REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 89 OF 2014

JOHANA MAEMBE KALOI...APPELLANT

-VERSUS-

REPUBLIC..RESPONDENT

[Appeal from original Conviction and Sentence in Naivasha C.M.CR. No.2019 of 2013 by Hon. Kimilu, Ag. P.M. dated 16th April, 2014]

JUDGMENT

FACTS

The Appellant was charged in the lower court with the offence of attempted murder contrary to Section 220(a) of the Penal Code. The particulars of this offence were that on 3rd September 2013 at Sakutiek Village in Naivasha Municipality, Nakuru County, the Appellant attempted to unlawfully cause the death of Ester Naiyesu Ngosira by cutting her twice on the head with a Somali sword and chopping off three fingers on her right hand.

He was convicted on his own plea of guilt and sentenced to life imprisonment. This appeal is against both his conviction and sentence. The grounds of appeal listed in the Memorandum of Appeal dated 23rd May 2014 are that:

(a) the procedure for taking plea was not followed;

(b) the appellant's plea of guilt was equivocal;

(c) the trial court did not inform the appellant of the consequences of pleading guilty and the penalty which the offence carried;

(d) the appellant did not understand the language of the court when he pleaded guilty;

(e) the appellant was coerced into pleading guilty on the promise that the matter would thereafter be settled amicably;

(f) the sentence meted out was harsh and was based on an improper conviction;

(f) the offence was committed in Sakutiek Location of Narok North District within Narok County and not Naivasha Municipality of Nakuru County as alleged in the charge sheet which is an indication that the appellant did not understand the proceedings.

APPELLANT'S SUBMISSIONS

Counsel for the Appellant submitted that the conviction could not stand because the Appellant was charged with the offence of attempted murder which he pleaded guilty to, yet he was convicted and sentenced on the offences of assault and causing grievious bodily harm and not that of attempted murder for which he had been charged with. In support of this submission Counsel cited **James Waithaka & 2 Others** V. **Republic,** [2005] eKLR Counsel submitted that the Appellant should be acquitted on this ground.

On the second ground, Counsel relied on the decision of **Judy Nkirote** V. **Republic**, [2013] eKLR and **Bernard Munyau Ndunge & Another** V. **Republic,** [2014] eKLR. That a plea is only unequivocal if the procedure laid out is followed and also contended that the words “it is true” were inadequate and did not amount to an unequivocal plea.

The third ground was with regard to the state of mind of the accused. Counsel's submission was that the Appellant was confused at the time when the plea was taken. He was therefore not even able to inform the court that the offence was committed in Narok County and not Nakuru County as stated in the charge sheet. Further he was not cautioned on the consequences of pleading guilty.

That in this case, the appropriate remedy is not a retrial because the mistake on record was not occasioned by the trial court but by the prosecutor who failed to read the facts to the Appellant and instead opted to rely on the charge sheet and the evidence of PW1. The trial court was also to blame by convicting the Appellant before the facts were read to him.

RESPONDENT'S SUBMISSIONS:

The prosecution counsel conceded the appeal on the grounds that the record did not show that the facts were read out to the Appellant. Counsel asked the court to consider a retrial as the evidence on record against the Appellant was overwhelming.

ISSUES FOR DETERMINATION

i. Whether the procedure for taking the second plea of guilty was properly followed;

ii. whether the appellant's plea of guilt was equivocal;

iii. Whether the appellant understood the language of the court when he pleaded guilty;

iv. Whether the appellant was coerced into pleading guilty on the promise that the matter would thereafter be settled amicably;

v. Whether the sentence meted out was harsh and was based on an improper conviction;

vi. Whether this is a suitable case for retrial

ANALYSIS

This being the first appellate court it is incumbent upon it to re-evaluate the evidence on record and arrive at its own independent conclusion. Refer to **Okeno** V. **Republic, (1972) EA 32.**

When the accused was arraigned in court on 5th September 2013 before the Chief Magistrate for taking plea there was an English Swahili interpretor. The charges were read to the accused in Kiswahili

language, which he understood and he replied it is true. A plea of guilty was entered.

The proceedings were as follows:

> **“COURT**
>
> **Charge read over and explained to the accused persons in the Swahili language which he/she understands who being asked whether he/she admits or denies the truth or every element thereof replies:-**
>
> **ACCUSED**
>
> **It is true**
>
> **COURT**
>
> **Plea of guilty entered.”**

Thereafter, the Prosecutor made two applications one asking for the matter to be mentioned on another day because the P3 Form had not been filled and the other for production of the three fingers that had been severed from the complainant's hand. The court made the following short ruling:

> **“COURT**
>
> **We can't hear the case for purposes of producing fingers. Plea has not been taken and the case is not for hearing. We are not even certain of the direction it will take. It's not ripe for production of the exhibit. It may be heard before the High Court given what the prosecution has said.**
>
> **Mention 19/09/2013.”**

Therefore the plea taking process was not completed as the prosecutor did not read out the facts to the appellant and he was not given a chance to dispute the facts or explain them or add any relevant information. Further the court did not convict the Appellant but made a finding that there was sufficient cause not to enter a plea of guilty at that stage as there was a possibility of the matter being transferred to the High Court possibly on a graver offence of murder.

Later on the when the case came up for mention on the19th September, 2013 the Appellant changed his plea and the court record reads as follows;

> **ACCUSED**
>
> **" I didnt commit the offence"**

The court was correct in disregarding the first plea of guilty and the basis for the trial that ensued arose from the appellant's change of plea to that of not guilty. This court is of the view that there was no fundamental error or flaw in the procedure adopted by the trial court to proceed to full hearing as there was sufficient cause to do so.

I have perused the court record at length and have not sighted a time when the appellant requested that he needed a interpretor as he did not understand the proceedings nor the case against him.

The language in which the charges were read out to the appellant is clearly indicated on the court record as English/Kiswahili and that it was PW1 who needed a Masai interpreter and not vis versa. The court record further shows that the appellant understood the nature of the business of the court in which he was involved and even requested for bond on his own accord. He was not granted bond immediately and the

reasons for its denial were spelt out clearly to him, the reasons being that the community was still hostile and the situation on the ground was volatile.

I find that the Appellant was not prejudiced by being required to undergo full trial and further the court record does not show that the appellant was prejudiced by the language used by the court.

After the first witness (PW1) had testified the appellant stated;

> **"I wish to admit that I assaulted and caused grievous harm to the Complainant".**

The Appellant pleaded guilty a second time in the course of this trial. It is this plea that is the subject of the appeal. When the matter came for hearing on 16th April 2014 the complainant gave her evidence. When asked to cross examine the witness, the Appellant stated that:

> **ACCUSED**
>
> **I wish to admit that I assaulted and caused grievous harm to the complainant.**
>
> **E.K. KIMILU**
>
> **Ag. PM**
>
> **16/4/14**
>
> **The substance of the charge and every element thereof has been stated by the court to the accused person who replies in Kiswahili:-**
>
> **ACCUSED**
>
> **It is true**
>
> **COURT**
>
> **Plea of not guilty entered**
>
> **E.K. KIMILU**
>
> **Ag. PM**
>
> **16/4/14**
>
> **FACTS**
>
> **PROS**
>
> **We adapt the evidence of PW1 for our facts and produce PW3 Form as exhibit No. 1 together with the three photos as exhibit 2(a) (b) and (c).**
>
> **E.K. KIMILU**
>
> **Ag. PM**
>
> **16/4/14**

ACCUSED

Facts are true as stated.

E.K. KIMILU

Ag. PM

16/4/14

COURT

Accused is convicted on his own plea of guilty.

E.K. KIMILU

Ag. PM

16/4/14

The process of taking plea is provided for under **Section 207** of the **Criminal Procedure Code:**

> **"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 a plea agreement;**
>
> **(2) If the accused person admits the truth of the charge otherwise than by a 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.**
>
> **(3) If the accused person does not admit the truth of the charge,the court shall proceed to hear the case as hereinafter provided."**

The process was restated by the Court of Appeal in **Adan** V. **Republic,** [1973] 1 E.A. 445 (CAN) as follows:

> **"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;**
>
> **The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;**
>
> **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**
>
> **If the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and change of plea entered;**
>
> **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 statement should be recorded."**

The Appellant's contention that he pleaded to an offence other than the one which he had been charged with is not correct. The record is clear that after the Appellant's admission, the trial magistrate read the charge and explained the elements of the offence to the Appellant. Therefore, the plea of guilt was to the charges that were read to him for the offence of attempted murder.

Counsel for the Appellant also alleged that the admission of guilt must be recorded as nearly as possible as to the words that were used by the Appellant. He alleged that the words "it is true" are not adequate. However, those were the words that were used by the accused. If that is what he responded then there is no prejudice.

The allegation that he did not understand the proceedings has no merit. The trial went on for a considerable period during which the Appellant was able to follow through and at no point did he indicate that he was unable to understand the proceedings. The error in the charge sheet as to the name of the county was not material as the appellant did not dispute this nor did he attempt to explain or add anything more in correction thereto.

This court finds that there is nothing in the appellant's second plea or in his mitigation that negated the elements of the offence which were intent and the overt actions and the choice of weapon and the facts as narrated by the prosecution witness were admitted by the appellant.

On the last issue of the harshness of sentence this court makes reference to the criteria set out in the case of **Wanjema** V. **Republic**, [1971], E.A. 493 as to when a court can interfere with sentence. In this case I find no reason to interfere with the sentence imposed as I find that the sentence imposed for the offence was that which is prescribed by the law and this court is satisfied that the trial magistrate did not act on wrong principles of the law nor did he overlook material facts.

Due to the severity of the injuries and the choice of weapon the sentence is not harsh or excessive.

This court finds no reason to address or belabour itself on the issue of a retrial as it does not obtain.

FINDINGS

For the reasons stated above I shall make the following findings;

i) The second plea is found to have been properly taken and is also found to have been unequivocal and the conviction is found to be safe.

ii) The sentence is found to be the one prescribed by law and is proper and finds no reason to interfere with it.

iii) Retrial is found not to be necessary in this instance.

DETERMINATION

The appeal is found lacking in merit and it is hereby dismissed.

The conviction and sentence are hereby upheld.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 22nd day of May, 2015.

A. MSHILA

JUDGE