REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Criminal Appeal 187 of 2008

(From original conviction and sentence in the Senior Resident Magistrate's Court Rongo , Criminal Case No 647 of 2008 by D.KEMEI (SRM)

WILLIAM OBIERO MATATA……APPELLANT

-VERSUS-

REPUBLIC……RESPONDENT

JUDGMENT

The appellant was convicted on his own plea of guilty by the Senior Resident Magistrate at Rongo of grievous harm contrary to *section 234 of the Penal Code* whose particulars were that on 31/5/2008 at Kadera/Wala sub- location in Migori District within Nyanza Province he unlawfully did grievous harm to Mary Atieno.

The prosecutor narrated the facts which the appellant accepted to be correct. They were that on 31/5/2008 the appellant arrived home from a drinking spree. He was drunk. He found the complainant and demanded from her more cash to go and drink. She told him she had no money, whereupon he took a stick and beat her with it all over the body. She screamed for help. Members of public came, but the appellant ran away. The complainant went to report the matter at Awendo police station. The appellant was arrested on 8/9/2008. P3 issued to the complainant had been completed and showed she had suffered harm. It was produced in evidence. To the charge, the appellant replied:

"It is true"

And to the facts he responded:

"The facts are quite correct."

The court convicted him. The prosecution indicated he was a first offender. He was asked to mitigate. He stated as follows:

"Complainant is my wife. I was trying to correct her. I have four children. I also sustained injuries during the incident as I was attacked by her friends."

The complaint by Mr. Otieno for the respondent was that his client did not understand what was going on, as the proceedings were not explained to him in a language he understood. Mr. Mutai for the State responded by saying that the languages in which the proceedings were conducted are indicated as

English/Kiswahili/Dholuo/Ekegusii. It is clear from the record that the clerk wrote the coram had indicated proceedings would be interpreted in the four languages. The magistrate is shown to have encircled "dholuo" language and it is the same pen that is used by him throughout the proceedings. Dholuo was therefore the language with which the proceedings were interpreted. The appellant is not saying he is not a luo or that he does not understand dholuo language. This situation is completely different from that in *Paul Kangeru Mwangi .V.Republic,H.C. Criminal Appeal no.128 of 2004 at Nyeri* or in *James Maina Wanjiru.V Republic,Criminal Appeal no. 30 of 2006 at Nakuru*. In either case, the language in which the charge was read out or the proceedings conducted was not at all indicated. I am satisfied that the appellant understood the proceedings which were conducted in dholuo language which he understood.

The record of what the appellant stated in mitigation fortifies my finding above. He told court the person he beat and injured was his wife whom he was trying to correct and that those who came to her rescue were her friends who had also assaulted him. He could not have stated that if he did not follow the proceedings.

The second complaint by the appellant was that he was arraigned in court two days after his arrest which violated his constitutional rights as enshrined under *section 72(3) (b) of the Constitution*. Indeed the date of arrest is shown as 8/9/2008, and he was brought to court for plea on 10/9/2008. That would be a day after the allowed 24 hours. He was supposed to be arraigned within 24 hours of his arrest, or as soon as was reasonably practicable. I accept that it is now settled that an unexplained delay is taking an accused in court within the prescribed period of time amounts to a violation of his constitutional right, and such violation vitiates the trial.

In *Elizabeth Akinyi Odoyo And Another .V.Republic, Criminal Appeals nos 161 and 162 of 2006 at Kisumu,* the delay was for 8 days. In *Isaiah Okeyo Aduda.V.Republic, HC.Criminal Appeal No. 123 of 2007 at Kisii,* the delay was for 3 days. In each case the court found that, because there was no explanation, the appellant's rights had been violated. In instant case, there was a 24 hour delay. The appellant did not raise the issue. He probably was not expected to raise it as he is a layman who was not represented. The court did not raise the issue either. The prosecution was not given an opportunity to explain the delay. In the particular circumstances of this case, where the complainant was the appellant's wife, I do not find that the appellant's rights were violated by the delay by a day to bring him to court.

There was ground three in which the appellant had complained about the sentence; that it was excessive. Mr. Otieno indicated he was abandoning that complaint. It is , however, the duty of this court to subject to fresh and exhaustive examination the entire record of the proceedings in the lower court and to make its own decision thereon.(See *Okeno.V.Republic [1972]EA 32).* The sentence has caused this court a lot of anxiety because the complainant is the wife of the appellant. The two have 4 children. The complainant suffered serious injuries, but the two were in a permanent relationship. A crime committed as a result of a domestic quarrel will not usually attract a term in prison because it has been argued that since the parties are in permanent relationship imprisoning the offender may also in effect punish the complainant, or that imprisonment may not help such relationship but instead complicate it further. (See *Juma .V.Republic [1972] EA 437).* Secondly, the fact that the appellant pleaded guilty to the charge, and that he was a first offender ought to have been credit. It is true that the trial court was exercising its discretion when it sentenced the appellant, but I find that it did not consider the principles above and therefore the sentence ought to be interfered with. (*See Wanjema .V.Republic [1971] EA 493).* It should also be noted that the offence was committed when the appellant was drunk, a factor the trial court did not consider.

I consider that the appellant has been in jail for over one year and find that that is sufficient punishment given the circumstances of the case. Consequently, the sentence of 5 years is reduced to the period already served. To that extent, therefore, the appeal is allowed.

Dated, signed, and delivered at Kisii this 16th Day of November, 2009

A.O.MUCHELULE

JUDGE

16/11/2009

16/11/2009

Before A.O.Muchelule-J

Court clerk –Mongare

Mr. Mutai for state

Appellant-present

Mr. Nyawencha for Mr. Gembe for appellant

COURT: Judgment in open court

A.O.MUCHELULE

JUDGE

16/11/2009