REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 31 OF 2019

KEFA MAUMBA NYANG'AU.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. B. M.

Kimtai – PM Keroka dated and delivered on the 22nd day of July 2019

in the original Keroka Principal Magistrate's Court Criminal Case No. 612 of 2019}

JUDGEMENT

The appellant pleaded guilty to a charge of assault causing actual bodily harm contrary to Section 251 of the Penal Code and was sentenced to two (2) years imprisonment. His appeal to this court is premised on grounds that: -

> **"1. The trial magistrate erred in law and fact by not finding that the appellant was first offender.**
>
> **2. The trial magistrate erred in law and fact in finding that the appellant never did the crime intentionally.**
>
> **3. The trial magistrate erred in law and fact in finding the appellant never understood properly what was read to him.**
>
> **4. The trial magistrate erred in law and fact to establish whether the language used was properly interpreted to mean the same meaning as from the interpreted language to the mother tongue language.**
>
> **5. The trial magistrate erred in law and fact by not establishing the acceptance of the complaint for the appellant to re-join the community.**
>
> **6. The trial magistrate erred in law and handed the appellant higher punishment.**
>
> **7. The trial magistrate erred in law and fact by not considering remorsefulness of the appellant."**

In his submissions, Counsel for the appellant summarised the grounds into four as follows: -

> ***"(a) Whether the charges were properly interpreted to the appellant at the time of taking a plea or whether he understood the language the charges were read?***
>
> ***(b) Whether the trial court took regard to the wishes of the complaint (sic) and the family as expressed in the probation report?***
>
> ***(c) Whether the appellant was the first offender?***
>
> ***(d) Whether the offence alleged committed by the appellant had an option of a fine?"***

Counsel submitted that whereas the appellant is totally an illiterate person who does not understand English, the trial court assumed he did

and read the charge in English which he did not understand hence pleading guilty. Counsel submitted that it was evident from the probation officers report that the family of the appellant including the complainant wanted him to be given a non-custodial sentence and the sentence imposed by the trial court was therefore severe. Counsel submitted that the appellant who is still young was the bread winner of his family and urged this court to review the sentence. Counsel further submitted that the appellant was a first offender and the trial court ought to have taken that and the fact that he pleaded guilty into consideration and given him the option of a fine.

The appeal was vehemently opposed. Senior Prosecution Counsel Mr. Majale submitted that the fact that the appellant was a first offender is not a bar to conviction and subsequent sentence. Mr. Majale submitted that each case must be determined on its own merits and that the trial Magistrate considered the probation officer's report in sentencing the appellant. He submitted that the appellant understood the charges and the facts as they were stated and explained to him in Ekegusii language which he understood as evidenced by the record. Mr. Majale further submitted that given the circumstances of the case the sentence imposed by the trial court was lenient. Counsel also pointed out that Section 348 of the Criminal Procedure Code does not allow appeals where the accused has pleaded guilty save for the extent and legality of the sentence. Counsel contended that the guilty plea was unequivocal and that this appeal lacks merit and it should be dismissed and the conviction and sentence upheld.

I have carefully considered the submissions by both sides. My perusal of the lower court record indicates that the languages used by the court were English, Kiswahili and Ekegusii and that there was a court clerk, who is usually an interpreter, in court on that day. The appellant does not allege that he did not understand Kiswahili and Ekegusii. My finding therefore is that the appellant understood the charge and the facts stated to him and that the plea was unequivocal.

On the sentence it is trite that: -

> **"An appellate court is not entitled to alter sentence on appeal unless convinced that the trial court erred in principle in imposing sentence; that the sentence was so manifestly harsh or excessive that it was evident that the trial court erred. The judge may not reduce it simply because he would have felt differently, or substitute a sentence which he would have passed."** ***(See Amolo v Republic [1991] KLR 392 at 393).***

It is clear from the record that the trial court took into account the probation officer's report before sentencing the appellant. While the report may contain recommendation on the sentence, it is never binding on the court and the court is not bound by its contents. In this case the trial court indicated it had notice of the report but did not wish to abide with it as the appellant had been a constant threat to the family. The court noted that a preventive and reformative sentence was most appropriate. Given that the section under which the appellant was charged prescribes a maximum sentence of imprisonment for five years and given the character and attitude of the appellant towards the complainant, I am not persuaded that the trial Magistrate erred in the manner in which he exercised his discretion. The upshot is that this appeal has no merit and the same is dismissed in its entirety and the conviction and sentence are upheld.

Signed, dated and delivered in open court this 27th day of February 2020.

E. N. MAINA

JUDGE

<u>In the Presence of</u>:

Mr. Kaba for Onyancha for the appellant

Kefa Maumba Nyang'au - the appellant

Mr. Majale for state

Millicent – Court Interpreter