



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 53 OF 2011

(From Original Conviction and Sentence in Criminal Case No. 3583 of 2010 of the Chief Magistrate's Court at Mombasa: R. Kirui – P.M.)

VICTOR ODHIAMBO.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant herein **VICTOR ODHIAMBO** has filed this appeal challenging his conviction and sentence by the learned Principal Magistrate sitting at the Mombasa Law Courts. The Appellant was first arraigned before the subordinate court on 22nd November 2010 and charged with the offence of **ASSAULT CAUSING GREIVIOUS BODILY HARM CONTRARY TO SECTION 234 OF THE PENAL CODE**. Upon the charge being read out and explained to him the Appellant entered a plea of '**Guilty**' to the charge. The facts were read out to the accused and he maintained his plea of guilty saying:

“Accused: that is true”

The trial magistrate then proceeded to convict the accused based on his own plea of guilty. After listening to mitigation the trial magistrate sentenced the Appellant to serve two (2) years imprisonment without the option of a fine. Being aggrieved by both his conviction and sentence the Appellant filed this appeal.

MR. ONSERIO for the State conceded the appeal on the basis that the facts as read out were ambiguous. **MR. OBARA** who acted for the Appellant argues that the facts were not read out to the Appellant in a language which he understood.

On this latter point I note that the record clearly indicates that the language being used in the court on the date of plea was Kiswahili which the Appellant went understood, given that he made lucid replies to both the charge as well as the facts. I therefore dismiss this ground of the appeal.

On the issue of the ambiguity of the facts I am not in agreement with the learned State Counsel. The

Appellant was charged with the offence of Grievous Harm. The facts as read out stated ***“Then he also attacked and injured him”***. This in my view is clear enough. Further proof of the type and nature of the injuries sustained can be found in the P3 form which was produced as an exhibit Pexb1. The Appellant pleaded to the correctness of these facts by stating:

“It is true”

Mr. Onserio submitted that the facts reveal an offence of Robbery with which the Appellant was not charged. This does not negate or diminish the fact of the assault and cannot be deemed to be a ground of appeal. In my view the charge was properly read out and explained to the Appellant in a language which he understood. The facts were clear and the injuries sustained were corroborated by the P3 form. I am satisfied that the Appellant’s conviction was sound and I do confirm the same.

The Appellant was certified by the prosecution to be a first offender. The complainant sustained serious injuries i.e. a fracture to mandible. Certainly a stiff sentence was called for. However given the circumstances the trial court ought to have considered an alternative sentence such as a fine. A custodial sentence was in my view uncalled for. Thus I do allow the appeal against sentence. I hereby set aside the two (2) year sentence imposed by the trial court and substitute the same with a fine of Kshs.20,000/- in default to serve two (2) years sentence.

It is so ordered.

Dated and Delivered in Mombasa this 19th day of December 2011.

M. ODERO
JUDGE

In the presence of:
Mr. Odhiambo holding brief for Mr. Obara