REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO.11 OF 2018

GILBERT KIBET CHIRCHIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kericho

Chief Magistrate's Court Criminal Case No. 222 of 2018

(Hon. B. Limo, RM) dated 27th March 2018)

JUDGMENT

1. The appellant was charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that on the 19th January 2018 at 1900 hours at Itibey village in Kiptere location Belgut sub-county within Kericho County jointly with others not before court unlawfully assaulted Emily Koros thereby occasioning her actual bodily harm.

2. He pleaded not guilty to the offence and his trail commenced on 26th March 2018. On 27th March 2018, however, after the court had taken the evidence of all the prosecution witnesses and had placed the accused on his defence, he applied to change his plea. The charge was read to him and he stated *"Kweli"* and a plea of guilty was entered. The facts were then read to him by the prosecutor, and he admitted that the facts were correct. He stated in his mitigation that he was praying for leniency from the court. He was sentenced to 5 years imprisonment on 27th March 2018.

3. Aggrieved by both his conviction and sentence, he filed the present appeal through the firm of Mitey & Associates Advocates. In the petition of appeal dated 22nd June 2018, he raises 4 grounds of appeal. The first is that the circumstances under which the appellant pleaded guilty to the charge would render the plea not to be unequivocal. Secondly, that the language of interpretation of the proceedings was in languages in which the appellant was not fluent. Thirdly, that the participation of the appellant vis a vis that of his alleged accomplices was not brought out in the proceedings and finally, that the sentence meted out on him was harsh and excessive.

4. The appeal was argued by Mr. Maina for the appellant while Mr. Ayodo represented the state.

5. In presenting the appellant's appeal, Mr. Maina noted that the appellant pleaded not guilty when first presented to court and was released on a bond of Kshs 20,000. That he failed to appear in court on 9th February 2018 and warrants of arrest were issued. He was then brought to court on 26th March 2018 and the hearing proceeded. That his bond was suspended and directions issued that the case proceeds on priority basis. The case was adjourned to the next day, 27th March 2018, when the prosecution closed its case and the accused placed on his defence. He indicated that he was going to give unsworn statement and call no witnesses, but the record shows that he immediately indicated that he applied to change plea and he pleaded guilty and was convicted and sentenced on the same day.

6. Mr. Maina addressed the court first on the appellant's second ground of appeal. He submitted that the language of the proceedings was not the language in which the appellant fluent. He notes that the language indicated in the record is English/Kiswahili/Kipsigis. His submission was that it was not clear the language he used or responded in. Further, that on 26th March 2018, the language of the proceedings is not indicated, and his submission is that there was no translation on that day.

7. With regard to the proceedings of 27th March 2018, Mr. Maina submitted that the record indicates that the proceedings were only translated to Kiswahili. He contends that based on the fact that on the first day, Kipsigis was indicated as the language of the accused, translation to Kiswahili was not sufficient. He further observes that the record indicates that there was no cross-examination, and there is

therefore nothing to show that the appellant was communicating in Kiswahili.

8. Mr. Maina urged the court to consider the provisions of section 198 of the Criminal Procedure Code which requires translation to be done in the language of the accused person. As the appellant's language was Kipsigis, the appellant did not participate in the trial on 26th and 27th March 2018 as the proceedings were conducted in a language he did not understand as he could only communicate in his language, Kipsigis. Counsel relied on the case of **Stephen Gitonga Wachira vs R Crim. Appl. No.73 of 2018** in which the court declared a mistrial and remitted the case to the trial court in circumstances similar to what is before me.

9. Mr. Maina linked his submissions on the second ground to support the appellant's first ground, that the plea of guilty entered on 27th March 2018 was not unequivocal. This was on the basis that the trial was conducted in a language the accused did not understand. He further argued that the plea was unequivocal due to the circumstances, namely that the appellant's bond was suspended on 26th March 2018, 24 hours before he changed his plea. A ruling that the appellant had a case to answer had been made on 27th March 2018, and he was immediately put on his defence. That he initially said that he wanted to make an unsworn statement, but then changed his plea and pleaded guilty.

10. According to Mr. Maina, this action of changing plea when put on his defence is a move of an embarrassed and ashamed accused person, ashamed because he could not express himself in the language used in court on that day. He further contends that the appellant changed his plea as he was not ready to defend himself immediately a ruling was delivered. It is his submission further that the actions of the appellant were those of a confused and frustrated person since everything seemed to be against him.

11. Finally, he contended in regard to the unequivocal nature of the plea of guilty that the statement of the offence as read to the accused was not complete without informing the accused of the penalty to be meted on him after pleading guilty, placing reliance again on the case of **Stephen Wachira vs R**.

12. Mr. Ayodo's response with respect to grounds 1 and 2 of the appeal is that it is clear that the language used was English/Kiswahili/Kipsigis. He submitted that before the appellant changed his plea, he participated very actively in the proceedings, which he was doing in Kiswahili. He further submitted that the proceedings were conducted in a language he was comfortable in and understood. According to Mr. Ayodo, the language used on 27th March 2018 is indicated as Kiswahili/Kiswahili/Kipsigis.

13. When the charges were read to the appellant, he had responded in Kiswahili that the charges were true, and had responded after the reading of the facts that they were correct. Mr. Ayodo's submission was that the appellant understood the language of the proceedings and it was a language he was comfortable in. Had he not been comfortable, he would have complained to the court and this would have been captured in the proceedings.

14. I have considered the submissions of the parties on the first and second grounds of appeal. I observe, first, that indeed, the trial court was rather lax in the manner in which it recorded the language used in the proceedings. I have in the past decried the use of "English/Kiswahili/Kipsigis" by the trial court in indicating the language used in the proceedings-see **Robert Kipkemoi Tirop vs Republic [2018] eKLR.** I am unable to understand the difficulty in the trial court recording the specific language the proceedings are translated to-either, in the case of proceedings in an area such as Kericho where Kipsigis is spoken, from English to Kipsigis, or from English to Kiswahili.

15. I agree with the sentiments of my brother, Ngaah J in **Stephen Githaiga Wachira vs R** relied on by the appellant. Should a court conduct proceedings in a language that the accused person does not understand, then it has failed in its duty under section 198 of the Criminal Procedure Code.

16. However, having considered the record of the court in this case, I am not satisfied that the appellant did not understand the language used in the proceedings, and that therefore his change of plea to guilty was unequivocal. I note that when the proceedings commenced on 26th March 2018, the appellant indicated that he was ready to proceed. The prosecution then called the complainant, who testified in Kiswahili.

17. It is correct that the appellant did not cross-examine this witness. However, he cross-examined the other three prosecution witnesses, all of whom, as the record expressly indicates, testified in Kiswahili. I am not satisfied therefore that he was embarrassed due to an inability to understand the language, or at all.

18. With respect to his change of plea at the defence stage, I am inclined to the view by the state that he may have found that he had no defence to offer, hence his change of plea. There is no indication throughout the proceedings that the appellant was handicapped by the language used by the court. In my view therefore, grounds 1 and 2 of the proceedings have no merit.

19. The appellant did not address himself to the third ground regarding his participation *vis a vis* those of his accomplices in the assault on the complainant. I therefore deem this ground to have been abandoned.

20. With regard to the final ground on the sentence, Mr. Maina submitted that the sentence was severe and harsh. The appellant had pleaded for leniency and was noted to be a first offender. Yet, he was handed the maximum penalty allowed by law, 5 years' jail term. His submission was that the trial court exercised its discretion injudiciously in disregarding section 26 (3) of the Penal Code which allowed him to pass an alternative sentence.

21. Counsel relied on the decision in **Bila & Another vs R (2017) eKLR** in which the accused was charged with the offence of assault as in this case and was discharged on condition he does not commit another offence for 6 months. Mr. Maina noted that in that case, the sentence was upheld by the High Court, and in his view, this indicated that the trial magistrate in this case had alternatives which he disregarded without reasons. Counsel therefore invited the court to exercise its power under section 354 of the Criminal Procedure Code and review the

sentence.

22. In response, Mr. Ayodo argued that section 251 of the Penal Code provides for only one sentence upon conviction – 5 years. It was his submission that the sentence was legal and the trial court acted within the confines of the law.

23. Section 251 of the Penal Code provides that:

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

24. I have noted the submissions of Counsel for the appellant and the state in this matter. As submitted by the appellant's Counsel, however, and contrary to the argument by the state, a court has discretion on whether to pass the sentence of 5 years prescribed under section 251 of the Penal Code. I take this view on a consideration of precedents with respect to the use of the term ' shall be liable' in legislation.

25. In its decision in **MK v Republic [2015] eKLR** the Court of Appeal stated as follows:

> ***"19. What does "shall be liable" mean in law" The Court of Appeal for East Africa in the case of Opoya vs Uganda (1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in James vs Young 27 Ch. D. at p. 655 where North J. said:***
>
> ***"But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced".***
>
> ***We consider such to be the correct approach to the construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of s. 184 which are "shall be sentenced to death".***

25. I note also the decision of the Court of Appeal **Daniel Kyalo Muema vs Republic [2009] eKLR**. The Court was engaged in construction of the provisions of the **Narcotic Drugs and Psychotropic Substances (Control) Act, Act No. 4 of 1994** where the term 'shall be liable' is used. The Court expressed itself as follows:

> ***"The last observation we want to make is that the phrase as used in Penal statutes was judicially construed by the predecessor of this Court in Opoya vs Uganda [1967] EA 752 where the Court said at page 754 paragraph B:***
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> ***"It seems to us beyond argument the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it".***
>
> ***We respectfully adopt that construction which conforms with the opinion of Mr. Kaigai and which is supported by our preceding observations. We have no doubt that the sentences of 10 years imprisonment and 20 years imprisonment prescribed in Section 3 (2) (a) of the Act for the possession of cannabis sativa are the maxima and that the court can lawfully impose any shorter term of imprisonment. Furthermore, although Section 3 (2) (a) of the Act does not expressly provide for a fine, the court can lawfully in accordance with Section 26 (3) of the Penal Code sentence the offender to pay a reasonable fine in substitution for imprisonment."***

27. In this case, the appellant was a first offender. Though he went through a trial and only changed his plea after the prosecution had closed its case and he was placed on his defence, he did not, in my view, merit the maximum penalty under section 251.

28. From the facts, however, as they emerge from the prosecution evidence tendered before the appellant changed his plea, he had, while in the company of two others, launched an unprovoked attack on the complainant. It appears that the attack was launched because the complainant had purchased a piece of land from the appellant's father. He therefore, in my view, merited a custodial sentence, but not the maximum prescribed by law for the offence of assault.

29. In the circumstances, I hereby uphold the conviction of the appellant. With regard to the sentence, I hereby set aside the term of five (5) years imprisonment imposed by the trial court and substitute therefore a term of imprisonment for 18 months from the date of sentence by the trial court.

30. Orders accordingly.

Dated Delivered and Signed at Kericho this 27th day of February 2019

MUMBI NGUGI

JUDGE