REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 310 OF 2012

DAVID WESONGA KWEYU…….....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

1. When the Appellant herein was arraigned before the lower Court at Mumias on the 09/10/2012 he faced a holding charge of assault causing actual bodily harm since the victim was still admitted in hospital. The appellant however admitted the said charge and the matter was put off to 23/10/2012 for the presentation of the facts.

2. When the matter came up on 23/10/2012 the same charge which had been read to the Appellant on 09/10/2012 was once again read to him and he denied the same. A plea of not guilty was entered.

3. The matter thereafter came up in court on 30/10/2012 as well as on 15/11/2012 for mentions and a hearing date was fixed for 20/11/2012.

4. On 20/11/2012 the prosecution applied to substitute the charge with that of causing grevious harm. As the matter was then before a Resident Magistrate, it was taken to a court with the requisite jurisdiction and that was before learned Magistrate Hon. L.M. Nafula then a Senior Principal Magistrate.

5. The substituted charge was read out to the appellant in Kiswahili language and he admitted it. As the facts were not ready the matter was deferred to 07/12/2012 for that purpose. On the 07/12/2012 the substituted charge was again read to the appellant and he again admitted it. Facts were presented and exhibits produced and the appellant herein equally admitted them. He was convicted on his own plea of guilty and upon receipt of mitigations he was sentenced to life imprisonment. The Appellant was also explained to his right of appeal.

6. The Appellant being dissatisfied with the said conviction and sentence filed a Petition of Appeal one week later. He raised five grounds of appeal with a prayer that the case be heard afresh.

7. At the hearing of the appeal the Appellant appeared in person and relied on his written submissions wherein he expounded on the said grounds of appeal. Mr. Oroni opposed the appeal and argued that the Appellant properly participated in the proceedings and was lawfully convicted and sentenced.

8. As this is the Appellant's first appeal, the role of this appellate Court of first instance 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, analyse it and come to its own independent conclusion on the matter.

9. In line with the foregone, this Court in determining this appeal will principally endeavour to satisfy itself whether the plea as taken was unequivocal or otherwise.

10. The record of the proceedings before the subordinate court has been availed before me and I have carefully perused the same. This Court has also carefully considered the submissions of the parties on record.

11. The law on this subject is well settled. **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.'***

12. The above provisions have previously been subject to Court's interpretation. And, in particular 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- REPUBLIC (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 fact or raises any question of his guilt in his reply must be recorded and change of plea entered.**
>
> **(v) There is no change of plea a conviction should be recorded and statement of facts relevant to sentence and the accused reply.**

13. In the case of KARIUKI –VS- REPUBLIC (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."***

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.

14. 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.

15. **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.***

16. To therefore satisfy the above constitutional and statutory requirements, the Court when faced with a guilty plea scenario is called to exercise extreme care especially when the offence(s) involved carry serious legal penalties or are technical in nature moreso when the accused is unrepresented. The Court is called upon to ensure that the charge is read and explained to the Accused in such sufficient detail to enable the Accused make a very informed decision and to plead with such knowledge and information about the charge. All that must be clearly captured in the record including the language which the accused communicates in.

17. Another equally important aspect relates to the taking of the facts of the case. The purpose of the facts is to establish the ingredients of the offence before Court. It is the duty of the Court to scrutinize and be sufficiently satisfied that indeed the facts, as presented, do establish the ingredients of the offence. It is not enough for a Court to proceed and enter a guilty plea simply because the accused has admitted the facts, the facts must establish the commission of the offence. The Court should therefore endeavour to be fully satisfied that the facts truly connect the accused to the commission of the offence and that there appears no cause to the contrary as so clearly provided under Section 207 of the Criminal Procedure Code.

18. This Court dealt with the issue of plea-taking in some detail in **Kakamega High Court Criminal Appeal No. 46 of 2014 Dishon Malesia vs Republic (2014)e KLR** where it also expressed itself that it is always a good practice, though not the law, that despite the fact that in most cases the plea Court's are usually overburdened by pressure of work, once an accused person has pleaded guilty, in the circumstances envisaged as above, for the Court to consider the possibility of giving the accused person time so as to come up with a well thought decision on the way forward. The Court may opt either to warn the accused and/or retake the plea and/or the facts.

19. The record before the trial court is very clear. The substituted charge was read to the Appellant on two separate occasions; that is 20/11/2012 and 06/12/2012 in Kiswahili language. The appellant admitted the charge on both occasions.

20. The foregone followed two earlier instances where the appellant pleaded to the original charge of assault. On the first occasion, he admitted the charge which he denied on the second instance.

21. I have also analysed the facts as presented before court and the same clearly disclose the ingredients of the offence of grevious harm. The appellant also admitted the facts.

22. The appellant indeed had ample opportunity to reflect on and decide on how to plead to both the original and the substituted charges and on the facts as well.

23. The above discussion hence reveals that the plea of guilty as taken by the Court was and remains unequivocal. The appellant was hence properly convicted on his own plea of guilty.

24. The appellant also raised the issue of the sentence terming it as very harsh and excessive. **Section 234** of the Penal Code imposes the sentence on conviction in respect of the offence of grievous harm to a maximum of life imprisonment. The appellant was hence handed down the maximum possible sentence in law. That sentence remains lawful as it is provided for in the law. The question we should ask ourselves is whether the same is harsh and excessive in the circumstances of this case.

25. 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 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.

26. I have perused the P3 Form and the treatment notes and noted that the victim indeed sustained very serious injuries and had to be admitted in hospital for several days as she underwent emergency medical intervention. The victim did not provoke the appellant or at all as she had simply taken the appellant's son to hospital. It is not clear why the appellant decided to attack his vulnerable wife in such a manner and without any justification. The injuries were indeed life threatening. It is not in doubt that the appellant ought to serve a sentence in view of his said actions. In mitigations the appellant sought for the court's leniency with an undertaking that he will not repeat the commission of such offence in future. He was also a first offender.

27. The appellant having pleaded guilty and being a first offender and by taking into account the mitigations deserved a sentence but not the maximum possible one in law. I therefore agree with the appellant that the sentence imposed was both harsh and excessive and it is hereby set aside. Taking into account all the circumstances of the case and given that the appellant has been incarcerated since December 2012, I would be of the view that the appellant ought to be given a chance to reconsider his life in fulfilling what he undertook in mitigations outside prison. However to enable this court finally pronounce itself on the sentence it is desirable that a report by the probation department be availed. To that end, this matter shall be fixed for a mention after a reasonable time with a view to receive the said report and for sentencing.

28. Orders accordingly.

DATED and SIGNED at MIGORI this 6th day of November, 2015.

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at KAKAMEGA this 23rd day of November, 2015.

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JUDGE