REPUBLIC OF KENYA

High Court at Malindi

Criminal Appeal 6 of 2011

YUSUF CHIVATSI …….....….....……APPELLANT

VERSUS

REPUBLIC .....….....……RESPONDENT

(From the original conviction and sentence in Criminal Case No.19 of of 2011 the Chief Magistrate's Court at Malindi before Hon. D. W Nyambu – PM)

JUDGMENT

1. The Appellant herein was charged with the offence of Causing grievous harm contrary to section 234 of the Penal Code. The Particulars of the charge against the Appellant were that on the 3rd January, 2011 at about 7.30p.m at Malanga Village at Malindi District in Kilifi County, the accused occasioned grievous harm to Martha Yusuf.

2. The Accused was convicted on his own plea of guilt and sentenced to serve fifteen years imprisonment. He has appealed against both the conviction and the sentence and raised the following grounds in the petition of appeal:

1. That the learned magistrate erred in law and in fact in finding the accused guilty to the charge when the same was equivocal, self sentence and did not amount to a plea of guilty. The charge was read to the appellant he is recorded as saying "true", "true" does not amount to a plea of guilt. it should be more than just a mere true to what. Oremo v Republic (1990) KLR 290

2. The learned magistrate erred in Law in failing to consider that the Appellant did not understand the language which was used in court.

3. The learned magistrate erred in Law in failing to follow the correct procedure in recording a plea of guilty as required by section 207 (2) of the Criminal procedure Code (Cap) 75(Adan vs Republic (1973)EA 445)

4. The irregularities and omissions committed by the subordinate court resulted into the appellant not having a satisfactory trial occasioning injustice which are not durable under section 382 of the Criminal Procedure Code (Cap) 75 (Rex v Vashanjee Lilandar Dossani, Boya versus Republic Cr. Appeal no. 30 of 198 (KLR)

5. **There is nothing on record to show whether the Appellant mitigated but instead it is indicated nil which shows actual the appellant did not understood what was going on. This amounts to failure of justice, lack of fair trial and unprocedural thus the magistrates conviction was out rightly unsafe and untenable.** ***(sic)***

3. The Appellant was represented by Ms. Chepkwony who urged that both the conviction and sentence ought to be set aside for reasons ,*inter alia* , that the Appellant did not comprehend the language used at trial and neither was any mitigation indicated. That the Appellant is 'Kauma' by tribe. She relied upon the past decided cases of : **Adan v R [1973]EA 445, Vashanjee Liladhar Dossani Vs Republic(1946) 13 EACA 150, Oremo v Republic (1990) KLR 290**

4. Section 348 of the Criminal Procedure Provides that no appeal is allowed in respect of an accused person who has pleaded guilty to a charge in a subordinate court, except as to the extent or legality of the sentence.

5. The accused pleaded guilty to the charge. He has now challenged the resulting conviction. Was the plea unequivocal and unconditional? The procedure of plea taking was laid out in the **Adan case** 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 state the facts and the accused should be given an opportunity to dispute or explain the facts or to add relevant facts.

IV. If the accused does not agree with the facts or raises any questions 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.

6. The proceedings of the lower court show that the charge was read out to the appellant in Kiswahili, the language the accused understood, and to which he responded: " true". The particulars of the offence were also read out in Kiswahili and his response was: "facts are correct".

7. There is no indication in the said proceedings that the appellant did not understand the Kiswahili language used in reading out the charge and the particulars of offence to him. Section 382 provides that sentence passed by a court of competent jurisdiction can be

"**reversed or altered on appeal …... on account of an error, omission or irregularity in the.....or other proceedings before or during the trial ….....if it has occasioned a failure of justice. And in doing so the court in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.**"

8. There is no indication in the proceedings that the Appellant raised an objection as to the language of Kiswahili used in interpretation. The plea taken was therefore unequivocal and unconditional hence the conviction was proper. In **Ombena v Republic [1981] KLR 450** the court of appeal heldthat **"the decision as to whether the plea was unequivocal or not depends on the circumstances of each case. In this case it was clearly unequivocal as translation was properly given."** This is the case in the instant suit. This is distinguishable from the **Oremo Case** where it was not clear to what the accused had responded *"it is true"*

9. Ground '4' of the petition of appeal cites irregularities and omissions allegedly committed by the subordinate court resulting in the Appellant not having a satisfactory trial. During the appeal these were elaborated to include the charge not being read out in the language the accused understood as a result he seeks a retrial. In **Vashanjee Liladhar Dossani Vs Republic *(1946) 13 EACA 150*** the principles applicable in determining whether or not to order a retrial are basically two broad

considerations, one, whether the interest of justices require such an order being made and whether the order if made would occasion prejudice to an accused person, and secondly whether the admissible and potentially admissible evidence if tendered may result in a conviction. In the instant suit, the Appellant did not raise an objection as to the use of Kiswahili language and furthermore, it appears from the record that the admissible evidence that may result in a conviction. In the circumstances a retrial should not be ordered.

10. The Appellant also took issue with the sentence passed upon him. The established principle is that the appellate court will not ordinarily interfere with the discretion of the court in sentencing unless it is evident that the trial court acted upon a wrong principle or overlooked a material fact or the sentence is manifestly inadequate or excessive. See **Sayeko v Republic 1989 KLR.**

11. The trial court correctly took into account the gravity of the offence and the need to give a deterrent sentence 'to discourage others of like mind' and the severity of the injuries where in the complainant suffered 25% burns. The trial court also noted that the appellant “is the father of the complainant and ought to have protected the child instead of causing her grievous harm. The trial court considered the P3 form (exhibit 1). The trial court did not therefore act upon a wrong principle in reaching the sentence.

12. The offence of causing grievous harm attracts a maximum sentence of life imprisonment. Though it is correct that no mitigation was recorded, the sentence passed of fifteen years imprisonment is reasonable considering the circumstances and is not manifestly excessive so as to warrant interference by this court. In view of the foregoing there is no justification in interfering with the Learned Magistrate's finding on conviction and sentence. The Appeal on conviction and sentence has no merit and is dismissed in its entirety.

Delivered and signed this **16th** day of **October, 2012** in the presence of the Appellant, Ms. Mathangani for the State.

Court Clerk – Evans.

C. W. Meoli
JUDGE