



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL NO. 3 OF 2019**

**ZACHARIA GITHIOMI GICHUKI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[An appeal from decision of P. Kiama, Senior Principal Magistrate, in***

***Criminal Case No. 381 OF 2018 at Kangema dated 21<sup>st</sup> January 2019]***

**JUDGMENT**

1. The appellant was convicted on his plea of *guilt* for causing *grievous harm* contrary to section 234 of the **Penal Code**.
2. He was sentenced to *life imprisonment*.
3. The particulars of the charge were that on 21<sup>st</sup> May 2018 at Kiamuturi village, Mathioya Sub-County within Murang'a County, he caused *grievous harm* to his mother, Regina Wanjiru Gichuki.
4. The amended grounds of appeal are three-pronged: Firstly, that the plea of *guilt* was equivocal; Secondly, that the lower court failed to warn the appellant of the consequences of pleading *guilty*; thirdly, that the learned trial magistrate failed to consider that the appellant had an underlying psychiatric problem or did not comprehend the proceedings.
5. The appellant filed a notice waiving his attendance at the High Court due to the prevailing Covid-19 pandemic. He opted instead to rely on his home-made submissions filed on 1<sup>st</sup> September 2020.
6. The appeal is contested by the State. Learned State Counsel, *Mr. S. Mutinda*, submitted that the plea of *guilt* was unequivocal. He argued that the facts and the exhibit (P3 Form) disclosed all the elements of the offence. He said that the sentence handed down was lawful.
7. This is a first appeal to the High Court. I have examined the record; re-evaluated the facts and drawn independent conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E. A. 32.
8. The appellant was first presented to court on 22<sup>nd</sup> May 2018; the same day he took plea. The charge was read to him in *Kiswahili*, a language he understood.
9. Ideally, the words used by the accused should be recorded as closely as possible. *Adan v Republic* [1973] EA 445. The record clearly shows his answer was: "*It is true*". That must be what he stated in *Kiswahili*.
10. However, the facts were not read out on that date for three reasons: Firstly, the court ordered that a *proper* charge be filed. Secondly, the complainant (who was his mother) was still in hospital nursing serious injuries from the assault. Thirdly, the court ordered that the accused be examined by a psychiatrist as to his mental status.
11. I have seen an original report dated 29<sup>th</sup> June 2018 by Dr. J. Mburu, Consultant Psychiatrist. He concluded that the appellant was *not fit* to take plea. Following the doctor's recommendations, the appellant was committed for treatment at Mathari Referral Hospital. A letter from the relevant Principal Secretary is on the record and dated 4<sup>th</sup> September 2018.
12. If I can pause there briefly, there is no doubt in my mind that the original plea of *guilt* entered on 2<sup>nd</sup> May 2018 was *irregular*. However, the trial court was alive to the issue of the appellant's capacity and called for a social inquiry report.

13. On 3<sup>rd</sup> December 2018, the appellant was presented afresh to take plea. By that date a new medical report was available from Mathari Referral Hospital. It confirmed that the appellant was now *fit* to take plea. On 21<sup>st</sup> January 2019, the amended charge was read and explained to the appellant in *Kiswahili*. He replied: *Ni Kweli* [It is true].

14. The facts were then read out to him in *Kiswahili*. He confirmed they were correct. The relevant part stated that he attacked his mother with a *panga* severing off her hand. She also suffered multiple cuts on the neck and shoulder as well as a fractured leg. From the P3 Form (exhibit 2) the degree of injury was assessed as *grievous harm*.

15. From those facts, I find that the appellant was *fit* to plead on 21<sup>st</sup> January 2019. There is no medical basis for his fresh assertions that he did not follow the proceedings. I thus find that the plea of guilt taken on the latter date was *unequivocal*. It must follow that the appeal against *conviction* is without merit and is hereby dismissed.

16. I will now turn to the *sentence*. Section 354 (3) of Criminal Procedure Code empowers the High Court to “*maintain the sentence, or with or without altering the finding reduce or increase the sentence*”.

17. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

*The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors.....The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence.*

18. The learned trial Magistrate considered that the appellant was unwell but not insane at the time of the offence; and, that he was a first offender. The court however took into account the gruesome injuries suffered by his mother. I concur that the offence called for a deterrent sentence.

19. Despite the fresh clamour for leniency, this was a felony. Section 234 of the **Penal Code** provides that any person who commits grievous harm to another is liable to imprisonment for *life*.

20. The vicious attack on his mother was unwarranted. But considering that the appellant was a first offender, and the other mitigating circumstances, I am inclined to reduce the sentence.

21. The upshot is that the appeal on conviction is *dismissed*. The sentence passed against the appellant is *set aside*. The appellant shall instead serve *twenty (20) years imprisonment*. For the avoidance of doubt, the term of imprisonment *shall* take effect from 22<sup>nd</sup> May 2018, the date when he was first committed to custody by the lower court.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG'A this 17<sup>th</sup> day of November 2020.**

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of-**

The appellant via *Zoom* link to Nyeri G.K. Prison.

Mr. Sebastian Mutinda for the Republic instructed by Office of the Director of Public Prosecutions.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.