REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 36 OF 2018

JOANNES NYAMIRI KERARIO.................................APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. P. N. Maina,

Senior Principal Magistrate in Kehancha Senior Principal Magistrate's

Criminal Case No. 249 of 2018 delivered on 05/04/2018)

JUDGMENT

1. The Appellant herein, **Joannes Nyamiri Kerario,** was charged on 14/03/2018 with the offence of **Grievous Harm** contrary to **Section 234** of the **Penal Code, Cap. 63** of the Laws of Kenya. He also faced a second charge of **Attempted Arson**.

2. The Appellant admitted the charges and a date was fixed for presentation of the facts. On 19/03/2018 the matter came up before the trial court for facts. The Appellant requested that the charges be again read to him and the application was allowed. On re-reading of the charges, the Appellant admitted the charge of grievous harm and denied that of attempted arson. Plea of guilty was entered based on the admission. The charge of attempted arson was later withdrawn.

3. The facts were then presented and on being asked to respond to the facts the Appellant stated that the facts were true. The Appellant was convicted on his own plea of guilty. After the presentation of *inter alia* a Pre-Sentence Report and a Psychiatrist Report the court sentenced the Appellant to 20 years' imprisonment.

4. Being aggrieved by the conviction and sentence, the Appellant filed the appeal subject of this judgment on 26/07/2018 with leave of this Court granted on 24/07/2018 and preferred the following grounds: -

> ***1. I pleaded guilty to the charges.***
>
> ***2. My plea of guilty was equivocal.***
>
> ***3. The prosecution took advantage of my being naïve in law and coerced me to plead guilty.***
>
> ***4. The prosecution failed to comply with the provisions of Article 50 (2) j of the Constitution.***
>
> ***5. The trial court failed to comply with the provisions of Article 50(2) (c) of the constitution.***
>
> ***6. The trial court failed to inform me on the consequences of pleading guilty.***

5. The appeal was heard by way of oral submissions. The Appellant who appeared in person in essence contended that the plea was unequivocal as he was beaten at the police station and forced to admit the charge. The Appellant however prayed that the sentence be reviewed to 10 years' imprisonment as according to him that was fair. The appeal was opposed. Counsel for the State **Miss Rono** submitted that the guilty plea was unequivocal in that all the procedural requirements in **Adan -vs- Republic (1973) EA 445** were adhered to. On sentence, Counsel submitted that since the maximum sentence was life imprisonment the term granted was indeed lenient. She prayed that the appeal be dismissed.

6. As this is the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **<u>Okemo vs. R (1977) EALR 32</u>** and further in the Court of Appeal case of **<u>Mark Oiruri Mose vs R (2013) eKLR</u>** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter.

7. In line with the foregone, this court in determining this appeal will principally endeavor to satisfy itself whether the plea as taken was unequivocal.

8. The record of the proceedings before the subordinate court has been availed before me and I have carefully perused the same. This court has also carefully considered the submissions of the parties on record.

9. The law on this subject is well settled. **Section 207** of the Criminal Procedure Code states as follows:

> ***'207 (1) The substance of the charge shall be stated to the accused person by the Court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to plea agreement;***
>
> ***(2) If the accused person admits the truth of the charge otherwise than by plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary;***
>
> ***Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.'***

10. The above provisions have previously been subject to Court's interpretation. And, in particular the procedure and steps to be taken in taking a plea of guilty were clearly laid down in the case of **<u>Adan -vs- Republic (1973) EA 445</u>** and in the Court of Appeal case of **<u>Kariuki -vs- Republic (1954) KLR 809</u>** as follows: -

> ***(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.***
>
> ***(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.***
>
> ***(iii) the prosecution should then immediately take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.***
>
> ***(iv) If the accused does not agree to the facts or raises any question of his guilt in his reply it must be recorded and change of plea entered.***
>
> (v) ***If there is no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused reply.***

11. In the case of **<u>Kariuki -vs- Republic</u>** (supra) the Court went on and stated that:-

> ***The narration and interpretation of the facts of the alleged offence before the entry of a conviction and asking the appellant if he agreed with the fact is evidence of the precaution which the trial magistrate adopted to ensure that the appellant fully understood the charge before pleading.***

12. In the case of **<u>Atito -vs- Republic (1975) EA 278</u>** the Court also held that the narration of facts supplemented the explanation by the trial magistrate of the ingredients of the offence.

13. Upon the promulgation of the Constitution of Kenya in 2010, the people of Kenya gave unto themselves an elaborate Bill of Rights under Chapter Four thereof. **Article 50** thereof deals with the right to a fair hearing and in **sub-article (2)(b)** it states that: -

> ***(2) Every accused person has the right to a fair trial, which includes the right-***
>
> ***(a)……..***
>
> ***(b) to be informed of the charge, with sufficient detail to answer it.***

14. To therefore satisfy the above constitutional and statutory requirements, the Court when faced with a guilty plea scenario is called to exercise extreme care especially when the offence(s) involved carry serious legal penalties or are technical in nature more so when the accused is unrepresented. The Court is called upon to ensure that the charge is read and explained to the accused person in such sufficient detail to enable the accused person to make an informed decision and to plead with such knowledge and information about the charge. All that must be clearly captured in the record including the language which the accused communicates in.

15. Another equally important aspect relates to the taking of the facts of the case. The purpose of the facts is to establish the ingredients of the offence before Court. It is the duty of the Court to scrutinize and be sufficiently satisfied that indeed the facts, as presented, do establish

the ingredients of the offence. It is not enough for a Court to proceed and enter a conviction simply because the accused has admitted the facts, the facts must establish the commission of the offence. The Court should therefore endeavor to be fully satisfied that the facts truly connect the accused person to the commission of the offence and that there appears no cause to the contrary as so clearly provided under **Section 207** of the **Criminal Procedure Code**. (See: **Kakamega High Court Criminal Appeal No. 46 of 2014 Dishon Malesia vs Republic (2014) eKLR**).

16. The record before the trial court is very clear. The charges were read to the Appellant in Kiswahili language. The Appellant admitted both charges and the facts were deferred. A week later the Appellant requested that the charges be re-read and that was done. He admitted the charge of grievous harm and denied that of attempted arson. He also admitted the facts as presented.

17. On whether the facts proved the ingredients of the charge of grievous harm, I have equally analyzed the facts as presented before court and the same are clear that the offence was proved. The charge was not technical. The Appellant must have been so clear in his mind to ask the court to read the charges afresh and admitted that of grievous harm while denied that of attempted arson. Even when the P3 Form was produced the Appellant was given an opportunity to respond to the facts and challenge the P3 Form and he consciously chose to admit both the facts and the contents of the P3 Form.

18. There was also the contention that the Appellant's rights under **Article 50(2) (c)** and **(j)** of the **Constitution** were infringed. the Appellant was accorded every opportunity to understand and respond to the charges. The contention that he was coerced to admitting the charges does not arise as the Appellant did not raise the issue before court in any of the two instances where the charges were read to him. I am therefore satisfied and do find and hold that the Appellant understood the charges and their particulars as well as the facts thereof and that there was no hindrance to the process of plea taking. All the necessary legal requirements on plea-taking were complied with. The plea of guilty was hence unequivocal. The appeal on conviction therefore fail.

19. On sentence, the Appellant contended that the 20-year imprisonment term is excessive, harsh and very punitive and that he instead ought to be granted 10 years' imprisonment. The offence of causing grievous harm attracts a sentence of up to life imprisonment on conviction. The sentence was handed down after the sentencing court received mitigations, a comprehensive Pre-Sentence Report, a Psychiatric Report and an Age Assessment Report.

20. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act upon in dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

21. Revisiting the circumstances surrounding the commission of the offence herein and the mitigations tendered, I do not see how the sentencing court can be faulted. The Appellant attacked the complainant without any justification at all. From the evidence, the court formed an opinion that the Appellant indeed intended to murder the complainant. The injuries were so serious and included over 13 serious cuts. I therefore find that the sentence was appropriate in the circumstances of this case. The appeal on sentence is as well disallowed.

22. The entire appeal is hence not merited. It is hereby dismissed, and the decision of the trial court is hereby affirmed.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 28th day of March 2019.**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Joannes Nyamiri Kerario, the Appellant in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistant