



**Oyatsi v Republic (Criminal Appeal E111 of 2023)
[2024] KEHC 10856 (KLR) (20 September 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E111 OF 2023
JRA WANANDA, J
SEPTEMBER 20, 2024**

BETWEEN

SYPHROSE OYATSI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This Appeal arises from the conviction and sentence of the Appellant in Eldoret Chief Magistrate’s Court Criminal Case No. E2458 of 2023.
2. The Appellant was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars were that on 15/11/2023 at Huruma Estate in Turbo sub-County, within Uasin Gishu County, she assaulted one EO thereby occasioning him actual bodily harm. From the record, the said EO is the Appellant’s own 12 years old grandson and thus a minor.
3. The Appellant was unrepresented and was convicted on her own plea of guilty. She was then on 22/11/2023, sentenced to serve 4 years in prison.
4. Aggrieved with the decision, the Appellant, through her newly appointed Advocates, Messrs Gideon Nakhone & Co., instituted the present appeal vide the lengthy Memorandum of Appeal filed on 1/12/2023. She raised the following 12 grounds;
 - i. That the learned trial Magistrate erred in law and fact by convicting the Appellant on an own plea of guilty that was not unequivocal.
 - ii. That the learned trial Magistrate erred in law and in fact by failing to be cautious and extra vigilant as guided by law and precedents when accepting a plea of guilty from an unrepresented/undefended accused person.



- iii. That the learned trial Magistrate erred in law and fact by failing to inquire from the Appellant which language she understood and was comfortable with for the purposes of effective communication during the plea taking and the proceedings thereafter.
 - iv. That the learned trial Magistrate erred in law and fact by failing to explain/inform the Appellant in the language she understood, the charge/offence she had been charged with.
 - v. That the learned trial Magistrate erred in law and fact by failing to inform and explain to the Appellant (who was unrepresented) the essential elements of the offence that she had been charged with.
 - vi. That the learned trial Magistrate erred in law and fact by failing to explain to the Appellant in the language she understood and or at all the facts of the charge/offence she had been charged with.
 - vii. That the learned trial Magistrate erred in law and fact in failing to ask the accused person to comment on the facts of the case in her own words before entering the plea of guilty.
 - viii. That the learned trial Magistrate erred in law and fact by failing to inform, explain and warn the Appellant that the charge/offence she was about to plead guilty to carried a possible long jail term sentence.
 - ix. That the learned trial Magistrate erred in law and fact in failing to appreciate that the Appellant's plea of guilty was induced by threats.
 - x. That the learned trial Magistrate erred in law and fact in failing to appreciate that the Appellant was a sickly person on constant medication and that in fact there was need for a medical evaluation to be carried on accused person before sentencing.
 - xi. That the learned trial Magistrate erred in law and fact in sentencing the Appellant herein without the aid of a probation report given the entire circumstances of the case.
 - xii. That the learned trial Magistrate erred in law and fact by passing a sentence that was harsh and unreasonable given the circumstances of the case.
5. It will be immediately noted that although the Petition of Appeal is so lengthy and voluminous, such verbosity was wholly unnecessary since clearly, the grounds simply repeat, duplicate and reiterate one simple fact, namely, that the plea of guilty was not unequivocal. 2 or 3 condensed grounds could have sufficiently put the Appellant's grounds across. The only other discernible ground is that the sentence passed was unjustified and harsh.

Hearing of the Appeal

6. The Appeal was then canvassed by way of written Submissions. The Appellants' Submissions was filed on 24/02/2024 and the Respondent's also on the same date, through Senior Principal Prosecution Counsel, Patrick Onjoro.

Appellant's Submissions

7. In equally lengthy Submissions, Counsel for the Appellant submitted that had the trial Court made proper inquiries, it would have resolved the dispute through the Alternative Justice System. He submitted that the Appellant is a sickly, illiterate and elderly lady and is therefore required to have a steady supply of medication and that any interruption in the supply or intake thereof endangers her and also the people around her. Counsel then, obviously unprocedurally, went into what would



amount to introducing new evidence on factual matters. This was in respect to his attempt to explain out to the Court the cause, background and history behind the dispute herein. Basically, Counsel attempted to advance the version that this matter was simply a family domestic affair, a grandmother's act of disciplining her grandson going haywire and which consequently, overzealous neighbours and the police blew out of proportion and that the Appellant pleaded guilty out of threats from the police. Needless to state, such purported adducing of new evidence, particularly by way of written Submissions is not admissible at this appellate stage and I will therefore not consider it. Counsel even invited the Court to view a media clip in which an incident involving the Appellant was reported, an invitation which I swiftly refused for the reasons cited above.

8. Counsel then faulted the trial Magistrate for failing to explain to the Appellant the offence or break down for her the ingredients thereof, and failing to conduct a proper inquiry to ascertain the language that the Appellant understood. He submitted that the upon the plea being taken, the reading out of the facts was adjourned to 22/11/2023 on which date such facts were read out in the English language which the Appellant did not understand and that in any event, the facts as read out, were defective, ambiguous and did not disclose the offence. He submitted further that the Appellant was never served beforehand or at all with the evidence that the prosecution intended to rely on and that this rendered the proceedings unconstitutional. He contended further that the trial Court never bothered to request the Appellant to recount her own version of the events and nor was she warned that if she continued to plead guilty, she could be jailed for a lengthy sentence. Counsel also faulted the trial Magistrate for passing a harsh sentence of 4 years imprisonment without the option of a fine and without calling for a pre-sentencing Report or a Probation Report. He submitted that had the Court called for such Report, then it would have realized that a jail term would mitigate against the best interests of the minors involved.
9. Realizing that some of what he has submitted does not tally with the Court proceedings supplied to this Court, Counsel submitted that the typed proceedings do not fully match the handwritten version of the proceedings. He submitted that the proceedings was filled into a pre-prepared template, that the trial Court simply ticked boxes and filled in gaps without recording the exact questions posed to the Appellant and that it would appear as if the trial Court was filling up a questionnaire which practice, he submitted, was discouraged by the Court of Appeal in the case of *Elijah Njibia Wakianda v Republic* [2016] eKLR.
10. Regarding the competence of the Appeal, Counsel submitted that although Section 348 of the Criminal Procedure Code bars Appeals from subordinate Courts where an accused has been convicted on own plea of guilty, appeal against the extent and legality of the sentence meted out is excepted and that the bar also only applies where the plea was unequivocal. He cited the case of *Olel v Republic* [1989] KLR and also the case of *Ombena v Republic* [1981] eKLR which, he submitted, affirmed the holding in the case of *Adan v Republic*, 1973 EA 445. He also cited the case of *JMN v Republic* [2021] eKLR, the case of *Mose v R* [2002] eKLR, the case of *Judy Nkirote v Republic* [2013] eKLR, and also the case of *Abdallah Mohammed v Republic* [2018] eKLR.
11. Counsel further contended that the Prosecution never served the Appellant with the P3 Report which was the sole evidence that founded the case before the plea taking and that failure to serve the P3 Report contravened the Appellant's rights guaranteed by Article 50 of the *Constitution*. He cited the case of *Timothy Madaga v Republic* [2019] eKLR, the case of *Thomas Patrick Gilbert Cholmondeley v Republic*, Nairobi CA Criminal Appeal No. 116 of 2007, the case of *Joseph Ndungu Kagiri v Republic* [2016] eKLR and the case of *Joshua Njiiri v Republic*, Criminal Revision No. 11 of 2017 [2017] eKLR.
12. It was Counsel's further contention that at any rate, the P3 Report was never produced in the manner provided in law, that therefore it could not form part of the proceedings, and that the Report ought



to have been produced by the doctor, the maker thereof, and which was not done. He cited the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 Others* [2015] eKLR and the case of *Emmanuel Hatangimbabazi v Commissioner of Customs & Excise* [2020] eKLR and submitted that the Prosecutor could not in any assume the role of the doctor. He further urged that the facts read out to the Appellant made reference to the probability that the Appellant was a chang'aa brewer/consumer but that the illicit brew that was alluded to was not even produced as evidence. According to him therefore, since the P3 Report and the chang'aa alluded to were not produced as required by the law, the charges were ambiguous. He also cited the case of *Sarah Amulabu Omwaka v Republic* [2019] eKLR and submitted that the facts read out neither supported nor disclosed the charges that the Appellant was accused of insofar as the facts did not disclose how the Appellant purportedly hit the victim or the findings of the doctor who prepared the P3 Report.

13. On the trial Magistrate's alleged failure to warn or inform the Appellant of the possible sentence, Counsel cited the case of *Elijah Njibia Wakianda v Republic* (*supra*), the case of Jackson Wambua v Republic [2022] eKLR, and the case of Otumoi Putuai v Republic [2018] eKLR. He submitted further that the mitigation as recorded by the trial Court clearly demonstrated that the Appellant never understood what was read out as the statement of facts as she was clearly in a state of befuddlement.
14. On the trial Court's failure to call for a pre-sentence Report, Counsel cited the "Sentencing Guidelines of the Kenyan Judiciary" and also the case of *Purity Njambi Njoroge v Republic* [2017] eKLR and the case of *Simon Gitau Kinene v Republic* [2016] eKLR.

Respondent's (State) Submissions

15. On his part, regarding the rules for determining whether a plea was unequivocal, Counsel for the State, Mr. Onjoro, cited the case of *Ombena v Republic* (1981) eKLR and submitted that the record shows that the Appellant was asked the language she understood and her response was that she understood "Kiswahili" and that this is the language which she responded in while pleading guilty. He also argued that the trial Court informed the Appellant of her right to legal representation before the plea was taken and that she elected to proceed without an Advocate. He also contended that facts were read out to the Appellant and which she confirmed to be correct before she was convicted. According to him therefore, the conviction was sound in law and should be upheld.
16. On the issue of the sentence of 4 years imprisonment without the option of a fine, Counsel submitted that he was not opposed to the same. He conceded that the sentence was excessive and did not take into account the "Judiciary Sentencing Policy Guidelines.

Highlighting of Submissions

17. Upon request by Mr. Nakhone, Counsel for the Appellant, I allowed the parties to highlight their Submissions. On her part, when given the opportunity to briefly address the Court, the Appellant stated that the minor, being her own grandson, the matter had been resolved within the family and they had reconciled even before she was charged before the trial Court. Indeed, the boy's mother (Appellant's daughter) attended Court. Upon her request, I, quite uncharacteristically at the appellate stage, one may argue, allowed her to also address the Court. In her address, she, too, stated that the matter had been resolved within the family even before the Appellant was charged before the trial Court. She pleaded with the Court to release the Appellant (her mother) from prison. I agreed to hear the boy's mother at the appellate stage as no statutory provision was brought to my attention prohibiting the Court from doing so in deserved cases. Since the rights of a child and his protection were involved, I found this to be such deserved case. I also did so in appreciating the now well-



recognized place of alternative dispute resolution in our judicial system, even at appellate stage and also in the spirit of recognizing the spirit behind the *Victim Protection Act*, 2014.

Determination

18. As a first appellate Court, I am obligated to revisit and re-evaluate the matter afresh, assess the same and make my own conclusions (see *Okeno v Republic* (1972) E.A 32).
19. The issues that arise for determination in this Appeal are the following:
 - a. Whether the Appellant's plea of guilty was unequivocal and/or was properly conducted, and therefore, whether the trial Court properly convicted her.
 - b. Whether the sentence of 4 years imprisonment was justified.
20. First, I restate that where an accused person has been convicted on his own plea of guilty, generally, no Appeal against such conviction would lie. An appeal in such circumstances can only be on the sentence meted out, namely, "as to the extent and legality" thereof. This is apparent from Section 348 of the *Criminal Procedure Code* which provides as follows:

"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."
21. In regard to the same provision, the Court in the case of *Olel v Republic* (1989) KLR 444 stated as follows:

"Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the *Criminal Procedure Code* (Cap 75) does not merely limit the right of appeal in such cases but bars it completely." [underlining mine]
22. It is therefore evident that the prohibition against appealing against conviction in a case of a plea of guilty only applies only where the plea is unequivocal.
23. The other situation where the High Court may entertain an Appeal against conviction in a case of a plea of guilty is where the plea taking process was itself flawed. This was appreciated by the Court of Appeal in the case of *Alexander Lukoye Malika v Republic* [2015] eKLR, where the following was stated:

"May we, by way of commentary only remind that there is ordinarily no appeal against conviction resulting from a plea of guilty – See Section 348 of the *Criminal Procedure Code* which only permits an appeal regarding legality of sentence. A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous, or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also, where upon admitted facts the appellant could not in law have been convicted of the offence charged."



24. The correct manner of the plea taking process is set out in Section 207(1) & (2) of the Criminal Procedure Code as was restated in the leading case of *Adan v Republic* (1973) EA 445 at 446 in the following terms:

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those 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.”

25. In this case, the first complaint raised by the Appellant is that the proceedings were conducted in the English language. Regarding this allegation, I note that the trial Magistrate used a template while conducting the plea-taking. Regarding this use of a template, in the case of *Elijah Njibia Wakianda v. Republic* [2016] eKLR, the Court expressed itself as hereunder:

“With respect, we find this disturbing. It seems to us that this is part of a template used by courts at plea taking. That is why it speaks of “charge(s)” when there was a single charge and the rather odd “in a language he understands”, when it is more normal and logical to simply state the language used. This smacks of a mere going through the motions, a recital of ritual. While that may not much matter when the plea entered is one of not guilty followed by a trial with all its attendant safeguards, it assumes a critical dimension when the plea is one of guilty and leads to conviction. We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specifically asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language. We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the Constitution guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare. The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often-intimidating judicial process.”

26. My understanding of the above statement by the Court of Appeal is that it did not outlaw the use of a template while conducting plea-taking proceedings but only cautioned the Courts to be careful while doing so and ensure that no relevant details or particulars are omitted and that the accused person's rights are not violated. There would therefore be nothing wrong in a trial Court using such template as long no violation of the accused person's rights is demonstrated and no prejudice is caused to him.



27. In this case, the trial Magistrate used a template that he filled-in and the same indicates that the plea was taken on 17/11/2023. The template also indicates that the trial Magistrate asked the Appellant the language that he understood and upon which the Appellant responded that he understood the Kiswahili language. The template then indicates that the plea taking was conducted in the Kiswahili language with translation to English where necessary. The template then indicates that the charge and every element thereof was stated to the Appellant in a language that she understood. The template also indicates that when asked to confirm whether he admitted or denied the truth of the charge read out, he responded in Kiswahili that “ni kweli” (“it is true”). A plea of guilty was then entered.
28. The record then indicates that the facts were read out to the Appellant 5 days later on 22/11/2023. For this portion of the proceedings, the trial Magistrate now captured the proceedings in his own handwriting. The language used in reading out the facts is not indicated but the record indicates that after the facts were read out to the Appellant, he responded that the facts as read out were correct. There is no indication as to the language in which the Appellant responded but there is also no indication that the Appellant raised any issue regarding the language used or that she did not understand it. In the circumstances, I would assume that the earlier Kiswahili language used on 17/11/2023 is the same language that continued to be used on 22/11/2023. If there was a change in the language earlier used, I believe the Appellant, even though a lay person and undefended, would have protested or at least brought it up before the trial Magistrate.
29. I also consider that, as aforesaid, although the Appellant pleaded guilty on 17/11/2023 when he took plea, the trial Magistrate did not convict immediately but adjourned the reading out of facts, and it was not until 5 days later on 22/11/2023 that the same were read out to the Appellant. What this means is that by this 5-days adjournment, the Appellant obtained more time to think and reflect over the plea that she had taken. When the matter came up on 22/11/2023 and the facts read out to her, the Appellant confirmed that the facts as read out were correct. It is therefore only after this 5-day process that the trial Magistrate eventually convicted the Appellant on his own plea of guilty. This account does not point to a person who was ambushed with the plea or who did not understand the charge that she was facing, as alluded to by her Counsel.
30. In the circumstances, the ground of Appeal alleging that the Appellant did not understand the language used during the plea-taking proceedings fails.
31. The other allegation is that the Appellant was not informed of her right to obtain legal representation. However, the template referred to above indicates otherwise. On the contrary, it expressly indicates that the Appellant was informed of her rights under Article 50(2)(g) of the *Constitution* and that the Appellant responded that she would proceed without an Advocate. Since I have already found that use of a template during the process of plea-taking is not expressly outlawed and cannot be faulted in the absence of demonstration of any violation of an accused person’s rights, this ground also fails.
32. Another allegation raised is that after the facts were read out, the trial Magistrate failed to ask the Appellant to comment thereon in her own words before entering the plea of guilty. From the record, this seems to be a correct observation since I cannot find any evidence that the Appellant was asked to comment on the facts read out. However, while I agree that this duty must at all times be adhered to by a trial Court, I also believe that each case must be determined on its own facts and unique circumstances. In his lengthy Submissions before this Court, Counsel for the Appellant did not bring out any factual basis of any circumstances touching on conviction that would have been established had the Appellant been invited to comment. Finding otherwise will, in my view, therefore amount to mere speculation. As aforesaid, each case must be determined on its own unique circumstances and facts, and in this case,



I am not satisfied that the failure to invite the Appellant to comment on the facts read out, on its own, in any way violated the Appellant's rights.

33. Another allegation raised is that the trial Magistrate failed to inform, explain and/or warn the Appellant that the charge that she was about to plead guilty to carried a possible long jail term sentence. Again, I agree that this is a correct observation since the records do not indicate that the trial Court gave any such explanation or warning to the Appellant. I however again restate that each case must be determined on its own unique circumstances and thus one case, though similar to another, may not necessarily attract the same determination as another. Explaining to an accused person the nature of the possible sentence that may be meted out is an important step and is more paramount where the charge is a serious one and the possible sentence is substantially stiff and lengthy, for instance, in capital offences. In this case, considering that under Section 251 of the *Penal Code*, assault causing bodily harm, for which the Appellant was charged, is categorized as a "misdemeanour" (a minor wrong) as opposed to a felony, and the maximum sentence for the offence being 5 years, I do not believe that the failure to inform the Appellant of the possible sentence occasioned serious injustice to the Appellant to the extent that it would vitiate the entire plea of guilty.
34. There is also the contention that the Prosecution never served the Appellant with the P3 Report which was the sole evidence that founded the case before the plea taking and that failure to serve the P3 Report therefore contravened the Appellant's rights guaranteed by Article 50 of the *Constitution*. Counsel basically relied on the decision of R. Nyakundi J in the case of Joshua Njiiri v Republic, Criminal Revision No. 11 of 2017 [2017] eKLR. Although in that case, Nyakundi J held, correctly in my view, that if at the stage of plea-taking, the accused does not know the nature of the charge facing him or the evidence that the prosecution has against him, he cannot be expected to make an informed decision on whether or not to plead guilty, I note that in that case, by the time that the accused was taking plea, he had not even been supplied with a copy of the charge sheet. Clearly therefore the accused therein could not have been expected to know the nature of the charge he was facing beforehand and he was obviously seriously prejudiced. That situation is not the same herein and being so, that decision is not a proper comparable case herein. In this case, there being no allegation that the Appellant had not been supplied with the charge sheet, I also reject this ground of appeal.
35. In any event, when an accused person is arrested on commission of a cognisable offence, Article 49(1)(f) of the *Constitution* of Kenya requires that he be arraigned or presented in Court within 24 hours, basically for purposes of taking plea. It will be impractical to expect that the police and/or the prosecution will have completed full investigations within 24 hours such that they would be able to supply the defence with copies of all the exhibits before taking plea. At the stage of plea-taking, practically, only preliminary investigations will have been concluded and the process of compiling evidence would still be ongoing. Of course, in appropriate cases, the police should not rush to arrest if investigations are still ongoing.
36. My view is that once a charge sheet has been supplied to the accused person, that is sufficient for him to know and understand the nature of the charge that he is facing and to plead to it. If the accused pleads guilty and is then convicted, the prosecution will then have no obligation to go further to prove its case. Only where the accused pleads not guilty and the case has to then proceed to trial, would the prosecution have the duty to proceed to the second stage of compiling and supplying copies of the exhibits intended to be used at the trial. In view of the foregoing, insisting that before taking of plea, the prosecution must, apart from supplying the charge sheet, also supply the full evidence intended to be used at the trial will be tantamount to paralyzing the prosecution from discharging its duties. It is just not practical in our justice system. As aforesaid, since there is no allegation that the Appellant had not been supplied with a copy of the charge sheet at the time that he was taking plea, this ground, too, fails.



37. Regarding the allegation that the trial Magistrate failed to appreciate that the Appellant's plea of guilty was induced by threats, I cannot fault the Magistrate for this since the record has no indication that this allegation was at any time raised before the trial Court. It smacks of an afterthought and I therefore also overrule it.
38. It was also contended that the P3 Report was never produced in the manner provided in law, and that it could not therefore form part of the proceedings. According to Counsel for the Appellant, the Report ought to have been produced by the doctor, the maker thereof, and that the Prosecutor could not assume the role of the doctor. While this contention is correct where the accused person has pleaded not guilty and the case has gone to trial and witnesses have to testify, no provision of law that requires exhibits to be produced by the makers even where the accused person has pleaded guilty has been brought to my attention. I cannot therefore fault the trial Magistrate. This ground, too, fails.
39. Counsel only contended that the facts read out neither supported nor disclosed the charge that the Appellant was accused of. He argued that the facts did not disclose how the Appellant hit the victim or the findings of the doctor who prepared the P3 Report. Although it is true that the facts were deficient to some extent, I am satisfied that they met the requirement to an acceptable standard. For instance, although the findings of the doctor were not captured, this was cured by the P3 Report that was produced and which clearly indicated that the minor was hit on the head with a piece of wood. The Report also states that when brought to the hospital, the minor's clothes were soaked with blood and that upon examination, he was found to have suffered a deep cut wound on the head. The facts read out also sufficiently state that the Appellant hit the minor on the head. I therefore also reject this ground of appeal.
40. In the end, I agree that in this case, the process of plea-taking may not have been the best and may have had some flaws. However, considered as a whole, including the circumstances of the case, the process cannot be said to have been too extreme or too far-reaching to the extent that it would vitiate the entire plea-taking proceedings including the conviction on own plea of guilty. Yes, the trial Court could and should have better conducted the process, but even with the marginally unsatisfactory omissions and shortcomings, I am satisfied that the process, considered as a whole, substantially complied with the threshold and/or requirements set out in Section 207 of the *Criminal Procedure Code* to acceptable standards. In the circumstances and in the absence of demonstration that the process of plea-taking was irredeemably flawed, I find the flaws insufficient to vitiate the conviction.
41. Regarding sentence, the applicable principles at appeal stage were restated by the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR, in the following terms:
- “It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the 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 the wrong material, or acted on the 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 stated is shown to exist”.



42. The offence that the Appellant was convicted of was assault causing bodily harm, contrary to Section 251 of the [Penal Code](#) and which states as follows:

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

43. The maximum sentence is therefore 5 years imprisonment. In view of the above, it is clear that the sentence of 4 years imprisonment imposed was well within the law. The Appellant was also given opportunity to mitigate, which she did by apologizing and stating that she will not repeat the offence. The process therefore also complied with the required procedure. Nevertheless, I am required to also consider other factors that should ordinarily be also taken into account when determining an appropriate sentence.

44. Regarding sentence, Majanja J, quoting the case of [Francis Karioko Muruatetu & Another v Republic](#) [2017] eKLR), in the case of [Michael Kathewa Laichena & another v Republic](#) [2018] eKLR, stated as follows:

“The [Sentencing Policy Guidelines, 2016](#) (“the Guidelines”) published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;

- (a) age of the offender;
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.

45. Similarly, in the case of [Daniel Kipkosgei Letting v. Republic](#) [2021] eKLR, the Court of Appeal pronounced itself as follows;

“With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life



imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment.”

46. In this case, from the facts read out, the Appellant is said to have hit the minor on the head. The minor was the Appellant’s own 12 years old grandson with whom she was living and in respect to whom therefore, she was the one expected to protect. Instead, the Appellant turned into the minor’s tormentor. These facts clearly aggravated the offence.
47. However, in view of the guidelines set out in the authorities cited above, and considering the Appellant’s mitigation before the trial Court, I find that there are mitigating factors that should have also been taken account while determining the sentence. Upon considering these other factors, I find that the sentence of 4 years imprisonment was excessive in the circumstances. For instance, it is said that the Appellant was discipling the minor, though she clearly went overboard. There is also indication that it is the Appellant who was taking care of the minor after the minor’s parents parted ways after experiencing marital differences. In her mitigation, the Appellant stated that the minor’s mother left her with 3 children, including the minor, to fend for. If true, this burden may have taken its toll on the Appellant.
48. Although calling for a pre-sentence Report by a trial Court is not a mandatory requirement and, in any event, the same cannot practically be done in each and every case, I agree with the Appellant’s Counsel that in this case, the incident herein having arisen in a family setting, had the trial Magistrate called for a pre-sentence Report, he would most probably have obtained a better appreciation of the relevant circumstances and may not have, in the circumstances, imposed such an excessive sentence. As aforesaid, under Section 251 of the Penal Code, the offence of assault causing harm is categorized as a “misdemeanour” as opposed to a felony, thus it is a minor wrongdoing. According to her Counsel, though no evidence was produced, the Appellant is also said to be sickly and on constant medication. The Appellant is also elderly, evidently remorseful and having already been in custody since she was arrested on 15/11/2023, about 10 months ago, I trust that she has had ample opportunity to reflect and reform and is now ready to be released back to the society to achieve social re-adaptation and to facilitate the family unity. I believe that she has suffered sufficient retribution for her actions and is now ready for rehabilitation into the community.
49. I also take judicial notice of the minor’s mother’s address to the Court whereof she informed the Court that the matter had long been resolved within the family even before the Appellant was charged before the trial Court and that the concerned parties had long forgiven each other and reconciled. She frantically pleaded with the Court to release the Appellant (her mother).

Final Orders

50. In the circumstances, I make the following Orders:
 - i. The Appeal against conviction fails.
 - ii. The sentence of 4 years imprisonment imposed by the trial Court against the Appellant is however set aside and substituted with a sentence of 10 months imprisonment computed as from the date of the sentence read out by the trial Court, namely, 22/11/2023.
 - iii. In the event that the Applicant has now fully served the said prison term of 10 months now imposed herein, as I believe she already has, then she shall be released and set at liberty forthwith unless otherwise lawfully held.
 - iv. The Officer in Charge, the Children’s office, Uasin Gishu County is however hereby directed, upon release of the Appellant and if she will still be returning to live in the same home with



the minor herein, **EO**, to take up this matter and for the next 12 months, to continuously oversee the conditions under which the minor will be living with the Appellant, with a view to ensuring that the welfare and best interests of the minor is protected and safeguarded and to take any appropriate or necessary lawful action or steps within his jurisdiction, in connection with or in relation thereto.

- v. The officer-in-charge, the Office of the Director of Criminal Prosecutions, Uasin Gishu County shall extract this order and/or together with this Judgment and serve the same upon the Officer in Charge, the Children's office, Uasin Gishu County for action and/or implementation of order (iv) above.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 20TH DAY OF SEPTEMBER 2024

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Appellant

Nahone for Appellant

Okaka for the State

Court Assistant: Brian Kimathi

