**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CRIMINAL APPEAL NO. 16 OF 2016**

**FRANCIS KAYETE MAKODO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal arising from the conviction and sentence***

***by Hon. L. K. Sindani, Resident Magistrate in Migori***

***Chief Magistrate's Criminal Case No. 679 of 2015***

***delivered on 03/09/2015)***

**JUDGMENT**

1. The Appellant herein, **Francis Kayete Makodo,** was jointly charged with **David Otuoma Odhiambo** and **Rose Akinyi Oyuoma** with the offence of **Affray** contrary to **Section 92** of the **Penal Code**, Cap. 63 of the Laws of Kenya. That was on 27/08/2015 before **Hon. L. K. Sindani**, Resident Magistrate in **Migori Chief Magistrates Criminal Case No. 679 of 2015**.

2. The particulars of the offence were that '*On 26/08/2015 at Arombe village in Migori County in the Republic of Kenya, unlawfully took part in a fight in a public place namely public road within Arombe village.'*

3. All the then accused persons admitted the charge and the facts of the case followed immediately. The brief facts were that '*On 25/08/2015 at 8:00am the three accused fought in public because of a land dispute yet the dispute is being handled by the area Chief. They were arrested and brought to court. P3 Forms for all be produced as P. Exhibits 1, 2, & 3. Degree of injury is harm.'*

4. On being asked to respond to the facts all the then three accused persons stated that the facts were true. Pleas of guilty were entered and each of the accused persons was convicted on his/her own plea of guilty. They were each sentenced to six months' probation upon receipt of mitigations and a Pre-Sentence Report.

5. On 11/02/2016 the appellant herein through Messrs. Nyagesoa & Company Advocates filed **Migori High Court Criminal Application No. 6 of 2016** for leave to appeal out of time. Leave was granted on 17/03/2016 and the appellant filed the Petition of Appeal on 29/03/2016. He raised 22 grounds of appeal mainly challenging that the plea was not unequivocal.

6. The appeal was disposed of by way of written submissions. The appellant mainly expounded on why the plea should not be allowed to stand and contended that he did not understand the language used in the proceedings and that the charge was not proved. The persuasive decision in the case of **Republic -versus- Peter Muiruri & Another (2014) eKLR** was referred to on support of the appeal. The prosecution opposed the appeal and argued that the Appellant properly participated in the proceedings and was lawfully convicted and sentenced.

7. 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 **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs R (2013) eKLR** 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.

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

9. 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.

10. 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."***

11. 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 **Adan -vs- Republic (1973) EA 445** and in the Court of Appeal case of **Kariuki -vs- Republic (1954) KLR 809** 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.***

12. In the case of **Kariuki -vs- Republic** (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."***

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

14. 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.***

15. 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.

16. 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 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**).

17. The record before the trial court is very clear. The joint charge was read to the appellant and the others in English and interpreted in Dholuo Language. The appellant admitted the charge.

18. On whether the facts proved the ingredients of the charge of affray, **Section 92** of the **Penal Code** states that *'Any person who takes part in a fight in a public place is guilty of a misdemeanor and is liable to imprisonment for one year.'* I have equally analyzed the facts as presented before court and the same prove that the appellant and the two others fought on a public road at Arombe village. P3 Forms were produced which confirmed all the then three accused persons had sustained injuries which were classified as 'harm'. The facts were presented immediately the charge was admitted and were also admitted.

19. The appellant did not raise the issue of the language at any time of the proceedings from the time he took the plea on 27/08/2015 until 03/09/2015 when he was sentenced. Even by looking at the grounds of appeal the appellant does not state which is the language he was conversant with, he only and generally states that he did not understand the language used. Now which language is he talking about, is it English or Dholuo?

20. I have carefully considered all the grounds of appeal and do not see how the plea was not unequivocal. I am satisfied and therefore find and hold that the appellant understood the charge and its particulars as well as the facts thereof and that there was no hinderance to the process of plea taking up to sentencing. The plea was unequivocal. The appeal on conviction therefore fails.

21. Before I leave the aspect of plea-taking, I have noted in the record that the court entered both the guilty plea and the conviction when the appellant admitted the facts. The correct procedure was for the court to enter a plea of guilty on the admission of the charge and its particulars and then proceed to convict the appellant upon admission of the facts. However, that error is purely procedural and does not go to the root of the plea of guilty. It is also readily cured under **Section 382** of the **Criminal Procedure Code**.

22. On sentencing, **Section 92** of the **Penal Code** imposes the maximum sentence on conviction in respect of the offence of affray to one-year imprisonment. The appellant was handed down a six months' probation period. 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 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 take into account 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 as long as the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

24. I have considered all the issues in this matter together with the Pre-sentencing report and I find that the sentence was fair in the circumstances. I therefore do not wish to disturb the same. The appeal on sentence likewise fails.

25. The upshot is that the entire appeal is unmerited and is therefore dismissed.

26. Orders accordingly.

**DELIVERED**, **DATED** and **SIGNED at MIGORI this 19th day of April 2018.**

**A. C. MRIMA**

**JUDGE**

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

**Mr. Nyagesoa,** Counsel instructed by Messrs. Nyagesoa & Company Advocates for the Appellant.

**Miss Monica Owenga,** Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

**Miss Nyauke** – Court Assistant