



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CRIMINAL APPEAL NO. 11 OF 2018**

**BENARD ONCHIRI.....APPELLANT**

**=VRS=**

**THE STATE.....RESPONDENT**

**[Being an Appeal from the Conviction and Sentence of Hon. B. M. Kimtai (SRM) Keroka Law Courts dated 9<sup>th</sup> May 2018 in Keroka Principal Magistrate's Court Criminal Case No. 474 of 2018]**

**JUDGEMENT**

1. The appellant was sentenced to fifteen (15) months imprisonment after pleading guilty to assaulting his mother and causing her actual bodily harm contrary to Section 251 of the Penal Code.

2. Being aggrieved he preferred this appeal. The grounds of appeal are:-

**“1. THAT the Learned Magistrate erred in Law in convicting the Appellant on a plea of guilty that was equivocal and/or not properly taken.**

**2. THAT the Learned trial Magistrate erred in Law in failing to take such precaution and administer such warning so as to ensure that the Appellant understood the nature and the consequences of the charge he was pleading guilty to before he entered a plea of guilty and thereon sentenced the Appellant.**

**2. THAT the learned magistrate erred in law and fact in not taking into account the circumstances of the case that the accused was totally drunk at the time of the alleged offence and as such the accused did not know what he was doing, if at all he committed the offence.**

**3. THAT the learned magistrate erred in law and in fact in not taking into account that the accused had been detained in custody for more than 24 hours before he was presented in court to take the plea which plea of guilty was obtained by inducement and or enticement of the accused person by police officers who had escorted him and deceived him that if he pleaded guilty he would be set free.**

**4. THAT the learned trial magistrate erred in law and in fact by meting out a sentence which was excessive in the circumstance of this case.**

**5. THAT the learned trial magistrate gravely erred in fact by failing to consider mitigating circumstances and other options while sentencing the appellant.**

**6. THAT the Learned Trial Magistrate erred in failing to inquire into the goodness of mind, health and stability of the accused person who's asthmatic and had not eaten anything for more than 24 hours when for all appearances it was clear the appellant was not fit to plead to the charge.”**

3. By the appeal he urges this court to quash the conviction, set aside the sentence and set him at liberty forthwith.

4. The appeal which is vehemently opposed was canvassed by way written submissions.

5. Counsel for the appellant submitted that it is now settled law that for a person to be convicted on his own plea of guilty, the said plea must be unequivocal. This he stated was the position enunciated in the case of **Adan Vs. Republic [1973] EA 444** which was cited in **Feisal Abdi Adan Vs. Republic [2008] eKLR**. Counsel submitted that in this case the language in which the charge and the particulars of the offence

were stated to the appellant was not indicated. Counsel submitted that the appellant did not understand any of the languages indicated on the record. Counsel further submitted that it is also noteworthy that the accused's own words when he answered the charge were not recorded. Counsel submitted that for the above two reasons the conviction should be set aside. He further submitted that the appellant was not warned on the consequences of pleading guilty and that he was not brought before a court of law within 24 hours, a right guaranteed in Article 49 (1) (f) of the Constitution. Counsel contended that as a result the appellant was tired and hungry and this is reflected by his not saying anything in court. In regard to the sentence, Counsel submitted that it was excessive given the relationship between the appellant and the complainant. Counsel urged this court to either reduce the sentence or to place the appellant on probation. For this proposition he relied on the case of: -

· **BILA & Another Vs. Republic [2017] eKLR.**

6. Principal Prosecution Counsel Mr. Ochieng acted for the respondent in this appeal. He submitted that the plea of guilty was unequivocal as much as the appellant may have been drunk when he committed the offence he was not drunk when he took the plea. Mr. Ochieng submitted that the appellant understood the nature and consequences of the charge he was pleading to and that he confirmed the facts to be true. He urged this court to dismiss the appeal.

7. The issues for determination are: -

**(i) Whether the appellant's plea of guilty was unequivocal.**

**(ii) Whether failure to bring the appellant to court within 24 hours vitiated the charges against him.**

**(iii) Whether intoxication is a defence in this case.**

**(iv) Whether the sentence is excessive.**

8. Having perused the record my finding is that the plea in this case was unequivocal. The record shows that the languages used by the court were English/Kiswahili and Ekegusii. These were the same languages which the appellant elected to use during the hearing of this appeal. I am satisfied that he understood the charge. When the facts were read to him he admitted they were correct. The prosecution produced a P3 Form which confirmed that the complainant suffered injuries that amounted to actual bodily harm. The facts narrated supported the charge. After the conviction and before he was sentenced the court gave the appellant an opportunity to enter a plea in mitigation and the fact that he did this confirms that he was well aware of his surroundings and that he understood the proceedings. This plea was taken in compliance with the steps set out in **Adan Vs. Republic (Suppra)**.

9. It is now settled that the omission to bring an arrested person to court within 24 hours as stipulated in the Constitution does not vitiate the proceedings or even conviction. The appellant's remedy lies in a suit for damages.

10. Generally, intoxication is not a defence to any criminal charge. It is only a defence in the exceptional circumstances set out in **Section 13 (2) of the Penal Code** which states: -

**“(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –**

**(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or**

**(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.”**

The appellant did not establish any of those circumstances and hence the defence of intoxication does not avail to him.

11. Sentencing is a matter for the discretion of the trial court – see **Fatuma Hassan Salo Vs. Republic [2006] eKLR**. In imposing the sentence of fifteen (15) months imprisonment the trial magistrate took the following into consideration: -

**(i) That the appellant was a first offender.**

**(ii) That the offence was prevalent and there was need for a deterrent sentence.**

**(iii) The appellant's plea in mitigation.**

The sentence was not therefore arbitrary or whimsical. It is my finding that the same was guided by sound legal principles and took into account all relevant factors. I see nothing to warrant this court to disturb it.

12. The upshot is that the entire appeal lacks merit and it is therefore dismissed.

**Signed, dated and delivered in Nyamira this 28<sup>th</sup> day of March 2019.**

**E. N. MAINA**

**JUDGE**