



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO.12 OF 2013

EVEREST NG'WENO AGRIKACHAAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. The Appellant Everest Ngweno Agrikacha pleaded guilty to the Offence of Causing Grievous Harm contrary to Section 234 of The Penal Code. The particulars of the offence being that on 14th March 2013 at Ibanda Village Sikoma sub location, Marachi Central location within Busia County he unlawfully did grievous harm to Mary Oduol Oloo. Upon conviction, the Principal Magistrate at Busia sentenced him to a prison term of 7 years.
2. The Appeal raises 3 grounds;
 1. **“THAT the Learned Trial Magistrate failed to find that the plea was taken in a language the accused was not very conversant with English.**
 2. **THAT the Learned Trial Magistrate erred in law and in fact in not finding that the plea that was taken was not equivocal.**
 3. **THAT the Learned Trial magistrate failed to notice that the P3 form produced in court was not supportive wholly of the charge sheet.”**
3. At the hearing Counsel for the Appellant argued that the plea was not unequivocal as the language of the Court cannot be said to have been understood by the Appellant.
4. It was further argued that the sentence was harsh and excessive for a man who pleaded guilty at his first Court appearance and who was remorseful. Counsel drew the Courts attention to the fact that past criminal records of the Appellant were not produced and so the sentencing was improper.
5. The State Counsel Mr Waweru opposed the Appeal arguing that the Appellants understood the language. On sentence, Counsel thought a 7 year jail term to be lenient considering that the offence attracted a possible life sentence.
6. As the Appeal is substantially an attack on the plea taking proceedings then it becomes necessary to reproduce those proceedings in their entirety;

“20/3/13

BEFORE: I.T. MAISIBA, PM

C/PROS: CIP KORIR

CC: OPTY

INTER: ENGLISH/KISWAHILI

ACCUSED: PRESENT

Court: Charge is read over and particulars explained to the accused person in Kiswahili language which he understands and states.

Accused: It is true.

I.T. MAISIBA, PM

20/3/2003

Prosecutor: On 13/3/2013 the complainant Mary Oduol mother of the accused requested the accused to open his house so she could remove her iron sheets she had kept there. The accused refused to open claiming the sheets were his. The complainant went to the house, the accused armed with a rungu followed her complainant and started beating her inflicting serious injuries on the left arm the complainant raised alarm and brother of the accused came to her and the complainant was rushed to Khunyangu sub-district hospital for treatment she was referred to Bumala police post recorded a statement and was referred back hospital. A P3 form was filled it's here EX 1 the degree of injury was classified as grievous harm as complainant had a fracture on the left forearm. The accused was arrested and charged.

I.T. MAISIBA,PM

20/3/13

Accused: The facts are correct.

I.T. MAISIBA,PM

20/3/13

AIM: I pray for leniency.

I.T. MAISIBA,P.M

20/3/13

Court: The accused is sentenced to 7 years imprisonment. R/A within 14 days explained.

I.T. MAISIBA,PM

20/3/13”

Those are the proceedings that are said to fall short of the law. It is granted that criminal proceedings must be conducted in a language understood by the accused person. This is an explicit requirement of a fair hearing. This is captured in Article 50(2)m of The Constitution 2010 which provides that,

**“50(2) Every accused person has the right to a fair trial, which includes the right
.....**

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used as trial.”

The issue of language is also the subject of Article 50(3) which reads;

“If this Article requires information to be given to a person, the information shall be given in language that the person understands.”

7. Those Constitutions guarantees are repeated in Section 198(1) of The Criminal Procedure Code as follows:-

“whenever any evidence is given in a language not understood by the accused; as he is present in person, it shall be interpreted to him in open Court in a language he understands.”

Although the Section makes reference to giving of evidence, it would extend to all proceedings including plea taking.

8. The taking of plea should commence with the Court inquiring of the accused person the language he understands and of his choice. And the inquiry should be recorded. In the proceedings which are the subject of this appeal, the record does not show whether or not the Learned Magistrate conducted that inquiry. What the record shows is that there was interpretation from Kiswahili to English and that, the,

“charge is read over and particulars explained to the accused person in Kiswahili language which he understands.....”

9. In the Appeal the Appellant does not state that he does or did not understand Kiswahili language. The complaint is that the plea was taken in English(see Ground 1 of the Appeal). The Court record speaks for itself, the proceedings were interpreted into Kiswahili. That Ground of Appeal fails.
10. Was the plea unequivocal? I think it was. The charge was properly framed and the particulars of offence set out. The charge and particulars were in respect to an offence contrary to Section 234 of The Penal Code. And when invited to plead the accused answered.

“It is true”

11. The prosecutor thereafter read out the facts and produced a P3 Form as an exhibit. The medical examination revealed that apart from injuries to her back, the complainant suffered a fracture to her left forearm. The probable type of weapon which caused the injury was said to be blunt. The Medical officer assessed the injury as grievous harm. The results of the medical examination were consistent with the facts that were read out. It being said that the accused attacked the complainant with a rungu and fractured her left forearm. I do not see any merit in the argument that plea was not unequivocal or that the P3 did not support the charge. So Grounds 2 and 3 of the Appeal would have to fail.
12. I turn to the sentence. A sentencing Court receives records of any previous convictions of an accused person so as to determine the appropriate sentence to mete out. A first offender will not, as a general rule, be made to suffer a maximum sentence. It is true that no such records were provided to the Magistrate. It is not known whether or not the Appellant was a first offender. That said the Court imposed a 7 year jail term. That punishment was not the harshest possible given that maximum sentence for the offence is imprisonment for life. The Court appears to have treated the Appellant as a first offender. And although I may have been more lenient than the Trial Court, I cannot say that the sentence was manifestly excessive as the accused inflicted serious injuries on his victim, a fracture to the arm, and the victim was a person he ought to have respected his own mother. I see no reason to interfere with the sentence.
13. The Appeal fails entirely. I do hereby dismiss it.
14. In conclusion, I must apologize to the parties for the delay in preparing and delivering this decision. I was appointed an Election Court for purposes of hearing and disposing of three Petitions. The Constitutional timeframes for the hearing and determination of those Petitions is six months of the date they are lodged. The Petitions were involved and the Court dedicated its

energy and time there. Unfortunately, other matters, like this, had to suffer.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 18TH DAY OF SEPTEMBER 2013.

IN THE PRESENCE OF:-

KADENYICOURT CLERK

ASHIOYAFOR APPELLANT

OBIRI.....FOR RESPONDENT