IN THE HIGH COURT AT HOMA-BAY

CRIMINAL APPEAL NO. 35 OF 2013

BETWEEN

SHADRACK OCHIENG OKINYI ..... APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 466 of 2013 at Principle Magistrate's Court at Rongo, Hon. Z. J. Nyakundi, PM dated on 5th November 2013)

JUDGMENT

1. The appellant **SHADRACK OCHIENG OKINYI** was charged with the offence of assault causing actual bodily harm contrary to **section 251** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the charge were that;

   > *On the 1st day of November 2013 at Ulanda Trading Centre in South Sakwa Location in Migori County [HE] wilfully and unlawfully assaulted Milton Odhiambo Apidi thereby occasioning him actual bodily harm.*

2. The appellant was convicted on his own plea of guilty and sentenced to one year imprisonment. He was granted bail pending appeal though the same was revoked on 24th July 2014 when he failed to attend court.

3. He appealed against the conviction and sentence on the following seven grounds as follows;

i. *That the learned trial magistrate erred in law and in fact by heavily relying on facts as read by the prosecution which facts were unequivocal*

ii. *The learned trial magistrate erred in law by relying on the P3 form produced.*
iii. *The learned trial magistrate erred in law by failing to inquire and read out the charges in the language best understood by the appellant.*
iv. *The learned in fact erred in fact by failing to consider the particulars of the charge sheet with regards to the date of the offence against the date the complainant went to hospital for treatment.*
v. *The learned trial magistrate erred in law by shifting the burden of proof in the circumstance to the accused person.*
vi. *The learned trial magistrate erred in law and in fact by meting out a sentence which was excessive in the circumstance.*
vii. *The learned trial magistrate gravely erred in fact by failing to consider mitigating circumstances and other options while sentencing the appellant.*

4. The appellant, who appeared in person, relied entirely on the grounds of appeal and urged the court to set aside the conviction and sentence. The appellant submitted that he had talked to the complainant who was his brother and that they had reconciled. He requested the court to forgive him.

5. The State through learned counsel, Ms. Andabwa, supported the conviction and sentence. She submitted that, the plea was unequivocal and that the charges were read and explained. She further submitted that the record is clear that the appellant understood the offence. She relied on the authority of ***Kyalo Kalani v Republic*** **NAI CA Criminal App. No. 586 of 2010[2013]eKLR.** Ms. Andabwa pointed out that there was no error or defect in the proceedings. She further submitted that the sentence is not prejudicial and urged the court to dismiss the appeal.

6. This court has had the opportunity to read the proceedings from the lower court and is satisfied that as at the time of taking plea, the requirements of a plea of guilty were strictly adhered to. The legal principles to be applied in plea taking were well enunciated in ***Adan v Republic*** **[1973] EA 445** where the Court held:-

> *(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 state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.*
>
> *(iv) If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.*
>
> *(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.*

7. Further, the Court of Appeal in ***John Muendo Musau v Republic*** **NRB CA No. 365 of 2011 [2013]eKLR** added that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and been convicted for, the court must enter a plea of not guilty. That is to say that, an accused person can change his plea at any time before sentence. The procedure as laid out in ***Adan v Republic*** (**supra**) is also provided for under ***section 207*** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***.

8. As regards the language in which the proceedings were conducted, the record shows as follows, *"Charges read to the accused in English/Kiswahili/Dholuo/Ekegusii …"* The Court of Appeal held in ***Kyalo Kalani v Republic*** **(Supra)**, that it is fundamental that the proceedings be conducted in a language the accused understands. It is not necessary that the language be in the accused person's mother tongue but in a language he or she understands.

9. In this case the appellant pleaded guilty when the charges were read to him and a plea of guilty was entered. When the facts were read to him, he confirmed that they were true and the guilty plea was confirmed. When called upon to mitigate, the appellant asked for leniency. It is clear therefore that the proceedings were conducted in a language the appellant understood. He also understood the charges facing him and the question of misunderstanding could not have arisen.

10. The general principles upon which the first appellate court acts are now well settled. It has jurisdiction to interfere with 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 factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive

(see ***Wanjema v Republic*** **[1971] EA 493**).

11. **Section 251** of the **Penal Code** provides that a person who person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for 5 years. The appellant herein was sentenced to one year imprisonment. The sentencing notes of the learned magistrate do not reflect what factors he considered in arriving at the sentence. He only stated that it was based on, *"all factors considered."* The basis for the exercise of discretion was not clear. He did not consider whether there was a basis for imposing a non-custodial sentence which was available.

12. Although the assault was unprovoked, the appellant was a first offender, he pleaded guilty and showed remorse for his act. In the circumstances I quash the sentence of one year imprisonment and substitute it with a fine of Kshs. 20,000.00 in default 3 months imprisonment.

DATED and DELIVERED at HOMA BAY this 1st August 2014

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Andabwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecution for the respondent.