



REPUBLIC OF KENYA



**KENYA LAW**  
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**Orina v Republic (Criminal Appeal E046 of 2023)  
[2025] KEHC 3125 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3125 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CRIMINAL APPEAL E046 OF 2023  
WA OKWANY, J  
MARCH 13, 2025**

**BETWEEN**

**JAMES ATUNGA ORINA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the Judgment and Sentence at the Chief  
Magistrate's Court in Nyamira, Criminal Case No. E204 of 2023,  
delivered by Hon. W.C. Waswa, Resident Magistrate on 1st March 2023)*

**JUDGMENT**

1. The Appellant herein was convicted, on his own plea of guilty, for the offence of assault causing actual bodily harm contrary to Section 251 of the *Penal Code*. The particulars of the charge were that on the 14<sup>th</sup> February 2023 at Mborogo Village in Nyamira South Sub-County within Nyamira County, wilfully and unlawfully assaulted Teresa Nyanchama Kamanda thereby occasioning her actual bodily harm.
2. The Appellant was, upon conviction, sentenced to serve five (5) years imprisonment thereby triggering the filing of the instant appeal in which he listed the following grounds of appeal: -
  1. That, I honestly pleaded guilty to the offence of assault this asking this Hon. Court to kindly consider me for a more limited term or any other order this court may deem fit and just.
  2. That, this was a family or domestic issue between me and my wife this learnt the lesson hard way.
  3. That, my wife (whom we differed) and children needs me back dearly since I was the sole breadwinner thus asking this Hon. Court to consider my mitigation.



4. That, 5 years is manifestly harsh and excessive considering the circumstances surrounding the offence and bearing in mind that I pleaded guilty.
  5. That, I promise to abide by any terms or order this Hon. Court may deem fit and just.
  6. That, we have so far reconciled and mediated with my wife whom we differed and promised to solve our differences thus asking this hon. Court to pardon me.
  7. That, my children are not schooling since no one is caring for them as I was the sole breadwinner thus asking this Hon. Court to kindly consider my plight and mitigation.
3. The Appellant prays that this appeal be allowed, conviction and sentence be set aside and/or quashed, and the 5 years' sentence be reduced for a non-custodial term or any other order that the court may deem fit and just to grant.
  4. The Appeal was canvassed by way of written submissions which I have considered.
  5. The Appellant's submissions consist mainly of mitigation as he states that he is a first offender, breadwinner and an orphan. He further states that he is remorseful for his actions and has learnt that crime does not pay.
  6. The Respondent, on the other hand, noted that the appeal was only against the sentence passed by the trial court and submitted that the said sentence was legal since the Probation Officer's Pre-Sentence Report did not favour a non-custodial sentence.

### **Analysis and Determination**

7. In *Okeno vs. Republic* [1972] EA 32 the Court of Appeal in set out the duty of a first appellate court as follows: -
 

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”
8. As I have already stated in this judgment, the Appellant was convicted on his own plea of guilty to the offence of assault. This means that the evidence of the witnesses was not taken or a full trial conducted. The court is however still required to scrutinize the trial court's record with a view to establishing if the plea was unequivocal.

### **Whether the plea was equivocal**

9. Section 348 of the *Criminal Procedure Code* provides that:-

No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.



10. The Court of Appeal considered the above provisions in the case of Merali vs. Republic [1972] EA 47 and held that: -

“Although by Section 348 (1) of the Criminal Procedure Code no appeal shall be allowed in the case of any person who has pleaded guilty and has been convicted on such a plea by a subordinate court, except as to the extent or legality of the sentence, this limitation applies only where the plea itself is freely given and is unequivocal.”

11. Similarly, in Wandete David Munyoki vs. Republic [2015] eKLR the same court held: -

“It has long been settled that Section 348 of the Criminal Procedure Code which provides that no appeal is allowed in a conviction arising from a plea of guilty except to the extent and legality of the sentence, is not an absolute bar to challenging such a conviction on any other ground. Indeed, in Ndede v R [1991] KLR 567, this court held that the court is not bound to accept the accused person’s admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the accused person or the accused person may be confused or there has been inordinate delay in bringing him to court from the date of arrest. The list of circumstances and examples that may lead the first appellate court to consider the appeal on merit even when the conviction was on the accused person’s own plea of guilty are not closed.”

12. The above decisions point to the fact that this court has the jurisdiction to determine if Appellant’s the conviction was sound by considering whether the plea was unequivocal.

13. Section 207 (2) of the Criminal Procedure Code stipulates as follows:-

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(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

14. In Adan vs. Republic [1973] EA 445, the Court of Appeal set out the steps to be taken in recording pleas as follows: -

“When a person is charged, the charge and the particulars should be read out to him so far as possible in a language which he can speak and understand. The magistrate should explain to the accused person all the essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction



and proceed to hear any further facts, relevant to sentence. The statement of facts and the accused's reply must of course, be recorded.”

15. In the instant case, the trial court's proceedings show that the appellant was arraigned before the trial court on 16<sup>th</sup> February 2023 where proceedings were taken as follows: -

16/2/2023

Coram: Hon. W. C. WASWA SRM

Pros – Kihumba

Court Assistant – Brenda

Accused – Present

Interp: Eng/Kisw/Ekegusii

I understand Kiswahili Language

The substances of the charge (s) and every element thereof has been stated by the court to the accused person in the language that he/she understands, who being asked whether he/she admits or denies the truth of the charge (s) replies in Ekegusii

Accused – It is true.

Prosecutor – I pray for facts for tomorrow.

Court – Facts on 17/2/2023. Remanded in custody Nyamira Police Station.

HON. W. C. WASWA – SRM

16/2/2023

17/02/2023

Coram: Hon. C. W. WASWA – SRM

Pros – Ms. Kihumba

Court Assistant – Brenda/Terer

Accused – Present

Interp: Eng/Kisw/Ekegusii

Prosecutor – On the 14/2/2023 at around 2030 hours the accused arrived home drunk and found his wife washing utensils. He quarrelled her and closed the door. After an hour he returned with a panga and assaulted her by slapping her on the shoulder using a panga page – P. exh. No. 1. She was cut on the head. It was a deep cut. The accused was arrested by the chief.

Treatment notes – P Exhibit No. 2.

The P3 form – P Exhibit No. 3.

Accused – It is true.

Court – a plea of guilty is entered.

Prosecutor – no records.

Mitigations – I ask for forgiveness.



Court – Pre-sentence report. Mention on 1/3/2023.

HON. W. C. WASWA – SRM

17/2/2023

01/03/2023

Coram: Hon. C. W. WASWA – SRM

Pros – Ms. Kihumba

Court Assistant – Brenda

Accused – Present

Interp: Eng/Kisw/Ekegusii

Sentence

This court has considered the contents of the pre-sentence report as well as the accused's mitigation. The pre-sentence report is not favourable.

The victim is the accused's wife and she says that she has no peace at home. She also fears for her children. It would not be wise to release that accused at this stage. The accused to serve five (5) years imprisonment. Right of appeal within 14 days.

HON. W. C. WASWA – SRM

1/3/2023

16. From the above extract of the proceedings, it is clear that the charges were read to the accused in Kiswahili/Ekegusii language which he confirmed that he understood. I find that the plea was taken in accordance with the guidelines set out in *Adan vs. Republic* (supra). I am satisfied that the plea was properly taken in the language that the appellant understood, which is Kiswahili/Ekegusii, and I find that the plea was unequivocal. The fact that the Appellant mitigated and pleaded for leniency shows that he understood the charge that he was facing. I therefore uphold the conviction.

### **Sentence**

17. It is trite that sentencing is a matter that falls at the discretion of the trial court. In this regard, an appellate court will not ordinarily interfere with the sentence passed by the trial court unless it is shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive that it amounts to an error of principle. (See *Shadrack Kipkoech Kogo vs. R. Eldoret Criminal Appeal No.253 of 2003*).
18. In *Bernard Kimani Gacheru vs. Republic* [2002] eKLR the Court of Appeal stated that: -

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not



sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

19. Section 251 of the *Penal Code* provides that: -

Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

20. The meaning of the term “is liable to”, was discussed by Mativo J. (as he then was) in *NOO vs. Republic* [2019] eKLR as follows: -

“It seems to me beyond argument the words “shall be liable to” does not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it.”

21. In the present case, I note that the trial court considered the pre-sentence report before passing the sentence. In *State of M.P. vs. Bablu Natt* {2009}2S.C.C 272 at Para 13 the Supreme Court of India held that: -

“The principle governing imposition of punishment would depend upon the facts and circumstances of each case.”

22. The Appellant was sentenced to serve five (5) years imprisonment. The P3 form that was produced in the case indicated that the complainant sustained a cut wound on the scalp whose extent is not disclosed. The P3 form indicates that the complainant was given pain killers and antibiotics. My view is that the injuries were not very serious so as to warrant the maximum sentence of five (5) years imprisonment. It is noteworthy that the Appellant pleaded guilty to the charge thus saving the court precious time that could have been spent in conducting a full trial. I am of the view that the above factors ought to have been considered in granting the Appellant a less severe sentence. I find that the sentence is manifestly harsh, in the circumstances of this case.

23. I have considered the mitigation by the Appellant and the fact that the injuries inflicted on the complainant were not aggravated in degree. I am of the view that three (3) years imprisonment term would have been a more appropriate sentence. Consequently, while I dismiss the appeal against conviction, I allow the appeal on sentence by setting aside the 5 years imprisonment term and substituting it with a sentence of three (3) years imprisonment.

24. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 13<sup>TH</sup> DAY OF MARCH 2025.**

**W. A. OKWANY**

**JUDGE**

