REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CRIMINAL APPEAL NO.73 OF 2011

(Being Appeal from the conviction and sentence by the Principal Magistrate E. C. Cherono at Webuye in Cr. Case No. 377 of 2011)

MENRAD MATAYO WASWA.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was convicted on his own plea of guilty of grevious harm contrary to section 234 of the Penal Code whose facts were that on 5/3/2011 at Nasinyama Village in Naitiri Location in Bungoma County he unlawfully grievously injured Gabriel Wekesa Waswa. He was sentenced to 20 years in jail. He was aggrieved by the conviction and sentence and preferred this appeal. He was unrepresented. The appeal was opposed by Mrs Leting for the State.

Regarding the conviction, the Appellant complained in the Petition of Appeal that the charge was not explained to him and that he was not conversant with the language in which plea was taken. During the prosecution of appeal, however, his complaint was that while waiting to enter the court for plea, the investigating officer and the complainant came to him and asked him to plea guilty saying that they had agreed with the court that if he does not plead guilty he would be jailed. He had otherwise not committed the offence. This is a complete departure from the grounds in the Petition. From what he stated during the appeal, the language of proceedings was not a hindrance. In any case, both during the appeal and during the plea the proceedings were being interpreted from English to Kiswahili language which he understood.

The record shows that the Appellant was initially charged with assault causing actual bodily harm contrary to section 251 of the Penal code. When the charge was read to him, he denied it. He was asked to be released on bond and hearing scheduled. When he came for mention, before the hearing date, he sought that the charge be read again to him. The prosecution did not have the police file. The case was mentioned severally before the file was finally availed on the hearing date. The prosecution successfully applied to have the offence enhanced to grievous harm. The fresh charge was read to which he responded *"It is true."* The prosecution outlined the facts. They were that he came home with a slasher and cut and injured his younger brother (the complainant). The incident was reported to the police and the

complainant treated at Kitale District Hospital. The P3 showing the injuries was produced. To the facts he responded: *"The facts as read to me are correct."* He was convicted. I have no doubt that the plea was procedurally taken in compliance with section 207 of the Criminal Procedure Code and as directed in **Adan v Republic [1973] EA 445.**

The injuries suffered were three cuts on the scalp. They measured between 6 cm and 8 cm. The attack was without reason and a dangerous weapon was used. Nonetheless, 20 years in jail was manifestly harsh and excessive. Secondly, the Appellant was a first offender who had pleaded guilty and that was not considered. **(Shiani v Republic [1972] EA 557).** The court noted that the complainant had suffered permanent injuries, but that was not reflected by the medical report that was produced. It was not considered that it is in exceptional circumstances that the court will send to jail an accused who is in permanent relationship with the complainant. **(Juma v Republic [1972] EA 437).**

The result is that the appeal against conviction is dismissed. The appeal against sentence succeeds. The sentence of 20 years is set aside. Considering what I have said above and the facts of this case, it is ordered that the Appellant pays a fine of Ksh.50,000/= and in default serves 18 months in jail.

Dated and Delivered at Bungoma this 6th day of December, 2011 in the presence of the Appellant, the State Counsel Mrs. Leting and Lilian Gimose the court clerk.

A. O. MUCHELULE
JUDGE