**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 160 OF 2018**

**SARAH AMULABU OMWAKA..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

***(from the original conviction and sentence by F. Makoyo, SRM, in Butere SRMC Criminal Case No. 505 of 2018 dated 28/10/2018)***

**JUDGMENT**

1. The appellant was convicted on her own plea of guilty of the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code and sentenced to serve 5 years imprisonment. She was aggrieved by the conviction and the sentence and filed this appeal through the firm of **L. M. Ombete & Co. Advocates**. The grounds of appeal are:-

> (1) That the learned Senior Resident Magistrate grossly erred in law and fact in convicting the appellant on the purported plea of guilty while the language in which the plea was taken was not recorded as required by law.
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> (2) That the learned Senior Resident Magistrate grossly erred in law and fact in convicting the appellant while the appellant had not unequivocally pleaded guilty to the charge.
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> (3) That the learned Senior Resident Magistrate grossly erred in law and fact in imposing a maximum sentence of five (5) years imprisonment on the appellant, a first offender, a mother of two, and who had purportedly pleaded guilty which is the maximum sentence provided for under section 251 of the Penal Code.

2. The particulars of the offence against the appellant were that on the 21st October, 2018 in Butere Sub-county within Kakamega County unlawfully assaulted JM (herein referred to as the complainant) thereby occasioning him actual bodily harm.

3. The court record indicates that the appellant was arraigned in court on the 26/10/2018 when the charge was read to her and she replied:-

> ***"Ni ukweli/It is true."***

4. The prosecution counsel then gave the facts of the case upon which the response of the appellant was that:-

> ***"Facts are correct"***

5. The court then recorded a conviction on own plea of guilty. The prosecution then stated that they did not have records for the appellant. The appellant then mitigated that:-

> ***"I ask for forgiveness for burning the child. I will not repeat. I have a small child."***

6. The court in passing sentence on the appellant stated as follows:-

> ***"Looking at the seriousness of the offence and the circumstances surrounding the same and having considered the mitigation I do not hesitate in sentencing the accused person to five (5) years in prison."***

7. The advocates for the appellant condensed the grounds of appeal into two – first, whether the plea was unequivocal and secondly if that was the case, whether the sentence of 5 years imprisonment imposed by the learned Senior Resident Magistrate in all circumstances was appropriate.

8. On the first issue the advocates submitted that the plea of guilty entered by the trial magistrate against the appellant was not unequivocal. That the language in which the facts of the case were stated to the appellant is not recorded. That it was not stated in the facts of the case whether the appellant set the hand of the complainant on fire and burnt it. Therefore that the plea was not unequivocal.

9. On the second ground the advocates submitted that the sentence imposed on the appellant was harsh. That the maximum sentence for the offence under Section 251 of the Penal Code is 5 years imprisonment. That the trial magistrate did not consider giving the appellant an option of a fine. He also failed to consider that the appellant was a first offender with young children. That it is trite law that a maximum sentence is reserved for the worst kind of offenders. The advocates cited the case of **Gabriel Karani Mwazame –Vs- Republic, Mombasa High Court Criminal Appeal No. 508 of 2000** where Khaminwa J. (Commissioner of Assize as she then was) faulted the trial court for imposing a maximum sentence of 3 years without considering the mitigating factors of the case and the need to give the offender opportunity to reform. The advocates in this appeal urged the court to substitute the sentence with the period already served or impose a nominal fine.

10. The facts of the case as given by the prosecution were as follows:-

> ***"That on 21.10.2018 at 8 p.m. the complainant who is the accused's step son was alleged to have stolen Ksh. 10/- from the accused. He tried stealing the money. The accused chased the child away but he had nowhere else to go and insisted on staying in the house. The accused hit the child with a stick on the head and sent him to bed hungry. The next day the accused was still angry and took paraffin, poured on the complainant's hand in an attempt to set him on fire and she lit the match. The child went to his grandfather and the matter was reported to the assistant Chief and later to the police. The child was taken to hospital."***

11. The manner of recording plea in a criminal case were long time ago stated in the case of ***Adan vs Republic*** (1973), EA 446 to be as follows:-

> ***"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then normally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded."***

12. The quoram part of the plea indicates that the proceedings were conducted in Kiswahili language. The appellant is recorded to have answered to the charge in Kiswahili language and stated – *Ni ukweli*. The language in which the appellant responded to the facts when he stated that the "*facts are correct*" is not stated. It is not recorded the language in which the appellant mitigated in to the court. Since it is recorded that the proceedings were conducted in Kiswahili language the appellant must have responded and mitigated in the said language. It is clear from the mitigation given by the appellant that the language the proceedings were conducted in was not the issue. I therefore find no substance in the urguement about the language.

13. It is trite law that a plea of guilty entered by a court against an accused person must be unequivocal. Before a court enters a plea of guilty on an accused person, it is its duty to ensure that all the ingredients of the offence have been explained to the accused and that the accused has understood them. In **Simon Gitau Kinene –Vs- Republic (2016) eKLR** Ngugi J. held that:-

> ***"… I do not think that a guilty plea should be left to any deductions or conjecture. It should be clear, unambiguous and unequivocal. It shall be even more so when the accused faces a serious charge capable of attracting a custodial sentence."***

14. In the facts read out to the appellant it was stated that in the evening of the material day the appellant hit the complainant with a stick on the head and sent him to bed hungry. That on the following day she "took paraffin, poured on the complainant's hand in an attempt to set him on fire and she lit the match". The facts did not disclose whether the hand was burnt or not. It was not stated in the facts whether the injuries on the complainant were on the head or on the hand. The facts did not disclose the findings of the doctor as to where on the body the injuries were and whether they amounted to actual bodily harm. The facts thereby left it to conjecture as to where the injuries were and whether they were injuries amounting to actual body harm.

15. The facts indicated that the appellant attempted to burn the complainant on the hand. The appellant in her mitigation stated that she was asking for forgiveness for burning the child. Where did the issue of burning the child come from when the facts only indicated an attempt to burn the child? Did the appellant misunderstand the facts or is it that the facts were incomplete? It can only mean that the facts were ambiguous and were not properly explained to the appellant. The plea of guilty was not unequivocal. It ought to be set aside.

16. On the second ground of appeal, it is a general rule in sentencing that a maximum sentence should not be imposed on a first offender – See **Otieno –Vs- Republic (1983) KLR.** It is also a general principle in sentencing that a maximum sentence ought to be reserved for worst kind of offenders. The appellant was a first offender. She mitigated that she was remorseful and that she had a young child. The kind of injuries sustained by the complainant were not stated to have been serious enough so as to attract a term of imprisonment of 5 years. I find that the trial court erred in imposing a sentence of 5 years for an offence that was not stated to have caused serious injuries to the complainant. The sentence, if the plea was unequivocal ought to have been set aside.

17. Since the plea was unequivocal the question is whether the court should order for a re-trial.

18. The general principle in regard to re-trials is that a re-trial should only be ordered where it is unlikely to cause injustice to the accused. In **Obedi Kilonzo Kevevo –Vs- Republic (2015) eKLR** the Court of Appeal held that:-

> ***"Generally, where a suspect has not had a satisfactory trial, the fairest and proper order to make is an order for a retrial. A retrial on the other hand will be ordered only where the interests of justice require it and if it is unlikely to cause injustice to the appellant.*** In the case of **Muiruri –Vs- Republic (2003) KLR 552**, the court considered a similar situation and held as follows, inter alia:-
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> ***"Generally whether a re-trial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not."***
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> ***In the criminal justice system, the law requires that the right of the appellant must be weighed against the victim's right. In this case the appellant has been in confinement for three (3) years. Balancing the two competing interests, we believe justice demands that the case be re-heard in the subordinate court."***

19. In **Samuel Wahini Ngugi –Vs- Republic (2012) eKLR** the said court held that:-

> ***"The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:***
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> ***'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered…In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person'***

20. The appellant was charged with an offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The maximum sentence for the said offence is 5 years imprisonment. The appellant was convicted on 28/10/2018. She has now served 9 months of the sentence. This is enough punishment for the offence. There is no need of a re-trial. The appellant is set free unless lawfully held.

**Delivered, dated and signed in open court at Kakamega this 31st day of July, 2019.**

**J. NJAGI**

**JUDGE**

In the presence of:

Miss Omondi for state

Appellant - present

Court Assistant - George

14 days right of appeal.