



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Criminal Appeal 251 of 2005**

**ERNEST MWALUA LOMBO ..... APPELLANT**

**- Versus -**

**REPUBLIC ..... RESPONDENT**

**(Being an appeal from the judgment and Conviction in criminal case No. 4169 of  
2005 at Mombasa by H.M. Adika Esq, Resident Magistrate**

**J U D G M E N T**

The appellant was charged under section 251 of the Penal Code in that on 10/11/2005 at Migadini village Changanwe Mombasa, he unlawfully assaulted Mwikali Kitaa occasioning her actual bodily harm.

The plea taken on 24/11/2005 was one of guilty. The prosecution reproduced the facts which the appellant admitted as true. It was said that he had no previous convictions. After being heard in mitigation the learned trial magistrate handed down a 3 – month prison term.

Mr. Gatonye filed a petition (he called it a memorandum!) of appeal with five grounds: that the plea was not unequivocal because the facts reproduced did not disclose an offence that the date of the offence in the charge sheet differed with that in the P3 form. That the learned trial magistrate did not consider the appellant's mitigating factors and the sentence was too harsh for a young man who was a first offender.

These proceedings were preceded by an application for bail pending appeal. The court considered and both sides agreed that the actual appeal should itself be heard and that is what happened.

Mr. Gatonye argued his points and Mr. Monda the learned State Counsel responded.

Going down the recorded plea of guilty, this court is satisfied that it was defective. It did not conform to section 207 Criminal Procedure Code as enunciated in the case of ADAN VS REPUBLIC [1973] EA 445. The proper plea of guilty should go something like this after the proper coram has been set out including the language used.

- i) Reading and explaining the ingredients of the offence and requiring the accused to plead (to answer whether true or not) to it.
- ii) Recording the reply (It is true as charged or not, as close to the words used as possible).

- iii) The prosecutor reproducing the facts constituting the offence.
- iv) The accused being asked and admitting whether they are true or not.
- v) Recording the response and entering a plea of guilty on facts admitted.
- vi) The prosecution producing past records, if any.
- vii) The accused being heard in mitigation.
- viii) The court after considering all the above, pronouncing the sentence/order accordingly.

In the present case the learned trial magistrate omitted to record that the appellant had admitted the facts and he was thus convicted on his own plea of guilty. There must be a conviction following admitting the reproduced facts as true.

And for that the plea herein is found to have been defective and invalid. The appellant was never convicted for the offence charged. Accordingly the sentence meted out has no basis and it is set aside.

The appeal is allowed. The appellant is to be set free unless otherwise lawfully held.

Judgment delivered on 27/12/2005

J. MWERA

JUDGE