



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 13 OF 2019

1. PIUS ORENGO.....1ST APPELLANT

2. SARAH BOCHABERI.....2ND APPELLANT

VERSS

THE STATE.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. A. C. Towett – SRM Nyamira

dated and delivered on the 18th day of March 2019 in the Original Nyamira

Chief Magistrate's Court Criminal Case No. 421 of 2019}

JUDGEMENT

The appellant together with four others were charged with assault causing actual bodily harm contrary to Section 251 of the Penal Code.

The appellants pleaded guilty to the charge and were sentenced to serve 5 years' imprisonment each.

The gist of their appeal is that the plea was unequivocal as they did not understand the proceedings, that they were sentenced without first being convicted and that the sentence was excessive.

The appeal which is vehemently opposed was canvassed through written submissions. The steps a court should follow when recording a plea of guilty were settled in the case of **Adan Vs. Republic [1973] EA 446** and they are: -

“2. The manner in which a plea of guilty should be recorded is:

(a) the trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands;

(b) he should then record the accused's own words and if they are an admission, a plea of guilty should be recorded;

(c) the prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

(d) if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply.”

The issue for determination is whether those steps were taken. Having considered the record of the lower court I am not persuaded that those steps were followed. Whereas in the record the appellants appear to have understood the proceedings as they were conducted in a language they would be expected to understand the reality is different. The 1st appellant who was the 1st accused in the trial court and who is quite elderly has a hearing problem which prevented him from following the proceedings in this court and it was not until the Court Assistant moved very close to him that he was able to communicate the proceedings to him. As for the 2nd appellant she was emphatic that her answer to the charge was not guilty and that what she told the court when the facts were read to her was that she had taken no part in the commission

of the offence. Had the trial Magistrate taken time to find out if the 1st appellant could hear properly and if she had recorded the reply by the appellants in nearly as possible in their own words albeit in English as she herself is not proficient in Ekegusii then she would have realized that they were not admitting the charge. She would also have realized the breakdown of communication with the first appellant who obviously has a hearing problem.

On sentencing, there is now in place a sentencing policy guidelines to guide the courts. Whereas the guidelines are not intended to fetter the discretion of the trial Magistrate, they are important and judicial officers would do well to look them up before imposing a sentence. As stated by the then Chief Justice Willy Mutunga:-

“The guidelines have collated the principles of law that should guide courts in the exercise of their discretion, so that sentences for analogous circumstances are delivered as transparently and consistently as practically possible. They are now presented as a one stop reference that judicial officers and other practitioners in the justice chain can use to guide their engagements with the courts on the matter of sentencing.

.....”

Clause 2.3 of the guidelines states: -

“2.3 They are geared towards anchoring the exercise of discretion in sentencing upon principles as opposed to being a subjective process. They are designed to ensure that sentencing is not carried out as an isolated exercise but one that contributes towards meeting the objectives of sentencing set out in paragraph 4 of these guidelines.”

However, as I propose to refer the appellants back for retrial, I shall refrain myself from making any finding on the sentence meted by the trial magistrate.

Counsel for the appellants submitted that the appellants were not convicted. However, my finding is that the omission by the trial Magistrate to state that she had convicted them did not prejudice the appellants and is in any event an error curable under Section 382 of the Criminal Procedure Code. This appeal is however allowed because the plea was not unequivocal. As the trial is still ongoing in the lower court, the appellants’ case is remitted back to the lower court to be tried afresh whether or not it shall involve halting the case of their co-accused and starting afresh. It is so ordered.

Dated, signed and delivered in Nyamira this 27th day of August, 2019.

E. N. MAINA

JUDGE