweli'*** for count I and count II '***Kweli'***.

[25]. On 18/6/2021, the prosecutor then stated the facts thus:

> **"Facts are that on 3/6/2021 at 10.00 p.m. the complainant was at home with her 2 sisters and slept after taking supper. As they were sleeping the accused called for them to open the door. One of the sisters opened and she entered and fell down as she was drunk. The sister woke up her other sister to her lift their mother to the chair. They helped her up. The accused started crying and attacked the complainant and punched her and bit her and picked a panga. She started beating her with it and cut her on the head. She then dropped the panga. One of the sisters picked up the panga and hid it. The accused then left. The other sisters gave the victim first aid and covered the wound with a mattress to absorb the blood. They then slept. The next morning at 8.00 a.m. one Cheptoo came to inquire why they were screaming the night before. They explained their mother was beating then and showed her the wounds. Cheptoo took the victim to hospital and then tourist police post. She was taken to Sekenani dispensary for further treatment. The accused was then arrested and charged. I wish to produce. P3 form- P. Exh 1."**

[26]. The appellant is then recorded as having stated "**facts are true**" after which the court convicted her on her own plea of guilty.

[27]. I do note that, although the trial magistrate recorded the reply to the facts as ''facts are true'', there is nothing to show that the appellant did not understand the facts. The record indicates the language the appellant understood was used.

[28]. Having examined the record of proceedings before the trial court, I find that the requirements in Section 207 of the Criminal Procedure Code as well as the steps set out in the case of Adan vs. Republic were adhered to.

Other contentions facts not disclosing offence, and warning

[29]. I must also determine the two contentions that; i) the facts as read out and admitted did not disclose the offence of assault causing actual bodily harm; and ii) she was not afforded of or warned as her statutory defence.

Facts not disclosing offence

[30]. The Appellant was charged with the offence of assault causing actual bodily harm C/S 251 of the Penal Code and cruelty to a child contrary to section 127 of the Children Act.

[31]. Of assault causing actual bodily harm, section 251 of the Penal Code provides:

> **"Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.** "

[32]. The claim that the facts read did not disclose an offence should be gauged against the facts that were read and recorded. It was recorded: -

"Facts are that on 3/6/2021 at 10.00 p.m. the complainant was at home with her 2 sisters and slept after taking supper. As they were sleeping the accused called for them to open the door. One of the sisters opened and she entered and fell down as she was drunk. The sister woke up her other sister to her lift their mother to the chair. They helped her up. The accused started crying and attacked the complainant and punched her and bit her and picked a panga. She started beating her with it and cut her on the head. She then dropped the panga. One of the sisters picked up the panga and hid it. The accused then left. The other sisters gave the victim first aid and covered the wound with a mattress to absorb the blood. They then slept. The next morning at 8.00 a.m. one Cheptoo came to inquire why they were screaming the night before. They explained their mother was beating then and showed her the wounds. Cheptoo took the victim to hospital and then tourist police post. She was taken to Sekenani dispensary for further treatment. The accused was then arrested and charged. I wish to produce. P3 form- P. Exh 1."

[33]. The essential elements of the offence of assault causing actual bodily harm are;

i. Assaulted the complainant or victim, which

ii. Occasioned actual bodily harm. (See the case of **Ndaa vs Republic[4])**

[34]. An assault is any act by which a person intentionally or recklessly causes another to suffer or apprehend immediate unlawful violence. The term is often used to include a battery- an intentional or reckless application of unlawful force to another person (*DPP v Little* [1992] QB 645).

[35]. Of actual bodily harm, or hurt or injury, in **Rex vs Donovan[5], Swift J,** stated:-

"For this purpose, we think that "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the complainant. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling."

[36]. See also **R vs Chan-Fook[6],** paragraph D Lord Hobhouse LJ said:-

"We consider that the same is true of the phrase "actual bodily harm". These are three words of the English language that receive no elaboration and in the ordinary course should not receive any. The word "harm" is a synonym for injury. The word "actual" indicates that the injury (although there is no need for it to be permanent) should not be so trivial as to be wholly insignificant."

[37]. Also relevant is a passage in ***Archbold's Criminal Pleading, Evidence and Practice,* 32nd Edition,** Page 959 where it is stated as follows: -

"Actual bodily harm includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor" (i.e. complainant)

[38]. Section 2 of the Penal Code defines: -

"harm" means any bodily hurt, disease or disorder whether permanent or temporary;

[39]. I have carefully examined the facts, especially: -

The accused… attacked the complainant and punched her and bit her and picked a panga. She started beating her with it and cut her on the head.

[40]. These facts show that;

i) the appellant attacked and punched, and beat and cut the victim with a panga- an act by which she intentionally caused her victim to suffer immediate unlawful violence; and

ii) the assault resulted in actual bodily harm which was evidenced by way medical documents. Thus, the facts proved the assault which caused actual bodily harm. Both elements of intention to suffer violence (mens rea) and the assault (actus reus) were present in the facts read.

[41]. These facts, therefore, disclose an offence and supported the charges of assault causing actual bodily harm contrary to section 251 of the Penal Code. I will however, revisit and discuss this charge under splitting of charges.

[42]. Assault is also subsumed in Section 127(a) of the Children's Act provides;

"127. (1) Any person who having parental responsibility, custody, charge or care of any child and who-

(a) wilfully assaults, ill-treats, abandons, or exposes, in any manner likely to cause him unnecessary suffering or injury to

health (including injury or loss of sight, hearing, limb or organ of the body, and any mental derangement);

[43]. The facts therefore supported both counts.

Warning

[44]. The appellant also contended that it was not brought to her attention the statutory defence in assault and causing bodily harm. Notably, the offence charged was not a capital offence or a felony.

[45]. Accordingly, I find that the plea was unequivocal.

Sentence

[46]. Was the sentence harsh? The appellant was sentenced to serve one year imprisonment in count I and 4 years imprisonment in count II. Sentences were to run concurrently.

[47]. Section 251 of the Penal Code provides that a person who is guilty of the offence of assault occasioning actual bodily harm commits a misdemeanor and is liable to imprisonment for five years. The appellant was sentenced to one year for count 1.

[48]. Section 127 of the Children's Act provides;

"127. (1) Any person who having parental responsibility, custody, charge or care of any child and who-

(a) wilfully assaults, ill-treats, abandons, or exposes, in any manner likely to cause him unnecessary suffering or injury to health (including injury or loss of sight, hearing, limb or organ of the body, and any mental derangement);

(b) by any act or omission, knowingly or wilfully causes that child to become, or contributes to his becoming, in need of care and protection, commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings, or to imprisonment for a term not exceeding five years, or to both.

Provided that the court at any time in the course of proceedings for an offence under this subsection, may direct that the person charged shall be charged with and tried for an offence under the Penal Code, if the court is of the opinion that the acts or omissions of the person charged are of a serious or aggravated nature."

[49]. The appellant was sentenced to 4 years imprisonment in count 2.

[50]. The court is acutely aware that, in law, and under section 127 of the Children Act, the court at any time in the course of proceedings for an offence under the section, may direct that the person charged shall be charged with and tried for an offence under the Penal Code, if the court is of the opinion that the acts or omissions of the person charged are of a serious or aggravated nature. However, in preferring different charges arising out of same set of facts or circumstances, care should be taken not to duplicate charges or enter the realm of unlawful splitting of charges or cause the person to suffer double jeopardy.

[51]. I do note that section 127(1)(a) of the Children Act makes it an offence where: -

Any person who having parental responsibility, custody, charge or care of any child and who-

(a) <u>wilfully assaults</u>, ill-treats, abandons, or exposes, in any manner likely to cause him unnecessary suffering or injury to health (including injury or loss of sight, hearing, limb or organ of the body, and any mental derangement); [underlining mine for emphasis]

[52]. Two major legal predicaments arise in the manner charges were preferred in this case.

[53]. One, assault of the minor by the appellant was charged under section 127 of the Children Act, and she was accordingly convicted. Therefore, charging her with assault causing actually bodily harm under section 251 of the Penal Code could be objectionable on the basis of unlawful splitting of charges or double jeopardy.

[54]. Two, the test in section 127 of the Children Act is: -

… the person charged shall be charged with and tried for an offence under the Penal Code, if the court is of the opinion that the acts or omissions of the person charged are of a serious or aggravated nature."

[55]. Given that the charge in section 251 of the Penal Code is a misdemeanour carrying a maximum sentence of imprisonment for five years, I doubt it would pass for a charge for…***acts or omissions of the person charged are of a serious or aggravated nature***.

[56]. Accordingly, I suspend the sentence in count I.

[57]. Is 4 years' imprisonment in Count I harsh?

[58]. There is no specific formula of attaining appropriate sentence (**Alister Anthony Pareira vs State of Maharashtra, [2012] 2 S.C.C** 648 Para 69). Appropriate sentence depends on the facts and circumstances of the case (**State of M.P. vs Bablu Natt {2009}2S.C.C 272** Para 13).

[59]. I have considered the nature, the manner of commission of the offence, the principles of sentencing and the amount of sentence imposed. The offence is grave and of aggravated nature for it was characterized by serious bodily injuries to the minor; and the manner it was committed was of a savage kind; bites and panga cuts. The weapon used was dangerous and the injuries were inflicted *inter alia* on the head- which is a sensitive area- a cut wound of 3cm wide, and 1cm deep cut on the head. See medical notes. The victim is her own child, and given that she bore parental responsibility to take care of and protect the child, her unlawful conduct requires deterrent punishment for others. The sentence was legal and appropriate to the offence. I find no reason to interfere with the sentence imposed by the learned Magistrate. I also dismiss the appeal on sentence.

Conclusion and orders.

[60]. Ultimately, I am satisfied that the entire appeal lacks merit and is hereby dismissed. I uphold the conviction and sentence of the trial court.

[61]. It is so ordered

Dated, Signed and Delivered at Narok Through Microsoft Teams Online Application

THIS 25TH DAY OF APRIL 2022

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F.M. GIKONYO

JUDGE