

before the trial court.

Finally, the trial court was faulted for not giving the appellant an opportunity for mitigation.

But the Respondent contends that the plea of the appellant was unequivocal.

Mr. Mulati, learned state counsel, pointed out that the proceedings were interpreted into Kiswahili, which is the language which the appellant had expressly told the court, he was conversant with.

Secondly, the facts which were admitted by the appellant indicated that the appellant had hit the complainant on his lower lip;

“and as a result the complainant lost 1 tooth.”

To my mind, the loss of one tooth is clearly stated in the facts which the court read out to the appellant.

In any event, the “Concise Oxford English Dictionary” defines the word “Detach” as follows:

“1. Disengage (something) and remove it.

2. (detach oneself from) leave or separate oneself from (a group or place).”

Thus the facts spelt out by the court bore an accurate meaning of the word which the doctor used in the P3 Form.

In the doctor's assessment, the injury sustained by the complainant was classified as “*maim*”. In the P3 Form an injury so classified is said to mean;

“the destruction or permanent disabling of any external or internal organ, member or sense.”

The loss of a tooth is a permanent one, implied the medical doctor.

There is, therefore, no doubt that the offence which the appellant admitted committing was a serious one.

I find that he admitted committing the offence because he admitted the charge and the facts which constituted the offence. He did so after the charge and the particulars thereof were read out to him in Kiswahili, which is the language that he well understood.

Thus the plea was unequivocal.

Pursuant to the P3 Form,

“Grievous Harm” means:

“Any harm which amounts to maim, or endangers life, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ.”

I therefore find and hold that the facts which the appellant admitted unequivocally constitute the offence of Grievous Harm.

In the result the conviction was sound.

The sentence prescribed by Section 234 of the Penal Code, for the offence of Grievous Harm, is Life

Imprisonment. But the Appellant was jailed for 7 years.

I find that sentence to be lawful.

However, could the sentence be deemed unlawful or irregular because there is no record of any mitigation put forward by the appellant?

The record indicates that the learned trial magistrate gave consideration to the appellant's mitigation. However, there was no record of the actual mitigation.

The Magistrate Courts and the High Court are courts of record. Therefore, when the accused person puts forward his mitigation, the court ought to record it.

The particulars of the mitigation would enable an appellate court appreciate the reasons or factors which the trial court took into account when determining the appropriate sentence in any particular case.

Nonetheless, the provisions of Section 323 of the Criminal Procedure Code makes it clear that;

“If the judge convicts the accused person, or if the accused person pleads guilty, the Registrar or other officer of the court shall ask him whether he has anything to say why sentence should not be passed upon him according to law, but the omission so to ask him shall have no effect on the validity of the proceedings.”

Therefore, the validity of the proceedings herein cannot be undone by the omission to record the appellant's mitigation.

However, the sentence stands vacated as this court cannot ascertain whether or not it was informed by such mitigation as the appellant allegedly put forward.

This court could refer the case back to the trial court for fresh sentencing. However, that would result in un-necessary delay.

Accordingly, and pursuant to the provisions of Section 354 (3), of the Criminal Procedure Code, this court will proceed to hand down an appropriate sentence after receiving mitigation from the appellant.

Save to that extent, the appeal is otherwise dismissed.

DATED, SIGNED AND DELIVERED AT ELDORET

THIS 23RD DAY OF OCTOBER, 2013

FRED A. OCHIENG

JUDGE