REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 29 OF 2019

COLLINS ANAMI SHILIVIKA...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(An appeal from the judgment of the Chief Magistrate's Court at Kajiado,

delivered on 28th March, 2019 by the Senior Principal Magistrate

Hon. M. Kasera in Criminal Case No. 383 of 2019)

JUDGMENT

1. The appellant was charged with the offence of grievous harm contrary to section 234 of the Penal Code. Particulars were that on the 24th day of March, 2019 at Kitengela Township in Isinya Sub County, he unlawfully did grievous harm to Mary Wanjeru Mugoiyo.

2. The appellant pleaded guilty to charge and the trial court convicted him on his plea of guilty and sentenced him to five years' imprisonment. The appellant was aggrieved with both conviction and sentence and filed a petition of appeal dated 8th July, 2019 raising the following grounds of appeal:

> **1. That the trial court erred in law and fact by failing to consider that the appellant was produced in court on 28th March, 2019 despite having been arrested on 26th march, 2019, thereby violating his constitutional right guaranteed under Article 49(1) (f).**
>
> **2. That the learned trial Magistrate erred in law and fact by failing to consider that the applicant is a layman and therefore did not fully understand the charge as read to him nor the proceedings as conducted in court.**
>
> **3. That the learned Magistrate erred in law and fact by failing to consider that the applicant while in custody and during plea taking, was not supplied with the charge sheet and witness statements of the complainant and therefore never had an opportunity to properly understand the charge and its attendant convictions, prepare a defence nor seek legal counsel.**
>
> **4. That the learned Magistrate erred in law and fact by failing to advise the applicant of his right to appoint legal counsel owing to the serious nature of the offence and accompanying sentence in gross violation of his right as enshrined in Article 50(2) (g) of the constitution.**
>
> **5. That the learned Magistrate erred in law and fact by failing to explain to the applicant, (a layman and who was unrepresented by legal counsel) the full ingredients and consequences of a plea of guilty to the preferred charge contrary to the sentencing guidelines as prescribed in the Policy Directions issued vide Gazette Notice No. 2970 as well as against the well stipulated procedure in plea taking as laid out in Adan v Republic [1973] EA 43.**
>
> **6. That the learned Magistrate erred in law and fact by failing to make the applicant understand his opportunity of mitigation in court and the general issues it encompasses contrary to the sentencing guidelines as prescribed in the Police Directions issued vided Gazette Notice Number, 2970.**
>
> **7. That the learned Magistrate erred in law and fact by failing to consider and take into account the mitigating circumstances of the application through open court or through a pre-sentencing report contrary to the sentencing guidelines as prescribed**

in the police directions issued vide Gazette Notice No. 2970.

8. That the learned Magistrate erred in fact by passing down a grossly excessive sentence and failing to consider the fact that the appellant had no previous criminal record.

9. That the Learned Magistrate erred in fact by passing down a hefty sentence while failing to consider that there were ongoing reconciliation efforts between applicant and the complainant.

10. That the learned Magistrate erred in fact and law by failing to consider that the charge sheet was defective in that the particulars set out do not disclose with precision the nature of the grievous harm suffered by the complainant.

11. That the learned Magistrate erred in fact and law by failing to consider that the facts read out to the applicant with respect to the injuries sustained, did not tally with the findings set out in the P3 form.

12. That had the consequences of the plea and subsequent conviction explained to the unrepresented applicant by the court; this would have altered the plea taken.

13. That the accused was not properly guided by the court on what is required of him during mitigation. The lower court could therefore not appreciate his family circumstances as well as the fact that he was a firs time offender.

14. That the sentence meted out by the court is grossly excessive considering that the learned magistrate did not have the opportunity to hear the applicant's defence and mitigating factors.

15. That it is in the interest of justice that the orders of the court are set aside and the appellants' application is allowed by this Honourable court.

3. During the hearing of this appeal, Mr. Musyoka, learned counsel for the appellant, relied on their written submissions dated 8th November, 2019 and filed in court on 11th November, 2019 in urging this appeal.

4. In the written submissions, it was submitted, first; that the appellant's constitutional rights were violated; that plea was taken two days after the appellant had been arrested which caused him anxiety and contributed to his pleading guilty to the charge. Counsel relied on Article 49(1) (f) of the Constitution to submit that a person arrested for a criminal offence has the right to be produced in court within 24 hours.

5. Second, it was submitted that the trial court erred because it did not advise the appellant on his right to appoint a legal representation in serious offences. Reliance was placed on Article 50 (2) (g) of the Constitution for this contention.

6. Third, it was submitted that a charge should be read to an accused in his own language or in a language he understands and where the accused pleads guilty to serious offences, the court should warn him the consequences to expect. They relied on ***Adan v Republic*** [1973] EA 43 on the duties of the court when taking plea.

7. Mr. Meroka, learned Principal Prosecution counsel opposed the appeal, supported conviction and the sentence. According to counsel, the appellant pleaded guilty and was convicted on his own plea of guilty. He argued, relying on section 348 of the Criminal Procedure Code, that given that the appellant was convicted on his own plea of guilty, an appeal lies only with regard to the legality or substance to the sentence.

8. Regarding sentence learned counsel argued that the sentence of 5 years meted out was appropriate for the offence. According to Mr. Meroka, the victim sustained personal injury where she lost a tooth as a result of the assault. He argued that the facts as stated by the prosecution supported the charge. He also argued that the appellant persistently attacked the victim which confirmed his intention to cause maim or grievous harm. He urged the court to dismiss the appeal, arguing that the plea of guilty was unequivocal.

9. I have considered this appeal, submissions by counsel for the parties and the authorities relied on. I have also perused the record of the trial court and the impugned decision. This being a first appeal, it is the duty of this court, as the first appellate court, to reconsider the evidence, reanalyze and reassess it afresh and come to its own conclusion. In doing so, the court should bear in mind that it did not see the witnesses testify and give due allowance for that.

10. In ***Kiilu& Another v Republic*** [2005]1 KLR 174, the Court of Appeal held that:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."**

11. In this appeal, the appellant pleaded guilty to the charge and was convicted on his own plea of guilty. He has challenged the conviction and sentence on various grounds. These include the fact that the trial court did not warn him of the dangers of pleading guilty. He also argued that the plea was equivocal; that the language used was not indicated and that he did not understand the charge as read to him.

12. The respondent on his part argued that the plea was unequivocal and for that reason, the appellant could only appeal against the legality or substance of the sentence.

13. I have agonized over this appeal. The appellant pleaded guilty to the charge and was convicted on his own plea as correctly submitted by counsel for the respondent. Section 348 disallows appeals against conviction where such conviction was on the basis of one's own plea of guilty.

14. The section provides;

> **"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."**

15. The above provision notwithstanding, an appellate court should apply the section only where the plea, the basis of the conviction, was voluntary and unequivocal. In that regard, whether or not to accept an appeal challenging conviction entered on the basis of a plea of guilty, is a matter at the discretion of the court to be determined if the court is satisfied that the plea of guilty was unequivocal so as to form the basis of the impugned conviction.

16. The court must always strive to do justice to the parties and deal with such an appeal before allowing or disallowing it on that ground. The issue of the nature of the plea recorded by the trial court whether unequivocal or not, is a matter of fact to be borne by the record and the circumstances under which it was recorded.

17. From the record, the trial court recorded the plea as follows:

> **"The substance of the charge and every element thereof has been stated by the court to the accused person in the language that he/she understand (sic) who being asked whether he/she admits the truth of charge(s) replies**
>
> **Accused: It is true.**
>
> **Court: plea of guilty entered."**

18. The prosecutor then read the facts and the appellant was recorded to state:

> **"Facts are correct"**

19. The trial court's record is silent on the language used when conducting the proceedings. The charge is said to have been read in a language that the appellant understood without indicating the language in which the charge was stated. I have perused the original record of the trial court. just like the typed proceedings, the original notes of the trial court are also silent on the language used. What I find are printed words **"English/Kiswahili"** which are not recordings of the trial court in terms of the language used. It cannot therefore be assumed that, that was the language used because that was not the recording of the trial court.

20. It is always important for a trial court to indicate in its handwritten notes, the language used in reading and explaining the charge to the accused. This is so because Articles 50(2) of the Constitution grants every accused person the right to a fair trial which cannot be achieved without clear indication that the aspect of language was compiled with.

21. As already stated, the record of the trial court does not show the language used to enable this court determine whether or not the appellant understood the charge he faced before pleading to it. Language is an important aspect of fair trial in terms of Article 50 (2), (b), (m) which confers on every accused person the right **to be informed of the charge, with sufficient detail to answer it**; and, (m), ***to have the assistance of an interpreter without payment if he cannot understand the language used at the trial.***

22. Without indicating the language in which the charge was read to the appellant, it would be difficult for this court to assume that the appellant understood the charge he faced and unequivocally pleaded guilty to it. The appellant had a constitutional right to a fair trial, a right that is non derogable under Article 25 (c) of the Constitution. Failure by the trial court to ensure that the appellant was accorded this right, by indicating in its record the language used in explaining the charge to him, violated his right to fair trial before that court.

23. The facts constituting the charge were also read to the appellant. This should have also been done in a language he understood to enable him or her respond to them and either admit those facts as stated by the prosecution or dispute them. If he disputed the facts, the court would then have to enter a plea of not guilty and proceed to conduct a trial. The trial court could only convict the appellant on his own plea of guilty if satisfied that he understood the facts as stated by the prosecution and admitted by him. Without indicating the language in which the facts were stated, it would be difficulty for this court to agree with Mr. Meroka that the plea was voluntary and unequivocal.

24. A trial court must always bear in mind the provisions of section 207 of the Criminal Procedure Code on how a plea should be recorded. The section states;

> **"(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.**
>
> **(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded**

as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.

(5) If the accused pleads—

(a) that he has been previously convicted or acquitted on the same facts of the same offence; or

(b) that he has obtained the President's pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge.

" (emphasis)

25. The import of the above provision was emphasized by the East Africa Court of Appeal in ***Adan v Republic*** (supra) where it was held that:

i. The charge and all ingredients of the offence should be explained to the accused in his language or in a language he understands and in instances of a capital offence, where the accused pleads guilty, the trial court must warn the accused person of the consequences of entering such plea;

ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be swiftly 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 guilty, his reply should be recorded and change of plea recorded.

26. It is clear from the trial court did not comply with section 207 of the Code and the above decision when explaining the charge to the appellant and in recording his plea to that charge. Failure to indicate the language used and in the absence of evidence that the appellant understood the charge he faced and the plea he was entering to it, violated his right to fair trial guaranteed under Article 50(2) of the Constitution, a right that is non derogable under Article 25(c).

27. I have also seen the P3 form on record which shows the injuries the victim was alleged to have sustained. The record does not however show that the P3 form was produced as an exhibit. That notwithstanding, the document shows that, whereas the victim was sent to hospital on 26th March 2019, the medical officer signed that P3 Form on 25th March 2019, and it was stamped on 26th March 2019. There was no explanation by the prosecution why there were these discrepancies given that the appellant was unrepresented, and the document was filled in English, a language, it is not clear to this court, if the appellant understood or could read. This casts doubt on that document.

28. The appellant again complained that he was produced in court more than the twenty-four hours allowed by the Constitution after his arrest. The respondent did not respond to this complaint. I have perused the record of the trial court as well as the charge sheet. The charge sheet shows that the appellant was arrested on 26th March 2019. According to the trial court's record, he was presented to court for plea on 28th March 2019. 26th of March 2019 was a Tuesday while 28th was Thursday.

29. It is therefore true that the appellant was indeed produced before court more than twenty-four hours in violation of Article 49 (1)(f) of the Constitution which provides that:

"An arrested person has the right to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day"

30. Although the fact alone that the appellant was produced before court after 24 hours may not have a bearing on the result of an appeal, it may be a factor to consider if it influenced an accused to plead guilty. It is therefore important for the prosecution to comply with constitutional timelines, as failure to do so violates the accused person's constitutional rights and fundamental freedoms. In this appeal, the prosecution a owed the trial court an explanation why it did not comply with the constitutional requirements and produce the appellant before court within twenty four hours.

31. In the end, having considered the appeal, submissions the Constitution and the law, I am satisfied that this appeal has merit and is hereby allowed. The conviction is hereby quashed and the sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated, signed and delivered at Kajiado this 28th day of February, 2020.

E.C. MWITA

JUDGE