



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL APPEAL NO. 29 OF 2015

BETWEEN

JACKSON MMBAYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence

in Kakamega CMC CR.Case no. 704 of 2014

by Hon J. Ong'ondo Ag P.M. on 24.2.2015)

JUDGMENT

Introduction

1. The appellant herein pleaded guilty to the charge of maim contrary to section 234 of the Penal Code, the particulars of which were that on the 22nd day of February, 2015 at Lidambira area of Iguhu Location of Kakamega South District within Kakamega South he unlawfully did maim to Caleb Tsisala.
2. The facts of the case were that on 22/02/2015 at 7.00pm, the complainant arrived at his workshop at Lidambira. He found the appellant seated there. The appellant started complaining that the complainant had refused to repair the verandah which belonged to the appellant. Soon thereafter a commotion ensued and the appellant hit the complainant, knocking one tooth out and loosening one of the upper molars. The complainant was rushed to a nearby hospital as appellant was arrested and charged. The P3 form confirming injuries sustained by the complainant was produced as PExhibit 1, while treatment book was produced as PExhibit 2.
3. Upon admission of the charge and the facts as outlined above the appellant was convicted on his own plea of guilty and sentenced to five(5) years imprisonment.

The Appeal

4. Being aggrieved by both conviction and sentence, the appellant filed this appeal through the firm of M/S K.N. Wesutsa & Co. Advocates. The appellant cites violation of his constitutional rights, saying he was not produced in court within 24 hours of his arrest. He also complains that the medical evidence upon which he was convicted was infact not produced as exhibits and that as such the trial Court failed to

ascertain the degree of injuries spelt out in the medial documents. The appellant prays that the appeal be allowed, conviction quashed and sentence of 5 years imprisonment set aside.

5. This is a first appeal and at such this Court is under a duty to reconsider the case facing the appellant afresh with a view of reaching its own conclusions in the matter. See Okeno – Vrs – Republic (1972) E.A 32.

The Law

6. Since the conviction herein was based on a plea of guilty, this Court will consider the rules for recording of guilty pleas as set out in the case of Adan- Vrs – Republic (1973) EA 445 which are:-

(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 state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

(iv) If the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

(v) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded

7. It is clear from the above rules that a plea of guilty will be entered only if the language used by the court is understood by the accused person in addition to the record showing that the accused person fully knew what he/she was committing himself/herself to by returning a plea of guilty. In the case of Choge – vrs – Republic (1983) KLR 425 the Court held that a plea of guilty must be taken cautiously and the record must show that the facts were read to the accused; that he understood those facts and that he admitted the facts.

Submissions.

8. Counsel for the appellant submitted that as a result of the appellant not being produced in court within 24 hours of his arrest and there being no explanation from the state the appeal ought to be allowed. Counsel also submitted that the appellant's right under article 49(1)(c) of the Constitution was violated because he did not have legal representation on during the trial.

9. Thirdly counsel submitted that the use of the word maim in the charge sheet did not bring to the notice of the appellant the exact nature of the injury referred to therein and that the trial court had the duty to explain to the appellant the consequences of pleading guilty to such a serious offence. See Boit – Vrs Republic (2002) KLR815

10. On grounds 2 and 3, counsel for the appellant submitted that though the P3 form and the treatment notes were said to have been produced as exhibits the said documents are not on the court file. For the reasons stated, counsel urged this court to allow the appeal.

11. In response, Mr. Omwenga, counsel for the state conceded the appeal on the ground that the facts as read to the appellant did not disclose the charge and as such the appellant's plea of guilty was not unequivocal.

Issues for Determination

12. From the facts given to the court, the submissions by counsel and taking into account the law, the issues that arise for determination are;-

- i) Whether the plea by the appellant was unequivocal
- ii) Whether the facts as given by the prosecutor disclosed the offence of maim;
- iii) Whether the documentary evidence produced as PExhibits 1 and 2 were indeed produced in evidence.

Determination

13. On the first issue of whether the appellant's plea was unequivocal, the record shows that the charge was read and explained to the appellant in Kiswahili, a language which he understood and in answer, thereto the appellant admitted that the charge was true. The facts were then given, although it is not clear from the record whether the facts were given in English or Kiswahili. The facts read that there was a commotion between the appellant and the complainant during which the appellant hit the complainant and knocked one of the complainant's teeth out and left one tooth loose. It is submitted on behalf of the appellant that these facts do not disclose the offence of maim. In simple language, to maim somebody is to injure or wound seriously and leave permanent disfigurement or mutilation. The burden on the prosecution was to prove that the injury caused to the complainant was serious and that it left a permanent disfigurement or mutilation. In my considered view, knocking out a tooth from someone's mouth and leaving another tooth loose is not a small matter. The loss of a tooth leaves one's mouth permanently disfigured, and looking mutilated.

14. The additional issue that arises for consideration is whether the trial Court saw the P3 form and the treatment notes to confirm what the facts said happened to the complainant. I have carefully combed the record of the trial Court and as submitted by counsel for the appellant, there are no exhibits on the file. This court is not sure whether some intervening event took place resulting in the loss or disappearance of the exhibits or whether the prosecution did not actually produce the same. In the absence of these exhibits, which would form the basis for the trial Court's finding that the injury was indeed maim, this court cannot assume that the offence of maim was committed, for this reason, it is apparent that the appellant's plea was not unequivocal as the facts which were unsupported by medical evidence, did not disclose the offence of maim.

15. Regarding the third issue the record shows that the exhibits referred to in the facts were in fact never produced.

Conclusion

16. On the basis of the above findings, I agree with both counsel that this appeal must succeed. Accordingly I allow the appeal, quash the conviction and set aside the sentence of five (5) years' imprisonment. Unless otherwise lawfully held the appellant shall be released from prison custody forthwith.

17. Before I conclude this Judgment I wish to say a few words about the appellant's complaint that his constitutional rights under article 49(1)(c) and (f) were violated. In my humble view this issue ought to have been brought out at the earliest opportunity during the trial and not during appeal. In any event, a violation of the said right(s) would not necessarily lead to acquittal. If the appellant so desires, he may pursue a civil claim against the state in separate proceedings.

Orders accordingly

Judgment delivered, dated and signed in open court at Kakamega this 21st day of April, 2016

RUTH N. SITATI

JUDGE

In the presence of;-

.....Mr. Kundu (present).....for the Appellant

.Mr. Omwenga(present)..... Respondent

.....Mr. Lagat.....Court Assistant