REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 595 OF 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 5 of 2003 of the Senior Resident Magistrate's Court at Wajir (Mr. Kingori -SRM)

ADAN IBRAHIM ALI…..……...APPELLANT

VERSUS

REPUBLIC…… ……....RESPONDENT

J U D G M E N T

The Appellant **ADAN IBRAHIM ALI** was charged alongside two other persons, with the offence of **ASSAULT CAUSING GRIEVOUS HARM** contrary to section 234 of the Penal Code. The three accused persons were also charged that while in lawful custody, they **UNLAWFULLY REFUSED TO HAVE THEIR FINGERPRINTS TAKEN,** contrary to Section 21(3) of the Police Act.

From the record, it is clear that all the three accused persons pleaded guilty to the offence of unlawful refusal to have their fingerprints taken. Each of them, including the Appellant, were sentenced to a fine of Kshs.3,000/-, in default of which they were to be imprisoned for 2 months each.

The Appellant also pleaded guilty to count I of **GRIEVOUS HARM**. He was therefore, convicted on his own plea of guilty. The court then sentenced him to 5 years imprisonment, with 6 strokes of the cane. It is against the conviction on count 1 and the sentence therefor, that this Appeal was preferred.

At the hearing of his Appeal, the Appellant sought and was granted a Somali Interpreter. He, therefore, conducted the Appeal through the help of the said Somali Interpreter, a Mr. Adan Ali. Due to the similarity in names, I inquired from the interpreter if he was related to the Appellant, but he assured me that he did not know the Appellant at all. The Appellant also confirmed that he did not know the Interpreter.

Next, the Appellant asked the court to accept his written submissions. Before accepting the said written submissions, I passed them on to the learned state counsel, Ms. Mwenje. She noted that the Appellant had not only given his written submissions, but had also raised new grounds of Appeal. At that point in time, the Appellant sought leave to amend his grounds of Appeal, whilst the Respondent asked for an adjournment to enable them prepare their response to the new grounds of Appeal.

I granted leave to the Appellant to amend his grounds of Appeal, in accordance with the draft which he had filed in court. I also granted an adjournment to the Respondent. This development is significant, as will become apparent in due course.

In his Amended grounds of Appeal, the Appellant submitted that he was appealing against both

conviction and sentence. He said that he was not conversant with the languages used by the trial court, i.e. English, Kiswahili and Borana.

His reason for so saying is that he is a Somali, by tribe, but the interpreter who was before the trial court was a Borana. He, therefore, contends that the trial was conducted in a language which he was not conversant with.

On that point, the Respondent submitted that the Appellant's contention was no more than afterthought. Ms. Mwenje, learned state counsel, pointed out that from the record of the proceedings, the Appellant is said to have understood the charges which were read out to him.

A perusal of the record shows that when the charges were read out to the Appellant, he answered;

"It is not true**", in relation to count 1; but in relation to count 2, the Appellant said; "**It is true"

Thereafter, the facts of count 2 were read out, and the Appellant confirmed that they were true. He and his co-accused were sentenced to a fine of Kshs.3,000/-, and in default 2 months imprisonment.

All the foregoing took place on 7th January 2003. Later, on 23rd January 2003, the Prosecutor applied for leave to substitute the charges on count 1. The learned trial magistrate allowed the amendment, and the charge was then substituted with one for **"GRIEVOUS HARM**" contrary to Section 234 of the Penal Code.

In accordance with the provisions of Section 214(1) (i) of the Criminal Procedure Code, the trial court called upon the accused persons to plead to the altered charge. At that point in time, the Appellant responded to the charge by saying;

"It is true."

His other two co-accused maintained their pleas of not guilty. The Prosecutor then set out the particulars of the charge. Basically, it was the Prosecution case that the incident in question occurred on 1st January 2003, at 2.00 p.m. The Complainant, who had earlier been assaulted by the Appellant, was then taking a walk with her husband. Their intention was to apprehend the Appellant, from the place where he had been spotted, in Wajir town. They had wanted to apprehend him in relation to an earlier altercation between him and the Complainant.

When the Appellant saw the Complainant and her husband approach, he pulled out a knife. The Complainant held the knife, but the Appellant's co-accused grabbed the said knife and returned it to the Appellant. It is then that the Appellant stabbed the Complainant in her abdomen. Thereafter, the Complainant was rushed to Wajir District Hospital, where she was admitted. The issue was reported to the police, who traced and arrested all the 3 accused persons. Meanwhile, after the Complainant recovered, a doctor filled a P3 form, in which he assessed the Complainant's injury as grievous harm. It was for that reason that the Prosecution had the original charges substituted.

After the particulars of the offence were read out to the Appellant, he said;

"The facts are correct."

It is then that the trial court convicted the Appellant, on his own plea of guilt. However, the Appellant now says that the court proceedings were conducted in a language that he did not understand.

First, it is not possible for the trial court to have been capable of knowing whether or not the Appellant understood the proceedings, unless the Appellant had drawn the court's attention to that fact.

Secondly, and more importantly, a reading of the whole record persuades me that the Appellant cannot possibly be telling the truth when he now alleges that he had not understood the proceedings before the

lower court. Why do I say so?

When the Appellant was asked to mitigate, he sought leniency, and also told the trial court that he was already serving another sentence. The learned trial magistrate perused the records, and verified that the Appellant had indeed been sentenced to 18 months imprisonment, with 3 strokes of the cane, in **Criminal Case No. 12/03.**

To my mind, the foregoing interaction between the Appellant and the learned trial magistrate is a clear manifestation of the fact that there was unhindered communication between the Appellant and the court. I therefore, find no basis in law or fact for faulting the learned trial magistrate for convicting the Appellant on his own guilty plea.

I am fortified in my decision by the fact that in his original Petition of Appeal, the Appellant had actually re-affirmed his involvement in the offence, when he said;

"That I was driven by instinct to co-operate with the mob in perpetuating the crime in question."

I, therefore, have no doubt in my mind, that the Appellant understood the language of the court, and that his conviction was sound.

Accordingly, in accordance with the provisions of Section 348 of the Criminal Procedure Code, the Appellant was not entitled to challenge his conviction, by way of an Appeal.

The Appellant did contend that the trial court had failed to comply with Sections 169(1) and 198 (1) of the Penal Code. First, there is no such provision as Section 169(1) in the Penal Code. Secondly, the whole section was repealed by Act No. 5 of 2003. Thirdly, even prior to its repeal, the section had no Application to this matter at all. I say so because that section was dealing with the need for the sanction of the Attorney General before an accused person could be prosecuted under Sections 166 and 167 of the Penal Code.

And as regards Sections 198(1) that too has no application to this Appeal, as it sets out cases in which publication of defamatory matter is absolutely privileged.

But perhaps, the Appellant slipped-up in making reference to the Penal Code instead of the Criminal Procedure Code. If so, I would still hold that those two sections of Statute do not have any Application to this Appeal.

Section 169(1) of the Criminal Procedure Code stipulates what should be the contents of a judgment. In this case, the Appellant had been convicted on his own guilty plea. Therefore, the learned trial magistrate was not obliged to set out points for decision, the decision thereon and reasons for the decision.

And in relation to section 198(1) of the Criminal Procedure Code, I have already made a finding that the proceedings were conducted in a language understood by the Appellant.

The next issue which the Appellant canvassed was in relation to the sentence.

It was his submission that he had been discriminated against by the trial court. His reasons for so saying were, that whereas he was sentenced to 5 years imprisonment, his other two co-accused were sentenced to one year each.

In **JAMES CHEGE MWANGI vs. REPUBLIC CRIMINAL APPEAL NO. 107 OF 2003**, the Court of Appeal expressed itself in the manner following;

> ***"As regards disparity in sentencing, we wish to point out that in Fatehali vs. Republic [1972] E.A. 158, the predecessor of this court held inter alia that care should be taken not to discriminate between two accused persons where all the circumstances and facts are the same.***

In this Appeal, the evidence accepted by the trial magistrate and the first appellate court was to the effect that the Appellant was with the co-accused when they confronted the Complainant on the material day. We failed to ascertain any reason or basis for dealing so leniently with the Appellant's co-accused."

In the light of that authority, I must now ask myself if there are any material differences between the facts and circumstances as between the Appellant, on the one hand, and his two coaccused on the other hand.

In his judgment, the learned trial magistrate found that all the 3 accused persons had assaulted the Complainant. The said assault resulted in injuries to the person of the Complainant, hence the charge of Grievous Harm. But whereas the Appellant pleaded guilty, and admitted the facts as read out by the Prosecution, his co-accused denied the charges. Following the denial of the charges, it became incumbent upon the Prosecution to prove the case beyond any reasonable doubt.

At the close of the trial, the learned trial magistrate made the following findings, which have a direct bearing on the issue of the offence for which the co-accused were convicted, and therefore for which they were sentenced.

"PW2 and PW3 witnessed the assault by the 1st and 3rd accused and their evidence corroborates the Complainant's evidence. However, the prosecution amazingly neglected to adduce the medical evidence to substantiate the degree of injury occasioned on the Complainant. They had in their possession the P3 form and in fact had it marked for identification as MFI1 but failed to call the doctor to testify and produce it. I do not know whether this omission was deliberate or inadvertent but its effect is to deal a total blow to the charge as laid. They have to demonstrate by production of medical evidence that grievous harm was done by the accused to the Complainant, and the prosecution has not done so."

For those reasons, the learned trial magistrate convicted the Appellant's co-accused for the offence of common assault, contrary to Section 250 of the Penal Code. He then sentenced them to imprisonment for 1 year each.

In effect, the circumstances of the Appellant, as well as the attendant facts were different from those of his co-accused. They may have "had a common intention to assault the complainant and that they acted jointly to that end" as the trial court held, but that is where the similarity ends. Thereafter, the Appellant pleaded guilty to, and was convicted for Grievous Harm. That offence attracts a penalty of life imprisonment. But the Appellant was jailed for 5 years. In contrast, the other two co-accused were convicted for common assault, because the prosecution failed to adduce evidence to prove the degree of injury sustained by the Complainant. Those two co-accused were sentenced to one year in jail. That is the maximum sentence prescribed under section 250 of the Penal Code.

Everything considered, I find that although there is disparity between the punishment meted out to the Appellant as compared to that meted out to his co-accused, the circumstances were not the same. I say so because the learned trial magistrate could not have been entitled to presume that just because the Appellant had pleaded guilty to the charge of Grievous Assault, the co-accused had to be guilty of the same crime even if the Prosecution failed to prove it. On the other hand, even though the Prosecution failed to call the doctor who examined the Complainant to testify as to the gravity of her injuries, it was too late to undo the Appellant's conviction and sentence.

For those reasons, I find no reason to fault the sentence handed down to the Appellant.

In conclusion, I find no merit in this Appeal, and therefore, it is duly dismissed. I uphold both conviction and sentence against the Appellant, save for the corporal punishment, which is vacated.

It is so ordered.

Dated at Nairobi this 24th day of January 2005.

F. A. OCHIENG'

JUDGE

Read, signed and delivered in the presence of;

Mr. Makura for Mwenje for the State

Appellant in person

Adbirahman, Somali Interpreter

Odero CC

F. A. OCHIENG'

JUDGE