



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NO. 1 OF 2018

DAVID PKEMER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D M E N T

DAVID PKEMER, the Appellant herein was charged with two counts in the Lower Court. The first one being assault causing actual bodily harm, contrary to section 251 of the Penal Code. The particulars of this offence are that on the 15th day of December 2017 at Kishaunet area, within West Pokot County, the appellant willfully and unlawfully assaulted Robert Pkemei, thereby causing him actual bodily harm.

The second count is of attempting to strike with intent to harm, contrary to section 231 (b) of the Penal Code. The particulars hereof being that on the 18th day of December 2017 at Kishaunet area, within West Pokot County, the appellant with intent to do grievous harm, willfully and unlawfully attempted to strike Esther Sendeya with an arrow.

The charges were first read to the appellant on 21.12.2017 in Swahili a language indicated that he understood, and to the first count he pleaded guilty and to the second one not guilty. The court consequently entered a plea of guilty in the first count and plea of not guilty in the second count. The court then indicated the file would be mentioned on 3.1.2018 for facts. It is not clear why this happened as there is no indication by the prosecutor that he was not ready with facts for the 1st count and he is not the one who requested for the said mention. The appellant was remanded in custody till then.

On 3.1.2018 the charges were re-read to him in Swahili and he pleaded guilty to both counts. Plea of guilty was consequently entered in both counts. The state prosecutor read the facts that on 15.12.2017 at around 2.00 p.m. the complainant in count 1 was at his home when the appellant went and started an argument with him (Robert Kemoi) without any provocation. The appellant assaulted him using fist and blows prompting the second complainant, who is the mother to the appellant, to intervene. She was also assaulted by the appellant and she lost consciousness. The first complainant made a report at Kapenguria. P3 form was issued and police officers went to arrest the appellant. He was arrested and released afterwards. He then armed himself and threatened to shoot the 2nd complainant (Esther), shouting that he will kill her since he was released and they would do nothing. They went back to police station and he was arrested and charged with the offences. The first complainant, Robert Kemoi was issued with P-3 form of which was filled at Kapenguria District Hospital. The complainant had cut wound near the left ear, and pain on throat. The age of injury was 5 days. The weapon used was a blunt object. The P-3 form was filled on 20.12.2017. Degree of injury according to it is harm.

The appellant admitted the facts by saying "It's true." He was convicted on his own admission.

In mitigation, he said he sought forgiveness. It was his first time. He was drunk. He will not repeat it and that the complainant was in court and wished the matter resolved at home.

The court sentenced him to serve on each count 2 years imprisonment, sentences to run concurrently.

The appellant dissatisfied with the said conviction and sentence, appealed to this court on 23rd of January 2018 on the grounds that: -

- 1) The trial magistrate erred in sentencing the appellant to 4 years for misdemeanors.
- 2) The plea taken was equivocal.
- 3) The trial magistrate erred in law by sentencing the accused to 4 years imprisonment for a family dispute.
- 4) The appellant mitigation was not considered.
- 5) The complainant was a brother to the appellant and was willing to forgive him.
- 6) The sentence meted was manifestly excessive having regard to the circumstances of the case.

The Appellant in his written submissions relied on the cases of ***Adan – vs- Republic (1973) EA 445, Ombena – vs Republic (1981) KLR.450 and Republic – vs Ndede***, to show that the plea by the appellant was equivocal.

It is averred that the appellant’s statement in Mitigation shows that he did not really understand the position when he pleaded guilty. ***In Adan – vs- Republic*** it was held that a person should not be convicted on his plea unless the court was certain that he really understood the charge and had no defence to it.

In ***Ombena – vs Republic***, the court held that if a conviction is based on a plea of guilty, it must be demonstrated that the plea was equivocal and not capable of any other interpretation.

In ***Republic – vs- Ndede*** the court of appeal faulted the trial court for entering a plea of guilty in case where the accused had been held in custody for 30 days; Stating that in interpreting section 207 (2) of the Criminal Procedure Code, the court is not always obliged to convict the accused on his plea of guilty as there may be sufficient reason for the contrary.

On sentence, it is argued that it was excessive in the circumstance. The Appellant had pleaded guilty to misdemeanors and the complainant were family members. It is claimed he should have been considered for a non-custodial sentence.

The state opposed the appeal on the ground that under section 348 of the Criminal Procedure Code, the appellant having pleaded guilty to the offences was estopped from appealing against the conviction and could only appeal on illegality of the sentence or its harshness. The maximum sentence for assault is 5 years and 2 years imprisonment was perfectly within judicial discretion in sentencing.

In considering this appeal, I have looked at the provision of section 348 of the Criminal Procedure Code, in line with what the Court of Appeal found in ***Ndede -vs Republic, Criminal Appeal No. 1 of 1989***. The court in considering whether sections 348 of the Criminal Procedure Code imposes an absolute bar to an appeal against a conviction entered after the accused’s plea of guilty, found that a conviction based on a plea of guilty is not absolute. The court relied on sections 207 and 208 of the Criminal Procedure Code in finding that the court is not bound to accept the accused’s admission of the truth of the charge and convict him as there may in the words of the statute, “appear sufficient cause to the contrary.”

The appellant in this case had pleaded guilty to the offence in court 1 and not guilty to the offence in

count 2. The court for no given reason did not complete the process of taking plea on that particular day but indicated the file be mentioned on 3.1.2018 for facts. There is no indication that on 21.12.2017 when this happened, the prosecution did not have the facts ready. This day was on a Thursday and even if the prosecution never had the facts ready would have probably been told to avail them later in the day or the following day of which was on a Friday. The appellant was not granted bail or bond but was remanded in custody. It was in the month of December and the process ensured he remained in custody during the crucial time of Christmas holiday and the new year when freedom is highly valued to celebrate the holidays with relatives and friends. When the plea was taken on 3.1.2018. the appellant was definitely not in the same state of mind he was in on 21.12.2017. He pleaded guilty to both counts. In mitigation, he sought forgiveness saying he was drunk, he will not repeat it and that the complainant was there and wished the matter dealt with at home.

The statement that he was drunk definitely meant that he was not in right state of the mind when he committed the offence. This is a circumstance which would have called for reverting of the plea of guilty to that of not guilty so as to establish during trial whether the appellant was drunk to a point of negating *mens rea*

Holding of the appellant in custody for 13 days, during Christmas and New Year festivities for no very good reason, before plea taking on 3.1.2018, and the fact that he said he was drunk during the commission of the offences, renders the plea of guilty to the offences equivocal. This appeal is accordingly allowed, the conviction and sentences are set aside, a retrial should be held before another magistrate.

Judgment read and signed in the open court before Madam Opondo for the appellant and Madam Kiptoo for the State, this 20th day of June, 2018.

S. M. GITHINJI

JUDGE

20.6.2018