



REPUBLIC OF KENYA

IN THE HIGH COURT

AT GARISSA

CRIMINAL APPEAL NO. 18 OF 2015

MBUVI MWANIKI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(from original conviction and sentence in criminal case no. 767 of 2014

of the CM Magistrate court at Garissa).

J U D G M E N T

The appellant was charged in the subordinate court with two counts of assault causing actual bodily harm Contrary to Section 251 of the Penal Code. The particulars of count 1 were that on 27th March 2014 at 8.00 Pm at Mororo market Mororo location in Tana North District Tanariver County jointly with others not before court unlawfully assaulted Rose Muthoni thereby occasioning her actual bodily harm. The particulars of count 2 were that on the same day time and place with others not before court unlawfully assaulted Mutemi Muthui thereby occasioning him actual bodily harm.

When he was taken before the trial court, he was recorded as having pleaded guilty to both counts. He was thus convicted and sentenced to serve 18 months imprisonment on each count.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. His grounds of appeal are seven, and they are as follows:-

1. That he is a first offender.
2. That he is remorseful and thus seeks leniency.
3. That his sentence be ordered to run concurrently.
4. That he did not understand the intensity of the case.
5. That the court should order probation or community service.
6. That this court should set aside the decision by the trial court and give him a chance to pursue justice.
7. That this court should review the whole matter considering that he had reformed due to the time

he had stayed in prison and acquit him.

The appellant also filed written submissions to the appeal. At the hearing of the appeal, he relied on the written submissions. I have perused the same.

The learned prosecuting counsel Mr. Orwa opposed the appeal. He was of the view that the grounds of appeal were a mere mitigation and not proper grounds of appeal. Counsel submitted that the record showed clearly that the appellant pleaded guilty. He also admitted the facts before he was convicted. He could not therefore come to this court and say that he did not understand the seriousness of the charge. Counsel emphasized that the mitigation of the appellant was taken into account before he was sentenced. Counsel emphasized that the maximum sentence for the offence was 5 years imprisonment. Counsel submitted also that the sentence imposed was concurrent, so the appellant should not again ask for concurrent sentences. After the closure of the appeal hearing, a judgment date was fixed.

Before judgment was delivered however, Mr. Okemwa learned prosecuting counsel informed the court that the committal warrant sent to the prison indicated that the sentences were to run consecutively rather than concurrent. He asked the court to give directions. This court thus directed the trial court to clarify the position which they did. The trial court confirmed that the sentences were concurrent. It also confirmed that the initial mistake on the committal warrants which indicated that the sentence was consecutive did not affect the committal warrant to the prison, as that erroneous warrant was not sent to the prison authorities.

This is a first appeal.

As a first appellate court, I am duty bound to re-examine all the record and come to my conclusions whether or not the plea of guilty and conviction entered was unambiguous.

The grounds of appeal indicate that the appeal is against both conviction and sentence.

I have perused the record of the proceedings in the subordinate court. The charges were read and explained to the accused. He answered in Kiswahili that both charges were true. The language used by the court was English translated to Kiswahili. After the charges were read and the appellant admitted that they were true, the prosecutor summarized the facts and the appellant stated that the facts were correct. The appellant was thus convicted on his own plea of guilty under section 215 of Criminal Procedure Code(Cap 75).

Though the language in which the charges were read and explained to the appellant was not indicated in the record, it is clear to me that the language used in court proceedings was English translated into Kiswahili. The appellant is also recorded as having replied to the charges in Kiswahili language. In my view, the appellant cannot come to this appellate court and claim that he did not understand the language used in court. I dismiss that complaint.

I note however that after the charges were read and explained to the appellant and he said it was true, pleas of guilty to the charges were not entered. This was a mistake. In my view the trial court should have entered pleas of guilty in each of the 2 counts before proceeding to allow the prosecutor give a summary of the facts. See the case of *Adan –vs- Republic (1973) EA 445*. That was not done. In my view however this omission did not cause any prejudice to the appellant. I thus find that the plea of guilty of the appellant was properly recorded. The conviction was also proper, as the appellant admitted the facts, which disclosed the offences charged.

I now go to the sentence. The confusion about the sentence being consecutive or concurrent has now been cleared. The appellant is serving concurrent sentences of 18 months imprisonment.

Before he was sentenced the appellant was allowed to mitigate. He asked for leniency. He stated that he had a young child whom he cared for and that he was a first offender. Though the trial court did not specifically state that it considered the mitigation before sentencing, in my view the sentence of 18

months imprisonment on each count to run concurrent showed that the trial court considered the mitigation before sentencing the appellant. The maximum sentence for this offence is 5 years imprisonment. I thus find no reason to disturb the concurrent sentences imposed by the trial court.

To conclude I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and concurrent sentences of the subordinate court.

Dated and delivered at Garissa this 30th day of June 2015.

GEORGE DULU

JUDGE