



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL CASE NO.52 OF 2014**

*(From original conviction and sentence in Criminal Case No.1710 of 2014 of the*

*CM's Court at Kisii delivered on 12<sup>th</sup> June, 2014 by Hon. Kibet Sambu – PM)*

IGNATIUS ANYENGA OMARE -----APPELLANT

VERSUS

REPUBLIC-----RESPONDENT

**JUDGMENT**

1. The Appellant herein, **IGNATIUS ANYEGA OMAE** was accused before the Chief Magistrate's Court at Kisii in Criminal case no. 1710 of 2014 where he was charged with the offence of assault causing actual bodily harm contrary to **Section 251 of the Penal Code**. The particulars of the charge were that on 7<sup>th</sup> June, 2014 at Nyamware sub-location, Keumbu Location in Kisii Central District within Kisii County, unlawfully assaulted **Hellen Bosibori Omare** thereby occasioning her actual bodily harm.
2. When the charges were read out to him, the appellant pleaded guilty but on mitigation, he stated that he was drunk at the time he is alleged to have committed the offence.
3. The trial magistrate proceeded to enter a plea of guilty, convicted the appellant and sentenced him to serve two (2) years imprisonment. It is the said conviction and sentence that has now triggered the instant appeal.
4. In the petition of appeal filed by M/s B.N. Ogari & Co. for the applicant, the appellant states, inter alia that the trial court did not afford him a fair trial, did not follow the procedure for recording a guilty plea and did not indicate the language used during the plea or if the appellant understood the said language. The appellant also contested the sentence meted out on him by stating that the same was harsh and unfair.
5. When the appeal came up before me for hearing on 24<sup>th</sup> March, 2016, Mr. Ogari for the appellant submitted that the appellant's main ground of appeal was that the language used by the court and the appellant at the time of taking the plea was not indicated and as such the plea was not unequivocal.
6. The appellant further submitted that his sentence was based on the findings by the probation officer in his report filed in court yet he was not given a chance to challenge the said probation officer's report.
7. Mr. Otieno, counsel for the state conceded the appeal for he reasons that the language used during plea

taking was not shown and that the plea was not unequivocal as the appellant qualified his plea during mitigation.

8. This being a first appeal, and despite the fact that the state conceded the said appeal, I am still under a duty to reconsider and re-evaluate the Evidence tendered before the lower court afresh with a view to reaching my own independent conclusion. See **Pandya vs Republic [1951] E.A 336**.

9. In this appeal however, the appellant pleaded guilty to the charge and this means that a full trial was not conducted. I will therefore scrutinize the record in order to establish whether the plea was unequivocal or not.

10. The court of appeal set out the steps to be undertaken in recording a guilty plea in the case of **Adan vs Republic (1973) EA 445**, as follows:

**“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 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. The need to exercise caution when recording a guilty plea was further emphasized in the case of **Njuki vs Republic [1990] KLR 334** in which it was held that the court must satisfy itself that the accused understood every element of the charge and pleaded guilty to every element of it unequivocally.

12. In the instant case, I am not satisfied that the appellant understood every element of the charge or pleaded guilty to it unequivocally. The proceedings do not show the language used when the charges were read out to the appellant or if he understood the said language.

13. Furthermore, as correctly stated by Mr. Otieno, counsel for the state, the appellant qualified his guilty plea on mitigation when he stated as follows:

**“I pray for court’s forgiveness and that of the complainant who is my mother. I was drunk at the material time and date.”**

14. In my humble view, the plea was not unequivocal. The mitigation amounted to a statement of defence as it raised the issue of drunkenness which ought to have been canvassed at a hearing. I find that the mitigation amounted to a change of plea to that of “not guilty” and the trial magistrate misdirected himself when he went ahead to convict the appellant despite the clear and apparent change of plea. For a guilty plea to be unequivocal, the steps set out in **Adan vs Republic (supra)** must be followed. Further, the record must be such that it leaves no doubt as to whether the accused understood the charges and confirmed the charges as true. I find that the plea in this case was not unequivocal and hereby quash the conviction and sentence.

15. Having quashed the conviction, should I order a retrial? I think not. I consider, in the circumstances of this appeal, that a retrial is likely to cause an injustice to the appellant. As stated by the Court Appeal in **Fatehali Manji vs Republic 1964 E.A 481**

**“even where a conviction is vitiated by a mistake of the trial court of which the prosecution is**

**not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its particular facts and circumstances and a order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.” (my emphasis added).**

16. I will therefore allow the appeal, quash the conviction, set aside the sentence and order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

**Dated, signed and delivered in open court this 30<sup>th</sup> day of May 2016**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

- Otieno for the State
- Ondari for Ogari for appellant
- Omwoyo court clerk