REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Application 200 of 2011

ABDI MOHAMED AHMED ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 347 of 2011 in the Resident Magistrate's Court at Wajir – Linus Kassan (AG. SRM) on 27th July 2011)

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JUGMENT

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1. The appellant was convicted on his own plea of guilty, for the offence of grievous harm contrary to **Section 234** of the **Penal Code,** in **Wajir SRM Criminal Case No. 347** of **2011,** on 27th July 2011. He was sentenced to serve 10 years imprisonment. The brief particulars of the case were that on the 20th day of July of 2011 at Jogbar location in Wajir, he unlawfully did grievous harm to Sadia Warsame Hussein.

2. In his submissions Mr. Mosota the learned counsel for the appellant, contended firstly, that the leaned trial magistrate convicted the appellant on an unequivocal plea of guilty, contrary to **Section 208(1)** of the **Penal Code.**

3. It was argued that the appellant's plea was equivocal for the reason that it was accompanied by words describing facts which establish a defence in law, and that his statement in mitigationwas inconsistent with his plea of guilty.

4. Mr. Mosota then contended that the charge was scanty and the facts vague and that therefore, the appellant was not accorded a fair trial as provided under **Article 50 (2)(a)** of the **Constitution**, which required him to be informed of the charge with sufficient detail for him to answer it.

5. Lastly, Mr. Mosota argued that the sentence of 10 years handed to the appellant was not only disproportionate to the alleged offence but was extreme from a moral or public interest point, in view of the appellant's advanced age and failing health.

6. Miss Venda the learned State Counsel, opposing the appeal on behalf of the respondent countered this argument stating that the plea was not defective and that the appellant was accorded a fair hearing, since the charge was read and all the circumstances of the case explained to the appellant in Somali language which he understood.

7. Miss Venda also contended that the sentence was in fact, lenient in view of the fact that the appellant was convicted of a felony, and the sentence provided therefor under **Section 234** of the **Penal Code** is upto life imprisonment. She urged me not to be swayed by the argument that the appellant was aged and sickly because he was able to commit the offence in that state.

8. Both counsels placed reliance in the case of **Adan v Republic (1973), EA pg 445** in which Spry V.P set out the manner in which a plea of guilty should be recorded as here under:

"(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 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 the facts relevant to sentence together with the accused's reply should be recorded."

9. I have perused the lower court record and applying the standard set out in the case of **Adan v Republic** above, I am satisfied that the plea was taken in a proper manner and was an equivocal. The the plea was not defective and the appellant was accorded a fair hearing, since the charge was read and all the components of the case explained to the appellant in Somali language which he understood.

10. That the appellant replied that the charge was true and that the fact were true and correct. In mitigation he stated that he was sorry and he was an old man. It is not evident what defence the appellant's response to the plea as recorded. **..."True. I plead for mercy. We had a plot case"....** could raise. It neither raises a defence of self defence which is a matter of evidence which in this case the appellant was the aggressor, nor does it avail a defence of provocation as non of the elements of provocation as are set out in **Section 208** ofthe **Penal Code** were present in the facts presented, and which he confirmed to be true. I therefore uphold the conviction entered against the appellant.

11. On the sentence the strong language in the pre-sentencing remarks is to be deprecated as it shows that the learned magistrate was influenced by his own reaction to the injury together with other

extraneous factors not supported by the evidence on record.

"The injuries sustained by the complainant are horrible. The piece of metal used is heavy steel with a nut at the end. The blow was meant to kill. I also wish to note that there are several cases of grevious assault/grevious harm in Wajir town and these calls for a deterrent punishment."

12. There was no evidence that the appellant intended to kill the complainant. If that were so he would have been charged with attempted murder. The prosecution did not also indicate to the court that there were **"several cases of grevious assault/grievous harm in Wajir"** as adverted to by the learned magistrate to warrant a deterrent sentence.

13. In view of the appellant's remorse and old age as borne out by the record, the interests of justice and the public would be properly served if the appellant's custodial sentence was reduced. In order for me to exercise my discretion to reduce the sentence in a judicious manner in the circumstances of this case, I order that a pre-sentencing report be availed.

SIGNED DATED and **DELIVERED** in open court this ***25th day*** of ***April*** **2013.**

L. A. ACHODE
JUDGE