REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 29 OF 2016

DAVID MWIKWALA MACHUGU...................................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from the conviction and sentence by Hon. G. Sagero,

Senior Resident Magistrate in Kehancha Principal Magistrate's Court

Criminal Case No. 475 of 2016 delivered on 13/06/2016)

JUDGMENT

1. This is an appeal against the conviction and sentence resulting from a plea of guilty which was entered upon admission of the offence by the appellant.

2. The day was the 13th day of June 2016 when the appellant was arraigned before the Senior Resident Magistrate in Kehancha facing the charge of **grievous harm** contrary to **section 234** of **the Penal Code,** Chapter 63 of the Laws of Kenya. The particulars of the charge were that *on the 19th day of May 2016 at Muswetu village in Kuria East District, within Migori County, unlawfully did grievous harm to Daniel Mwenge Ngitangita.*

3. The record indicates that the charge and its particulars were read to the appellant in English/Kiswahili/Kikuria which language the appellant indicated to understand. When called to respond the appellant admitted the charge. The facts of the case followed immediately which briefly disclosed that on the said 19/05/2016 the complainant was talking with the appellant's wife by the roadside in respect to some money which the complainant had advanced to the appellant's wife. The appellant then appeared while armed with a panga and saw the two talking. The appellant got enraged and abused the complainant and then chopped off the complainant's right ear with the panga. A struggle ensued and the complainant managed to disarm the appellant. The appellant then ran away as good Samaritans took the complainant to hospital. The matter was then reported to the Nyantiro Police Post. The complainant was treated and later filled in a P3 Form which classified the degree of injury as grievous harm. The appellant was arrested and charged accordingly. The P3 Form was produced as an exhibit.

4. When the appellant was called to respond to the facts, this is what he stated:

> ***"The facts are true. I had even reported the complainant over my wife."***

5. The court then convicted the appellant own his own plea of guilty and on mitigation the appellant stated as follows:

> ***"I wanted an exhibit. I met her in the bush with my wife. If he had given my wife money he should have involved me."***

6. The appellant was then sentenced to 3 years imprisonment.

7. It is on that background that the appellant being dissatisfied with both the conviction and sentence lodged a Petition of Appeal on 21/06/2016 where the appellant contended that he did not know what was required of him during the taking of the plea and that the language and the facts challenged him.

8. The appeal was heard by way of oral submissions where the appellant appeared in person and Learned State Counsel Miss Bosibori appeared for the State. At the hearing of the appeal the appellant blamed the police from Nyantiro Police Station for misleading him into admitting the charge whereas that was his first court appearance and knew nothing. The appellant prayed that if the appeal on conviction is disallowed then this Court ought to consider review of the sentence to a non-custodial one. The appeal was opposed.

9. As this is the Appellants' first appeal the role of this court is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that. In this case however since the matter did not proceed on for trial, the court did not have the advantage of observing the demeanor of the witnesses and hearing them give evidence.

10. Due to the centrality of the issue of plea-taking, I will first revisit the law on that subject. **Section 207** of the Criminal Procedure Code states as follows:

> ***'207 (1) The substance of the charge shall be stated to the accused person by the Court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to plea agreement;***
>
> ***(2) If the accused person admits the truth of the charge otherwise than by plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary;***
>
> ***Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.'***

13. The above provisions have previously been subjected to Court's interpretation. The procedure and steps to be taken in taking a plea of guilty were clearly laid down in the case of **Adan -vs- R (1973)EA 445** and in the Court of Appeal case of **Kariuki –vs- R (1954) KLR 809** as follows:-

> *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 take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.***

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

*v. **If there is no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused reply.***

14. Further in the case of **Kariuki -vs- R (supra)** the Court went on and stated that:-

"The narration and interpretation of the facts of the alleged offence before the entry of a conviction and asking the appellant if he agreed with the fact is evidence of the precaution which the trial magistrate adopted to ensure that the appellant fully understood the charge before pleading."

And in the case of **Atito -vs- R (1975) EA 278** the Court also held that the narration of facts supplemented the explanation by the trial magistrate of the ingredients of the offence.

15. Upon the promulgation of the Constitution of Kenya in 2010, the people of Kenya gave unto themselves an elaborate Bill of Rights under Chapter Four thereof. **Article 50** thereof deals with the right to a fair hearing and in **sub-article (2)(b)** it states that:-

"(2) Every accused person has the right to a fair trial, which includes the right-

(a)……..

(b) to be informed of the charge, with sufficient detail to answer it.

11. I have perused the record before the subordinate court. The plea was taken in English/Kiswahili/Kikuria languages. That means the proceedings were conducted in English, Kiswahili and in the local language Kikuria. The appellant did not raise any objection to the language used and instead proceeded to respond to the charge and its particulars. That was the case when the facts were equally presented to him. I again note that the appellant did not even state which language he had wanted the proceedings to be conducted in. The appellant did not also inform the court that he had been misled by the police or that he did not understand the proceedings. I therefore find that the contentions that the language challenged him, that he had been misled and that he did not understand what transpired in court to be unsustainable and are hereby dismissed as afterthoughts.

12. I also wish to state that in cases where an accused person pleads guilty to an offence and facts are taken the court is duty bound to scrutinize the facts and to ensure that the facts disclose the ingredients of the offence in issue. That is the only time when a court, in the further guidance of the law aforesaid, can proceed to convict the accused person. In this case the facts were clear and straight forward and the appellant readily agreed to them. I am so convinced that the facts disclosed the ingredients of the offence of grievous harm moreso with the availing of the P3 Form and that the appellant did not raise anything requiring the court to enter a plea of not guilty instead. That finding is further concertized by the appellant's own statement that he injured the complainant because he wanted an exhibit as he had met the complainant with his wife in the bush.

13. I have also confirmed from the record that the learned magistrate did not enter a guilty plea when the appellant admitted the charge and the particulars but instead entered a conviction when the facts were admitted. What the court failed to do was to enter a plea of guilty upon the admission of the charge and the particulars but it rightly convicted the appellant upon admitting the facts. However by invoking **Section 382** of the Criminal Procedure Code and without losing sight of **Article 50(2)(b)** of the Constitution, I find that the arnomaly is curable since it did not go to the root of the matter as to render the plea of guilty unequivocal. I now return the verdict that the plea of guilty was properly entered in the circumstances of this case and that the appeal against the conviction fails.

14. The last issue for consideration is the aspect of the sentence. **Section 234** of the Penal Code provides

that anyone convicted of the offence of grievous harm is liable to life imprisonment. The appellant was sentenced to 3 years imprisonment.

15. It is well settled that sentencing is an exercise of discretion on the part of a court and that such exercise of discretion is rarely interfered with unless in the clearest of instances. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act upon in dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not take into account a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and as long as the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

18. This Court is not convinced that the learned magistrate erred in handling the aspect of sentencing. The sentence is quite fair given that the complainant will have to live with the disability caused by the appellant without any legal justification for the rest of his life. The appellant may try his luck in applying for review of the sentence later. The appeal on sentence equally fails.

19. The upshot is that the appeal is hereby dismissed.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 30th day of November 2016.

A. C. MRIMA

JUDGE