



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 17 OF 2018

BETWEEN

MIKE LOPOGHOAPPLICANT

AND

REPUBLIC.....RESPONDENT

(Being on appeal from original conviction and sentence in Kapenguria SPMCCR case No. 262 of 2018 dated 4th June, 2018 by Hon VO Adet SRM)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Background

1. The appellant pleaded guilty to two counts of causing *grievous harm contrary to Section 234 of the Penal Code*. The particulars of the offence in count 1 are that on the 9th day of February 2018 at Kambi Chafu in Kongelai Division, West Pokot District within West Pokot County, he unlawfully did grievous harm to Akoleri Losem. In count II it was alleged that on the same date and in the same place he unlawfully did grievous harm to Hellen Chemtai. He faced a third count of threatening to kill contrary to *Section 223 (1) of the Penal Code*, the particulars being that on the same date and in the same place without lawful excuse uttered the words WACHA NIFUNGWE LAKINI NIKITOKA NITAWAUA NYINYI WOTE,” thereby threatening to kill Hellen Chemaiwa.

2. Upon conviction on count 1 and count II the appellant was sentenced to 4 years imprisonment on each of the counts. The sentences were to run concurrently. Count III was withdrawn under *Section 204 of the Penal Code* and the appellant accordingly acquitted of the same.

The Appeal

3. Being aggrieved by both conviction and sentence the appellant brought this appeal on grounds:-

a. That I pleaded guilty during the trial.

b. That your lordship I am a first offender and I plead guilty due to the tortune that I encountered when I was arrested and placed in cell.

c. That your Lordship I have now recovered and humbly pray to be given an opportunity to defend myself.

d. That you lordship I appellant fundamental right were violated and denied justice under the new constitution of 2010.

e. That your lordship, I the appellant was not accorded a fair trial under Article 50(4).

f. That your Lordship may the honourable court order for any other remedy as the court shall deem just.

4. The appellant prays that his case be remitted for retrial.

Facts of the case

5. The facts as given to the court are that on 9th February 2018 the complainant in count I AKOLERI LOSEM, was talking to his wife HELLEN CHEMAIWA who is the complainant in count II. This was at Kambi Chafu Village in Kongelai Division of West Pokot District. As Akoleri turned to go home, he was assaulted by the appellant without any reason. The appellant hit Akoleri with a stick on the head and the latter fell down unconscious. The appellant then descended on Akoleri with fists and also inserted his hand in Akoleri's mouth and tried to pull out Akoleri's tongue.

6. The second complainant who witnessed the attack raised an alarm prompting the appellant to turn on her with kicks and fist. Members of the public responded and wanted to lynch the appellant but the appellant fled from the scene. A Good Samaritan took Akoleri who was still unconscious together with the second complainant to Kacheliba Hospital where Akoleri was admitted. The case was reported to Kacheliba Police Station whereupon the appellant was arrested and charged.

7. After regaining consciousness, Akoleri was issued with a P3 form on 12th February, 2018. According to the doctor's observation Akoleri presented facial swelling and bruises all over his head. His clothes were blood stained. The doctor classified the injury suffered by Akoleri as grievous harm. The P3 form filled in respect of Akoleri was produced as Pexhibit 1.

8. The second complainant Hellen was also treated at Kacheliba District Hospital. Her P3 form was filled on 17th February, 2018 at the Kacheliba District Hospital. Hellen had pain on the neck, a scar on the right eye and healing wound on her leg. She was treated and discharged. Injuries were classified as harm. The P3 form in respect of Hellen was produced as Pexhibit 2.

9. When the appellant was asked to state whether or not the facts were true he said "Ukweli Ulikuwa hivyo" meaning what had been stated was the truth. It was upon that admission that the appellant was convicted on the two counts.

Duty of this court

10. In light of the plea of guilty, this court is required to satisfy itself that the plea of guilty as entered was unequivocal. In this regard the court is guided by the well-known case of *Aden vs Republic [1973] EA 445*, in which the steps for taking a plea of guilty were outlined:-

a. The charge and all its ingredients shall be read out to the accused person in vernacular or some other language which he fully understands.

b. The accused person's own words in answer to the charge shall be recorded and if the same amount to an admission then a plea of guilty shall be entered.

c. The prosecution shall then state the facts whereupon accused person shall be given an opportunity to admit, dispute, add to or subtract from the facts.

d. If the accused person does not agree with the facts or raises an issue as to his guilt that response shall be recorded by the court.

e. If there is change of plea the same shall be recorded and accused person's own version of facts shall be given and his reply shall be recorded.

Issues analysis and determination

11. From the record the issues for determination are whether the plea was unequivocal and secondly whether the sentence imposed by the trial court was in accordance with the law.

12. With regard to the first issue. I am satisfied that the plea of guilty in the instant case was unequivocal. First the record shows that the charges were read out and explained to the appellant in Kiswahili a language which the record indicates the appellant understood and on both counts, the appellant told the court the charges as read and explained were true. He denied the truth of the charge in count III which charge the prosecution later withdrew under *section 204 of the Criminal Procedure Code*.

13. Thereafter the prosecution gave the facts of the case after the plea of guilty had been entered. The facts included medical evidence by way of P3 forms which were produced as P exhibits 1 and 2 respectively. It was also indicated that the motive for the attack upon the complainant was unknown. The appellant confirmed to the trial court that the facts as given by the prosecution were indeed a true statement of what had taken place. It was upon this admission of the facts on the part of the appellant that the trial court entered the plea of guilty and proceeded to convict the appellant.

14. The appellant has contended that though he pleaded guilty, the trial court should have warned him of the consequences of entering a plea of guilty to such a serious offence, hence his plea to this court that the case be sent back to the trial court to start afresh so that he gets an opportunity to defend himself against the allegations. The appellant also submits that his rights under *Article 50 (4) of the Constitution of Kenya 2010* were violated but in my considered view, the provisions of the said sub-article are irrelevant to this case and no rights of the appellant were violated.

15. In opposing the appeal prosecution counsel M/s Kiptoo submits that having pleaded guilty the appellant could only appeal against sentence in accordance with *Section 348 of the Criminal Procedure Code* and that the right procedure for taking of the plea of guilty having

been followed the appellant's appeal on conviction should be dismissed. I do agree with the submissions of counsel that there is no justification for this court to interfere with the conviction because the trial court followed the laid down procedure for plea taking.

16. As regards 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”.

17. In other words if the circumstances of the offence are extremely grievous the most appropriate sentence is life imprisonment. I have myself considered the circumstances of the attack on the complaints and find that the attack was not only unwarranted, but it was unlawful. Prosecution counsel has urged this court to enhance the sentence. In **JMT Vs Republic {2016}eKLR**, the court persuasively held that:-

“Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice and or that the court acted upon wrong principles or if the court exercised its discretion capriciously”.

18. Also see **Shadrack Kipchoge Kogo Vs Republic – Criminal Appeal No 253 of 2003 at Eldoret**

19. In the instant case I agree with prosecution counsel that the sentence of 4 years for the kind of injury caused to Akoleri and his wife Hellen was extremely lenient but I cannot say that the learned trial magistrate acted capriciously in handing down the 4 years to the appellant. The only issue is whether the sentence should continue to run concurrently or whether they should run consecutively. In my considered view and in light of the appellant's attempt to pull out Akoleri's tongue the 4 years imprisonment for each of the two counts shall run consecutively.

Conclusion

20. From all the above, I find and hold that the appellant's appeal on both conviction and sentence has no merit and must fail. In addition the 4 years in respect of count 1 and count II shall run consecutively and not concurrently so as to serve as a deterrent to other like-minded people as the appellant.

21. It is so ordered.

Judgment delivered, dated and signed in open court at Kapenguria on this 28th day of November, 2018.

RUTH N SITATI

JUDGE

In the presence of

The appellant present in person

M/S Kiptoo for the Respondent

Mr. Juma – Court Assistant