REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 8 OF 2018

SAMSON MOGAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

{Being an appeal against the conviction and the sentence of Hon. P. W. Wasike – RM dated and delivered on the 24th day of July 2018 in the Original Keroka Senior Resident Magistrate's Court Criminal Case No. 415 of 2018}

JUDGEMENT

The appellant was charged with assault causing actual bodily harm contrary to Section 251 of the Penal Code.

The particulars of the charge were that on 9th April 2018 at Nyakumbati Sub-location in Masaba South Sub-county within Kisii County he unlawfully assaulted Sera Nyarangi Nyaboke thereby occasioning her bodily harm.

He pleaded guilty to the charge and was sentenced to four years' imprisonment. Being aggrieved by the conviction and sentence he preferred this appeal. The grounds of appeal in his petition are that: -

> **"1. The plea was not unequivocal.**
>
> **2. The proceedings are defective in substance.**
>
> **3. The sentence imposed on the appellant is excessive or too harsh."**

He has by this appeal urged this court to quash the conviction and set aside or reduce the sentence.

The appeal was canvassed by way of written submissions. Through his advocate, the appellant submitted only on ground 2 and 3 of the petition. He submitted that the trial magistrate erred in law when he entertained what he referred to as the oral and unprofessional medical opinions of the complainant and disregarded the clear medical evidence which confirmed that the complainant never sustained injuries of grievous harm. Counsel submitted that the learned trial magistrate "assumed the medical profession when making orders that: "the accused indeed caused grievous harm". He is lucky he was charged with assault. The complainant is hesitant to forgive him. From nature of injuries, he intended to cause grievous harm." Counsel submitted that by making those remarks the trial magistrate deviated from the medical evidence produced by the prosecution and hence imposed an extremely harsh sentence. Counsel further submitted that the trial magistrate having called for a probation officer's report should have based his sentence thereon. Counsel urged this court to allow the appeal.

The appeal was vehemently opposed. Principal Prosecution Counsel Mr. Ochieng submitted that the respondent opposed all the 3 grounds. Ochieng submitted that the plea was unequivocal as the stages of plea taking settled in the case of **Adan Vs. Republic [1973] EA 445** were followed. He submitted that the charge was read and explained to the appellant in Ekegusii a language he understood and the appellant replied that it was true; that likewise the appellant admitted the facts which were read and explained to him in Ekegusii and that therefore the appellant understood the substance of the charge and knowingly admitted it. Counsel further submitted that the proceedings which included calling for a probation officer's report were properly recorded. Counsel noted that even though one week passed before the appellant was sentenced, he did not change his plea. Counsel contended that the claim that the plea was unequivocal is an afterthought.

As for the sentence, Mr. Ochieng submitted that the same was fair given the gravity of injuries occasioned upon the complainant and supported the trial magistrate's remarks that the appellant was lucky he was not charged with a more serious offence.

Section 348 of the Criminal Procedure Code provides that **no appeal shall be allowed in a case where the accused has pleaded guilty except as to the extent or legality of the sentence**. It is perhaps for that reason that Counsel for the appellant abandoned ground 1 of the

appeal and I shall therefore make no determination on the same.

Ground 2 is based on the remarks made by the trial magistrate that the injuries occasioned to the victim of the assault amounted to grievous harm and the appellant was lucky that he had gotten away with the less serious offence. According to Counsel for the appellant, by so stating the trial magistrate unlawfully substituted the medical evidence which was before him which showed the victim had suffered harm.

I have considered this ground of appeal and my finding is that the same has no merit. It is evident from the proceedings that the trial magistrate was well aware that the charge he was considering was one of assault causing actual bodily harm and what he made was just a comment to the effect that given the extent of injuries sustained by the victim, the appellant should have been charged with the more serious offence of grievous harm. I am not persuaded that the trial magistrate erred in making those remarks as the injuries sustained by the victim who is the appellant's wife amounted to more than just harm as defined in the P3 Form.

As for the sentence, the offence attracts a term of imprisonment for five years. The trial magistrate considered the nature and circumstances of the offence committed by the appellant and imposed a sentence he considered most appropriate. Whereas the trial magistrate had called for a probation officer's report he was not bound by it as indeed **Section 4 of the Probation of offenders Act** which deals with the power of court to permit conditional release of offenders states that: ***"the court may release the offender on probation"***. Nowhere does the Act make it mandatory for a judicial officer who calls for a probation officer's report to rely on the same in sentencing the accused. The sentence imposed by the trial magistrate was lawful and I see no reason to warrant this court to interfere with it. Accordingly, this appeal is dismissed.

Dated, signed and delivered at Nyamira this 25th day of January 2019.

E. N. MAINA

JUDGE