REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 182 OF 2014

BERNARD KIPRONO.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

(Being an appeal from the original conviction and sentence in Criminal Case No. 5469 of 2014 at the Chief Magistrate's Court at Eldoret (Hon. A. Alego, PM) dated 21 November 2014)

JUDGMENT

[1] The Appellant was charged and arraigned before the Chief Magistrate's Court at Eldoret on allegations that he had willfully and unlawfully assaulted and caused grievous bodily harm to **Ogla Chelimo** on the **12 August 2014**. He initially denied the Charge and the case was fixed for hearing. He, however, of his own volition opted to change his plea to a Plea of Guilty; and although a Probation Officer's Report was called for, it was unfavourable to the Appellant. Accordingly, he was convicted and sentenced to serve 10 years' imprisonment.

[2] Being aggrieved by the sentence, the Appellant filed this appeal on **26 November 2014,** urging for a reconsideration of the sentence on the following grounds:

[a] That during the incident in issue, he was so drunk that he could not resist the provocation by the Complainant;

[b] That he is an orphan with a very young family to look after together with his siblings who depend on him for survival; and that the long sentence will cause them suffering;

[c] That the long sentence will disrupt his future vision of pursuing training as a technician;

[d] That the Complainant was a friend to his wife; and that he did not mean to harm her, were it not for the fact that the Complainant bit him first;

[e] That he is a first offender and has since learnt that crime does not pay.

[3] He relied on the written submissions filed herein by him wherein he reiterated his unequivocal plea of Guilty; and added that he overreacted because of intoxication. He submitted that although he was given an opportunity to say something in mitigation, the Learned Trial Magistrate disregarded the same and ended up passing a sentence that is not only excessive, being the maximum penalty for the offence, but also too harsh; and is bound to occasion him irreparable harm. He accordingly prayed for a review of the sentence and for such other orders as the Court may deem fair and reasonable to grant in the interests of justice.

[4] Ms. Kagali, Learned Counsel for the State, opposed the appeal. She submitted that the Appellant's plea before the lower court was unequivocal; and that the Charge was read to him in Kiswahili, a language that he understands; and that all the steps set out in **Adan vs. Republic** were followed. It was therefore submitted by Counsel that the sentence of 10 years imposed on the Appellant was well deserved. She urged the Court to dismiss the appeal as neither the conviction nor the sentence can be faulted.

[5] Accordingly, although the Petition of Appeal shows that the appeal was in respect of both conviction and sentence, having perused the record of the lower court, it is apparent that what is in issue is, in fact, the propriety of the sentence, granted that the Appellant pleaded guilty and was accordingly convicted on his own plea. Indeed, **Section 348** of the **Criminal Procedure Code, Chapter 75** of **the Laws of Kenya** is couched in peremptory terms thus:

"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by

a subordinate court, except as to the extent and legality of the sentence."

[6] Hence, in the case of **Olel v Republic [1989] KLR 444**, the court, in its interpretation of the above provision was of the view that:

> **"Having considered the submissions by both learned counsel on the interpretation of section 348 ... we have come to the conclusion that where the plea is clearly an unequivocal plea of guilty, an appeal against conviction cannot lie. The section itself is quite clear on that and permits of no confusion or difficulty in its interpretation. It does not merely limit the right of appeal but bars it completely in cases of an unequivocal plea of guilt. That is the fact of what the marginal note also states..."**

[7] In the premises, my duty, this being the first appellate court, is to satisfy myself that the Appellant's plea was unequivocal, before giving attention to the key question of the legality and propriety of the sentence. This obligation was well-articulated in **Okeno vs. Republic [1972] EA 32** as follows:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."**

[8] I have accordingly perused the record of the lower court in the light of the Grounds of Appeal filed herein. It is manifest there from that the Appellant's arraignment occurred on **15 August 2014**. The record further shows that the lower court made an inquiry to ascertain the Appellant's preference in terms of language; and he opted for Kiswahili. The Charge was then read and explained to him in Kiswahili to which he pleaded not guilty. He however subsequently informed the lower court on the **24 October 2014** that he wished to plead guilty to the Charge. An order was then made that facts be supplied on **31 October 2014**.

[9] The lower court record further shows that, the Prosecution was not ready to give the facts on the **31 October 2014** as scheduled; and was not ready until **12 November 2014**. On the **12 November 2014** the Prosecutor proceeded to give the facts, which were admitted by the Appellant; whereupon the Appellant was convicted and his mitigation taken on record. The lower court then called for a Probation Officer's Report and had the matter fixed for further orders on **21 November 2014**. On the **21 November 2014**, upon reading the Probation Report and noting that it was unfavourable to the Appellant, the Learned Trial Magistrate sentenced the Appellant to serve 10 years' custodial sentence.

[10] It is manifest from the foregoing that although the record does not show that the Charge was read afresh to the Appellant to enable him respond thereto with a Guilty plea, he made it clear on the **24 October 2014** that he wished to plead guilty. The record shows that the day's proceedings were interpreted into Kiswahili for his sake; as were the proceedings of **12 November 2014** when the facts were given. There is therefore no doubt that the process of change of plea was done in accordance with the steps outlined in the leading authority of ***Adan vs. Republic* [1973] EA 446,** in which **Spry, V.P**. opined thus:

> ***"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 formally 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."***

[11] It is noteworthy too that in his Grounds of Appeal and written submissions, the Appellant reiterated that he did plead guilty to the Charge of Grievous Harm. He opened his submissions with the following assertion:

> **"...it is on record that I was convicted on my own plea of guilty. I made this solemn decision because I had no ill motive and did not want to be subjected into a judicial trial on something that I knew that I was guilty about...I pleaded guilty to this offence on 12th November 2014 before Hon. SPM S. Mokua. The facts were read to me and I did not contest any item in the facts..."**

[12] In the premises, the Appellant's plea of guilty being unequivocal as it was, his conviction on own plea was sound cannot be faulted. As to the sentence, **Section 234** of the **Penal Code** provides that:

> **"Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."**

And looking at the nature of the injuries suffered by the Complainant, namely, loss and loosening of her teeth, some of which had to be wired to remain in place, it cannot be said that the sentence of 10 years is excessive. Thus, I would uphold the sentence imposed by the lower court as it is not only lawful but also deserved.

[13] In the result, I find no merit in the appeal and would dismiss it accordingly.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF AUGUST 2018

OLGA SEWE

JUDGE