

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA Criminal Appeal 180 of 2007

SOMBO JABU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Sombo Jabu, was charged in the Senior Resident Magistrate’s Court at Kwale with the offence of Greivous Harm contrary to section 234 of the Penal Code. The particulars of the offence were that the appellant on 16th July 2007 at 1.00 p.m., at Mwereni village in Mwereni Location in Kwale District within Coast Province, unlawfully did greivous harm to Chando Mwero. The appellant appeared before D. O. Ogembo, Senior Resident Magistrate and is recorded to have pleaded guilty to the charge. The record does not show that the charge and ingredients thereof were read out and explained to the appellant. The record does not infact reflect what was read out to the appellant when he appeared before the Learned Senior Resident Magistrate. The prosecutor then stated the facts of the offence. They were brief and as follows:-

“On 16th July 2007 at around 9.00 p.m., complainant was at his house with his brother’s daughter. Accused went there and suspected that complainant wanted to have carnal knowledge with her. A quarrel ensued. Accused took a rungu and beat complainant on the face. Complainant sustained injury. Accused ran away. Complainant reported to Lunga-Lunga Police Station and was issued with P3 form. He was treated and discharged at Msambweni District Hospital. The P3 form was filled and degree assessed as greivous harm. Accused was charged. I produce the P3 form – P3 form Exhibit 1.”

The appellant was invited to dispute or explain these facts and he is recorded to have informed the Learned Senior Resident Magistrate that the facts were correct. The Learned Magistrate did not thereafter record the conviction of the appellant but immediately proceeded to receive the prosecutor’s statement on sentence and the appellant’s mitigation followed with the sentence of five (5) years imprisonment.

The appellant was dissatisfied and has appealed to this court on the main grounds that the said sentence was excessive in the circumstances and that his plea was not unequivocal.

When the appeal came up for hearing the appellant relied upon written submissions in which he elaborated the said grounds. Mr. Onserio for the State initially opposed the appeal but after considering the appellant’s said submissions conceded the appeal on the ground that indeed the plea was not unequivocal. I concur with the Learned State Counsel. As already stated, the Learned Senior Resident Magistrate committed several mis steps. He did not explain the charge and all the ingredients thereof to the appellant. He did not record the appellant’s plea in his own words before he entered the plea of guilty. He did not record the appellant’s conviction. Since the plea would have been one of guilty to the charge, the Learned Senior Resident Magistrate should have observed the settled procedure set out in Adam – v – Republic [1973] EA 445.

I have also perused the P3 form which was produced by the prosecutor when the appellant’s plea was taken. It shows that the complainant sustained multiple injuries involving his head, shoulder, back, both legs and genitalia. The P3 further disclosed that the complainant was assaulted by more than one person. The medical evidence relied upon by the prosecution did not therefore agree with the facts as stated before the Learned Senior Resident Magistrate.

In those premises, this appeal must be allowed. The proceedings before the Learned Senior Resident Magistrate are hereby quashed and the sentence set aside. The appellant is to be set at liberty unless otherwise lawfully held.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

The Appellant and Mr. Onserio for the State.

F. AZANGALALA

JUDGE

22ND SEPTEMBER 2009