REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. 55 OF 2018

SULMAN OGEMBO MUNA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.352 of 2018 of the

Principal Magistrate's Court at Oyugis by Hon. J.P Nandi–Senior Resident Magistrate)

JUDGMENT

1. Sulman Ogembo Muna, the appellant herein, was convicted after pleading guilty to the offence of grievous harm contrary to section 234 of the Penal Code.

2. The particulars of the offences were that on the 30th day of November, 2018 at Karabondi location, Rachuonyo North sub County of Homa Bay County, unlawfully did grievous harm to Carolyne Achieng.

3. The appellant was sentenced to serve 30 years imprisonment. He has appealed against both conviction and sentence.

4. The appellant was represented by the firm of Omonde Kasera & Company Advocates. He raised four grounds as follows:

a) That he was not sober when the plea was taken.

b) That the police who arrested him misled him to plead guilty.

c) That the trial magistrate did not forewarn him on the consequences of pleading guilty.

d) That the sentence meted out was harsh.

5. The appeal was opposed by the state through Mr. Ochengo, learned counsel who contended that the plea was properly taken.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

7. Section 348 of the Criminal Procedure Code provides:

> **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.**

In the instant appeal, the issues raised are questioning the legality of the charge and the mode of taking the plea.

8. The charge and the particulars ought to be read in a language that the accused understands. This forms the basis of fair trial. An accused must understand the charge for him to respond adequately. This is what the Court of Appeal in the celebrated case of **Adan vs. Republic [1973] EA 445** held. It stated as follows;

1. The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

2. the accused's own words should be recorded and if they are an admission, a plea guilty should be recorded;

9. The record indicates that the charge and subsequently the facts were read to the appellant in Dholuo. This is the language he informed the court that he understood.

10. When the appellant was taken to court for plea on 3rd December, 2018, he pleaded not guilty. He changed his plea on 11th December, 2018 when the case was mentioned. By this time he had left police custody and was in prison remand. His contention that his arrestors misled him to plead guilty is therefore hollow. It would have been persuasive had he pleaded guilty when first taken to court. This contention is not supported by any evidence. Section 348 of the Criminal Procedure Code is clear that he cannot appeal against his conviction.

11. Though it was contended for the appellant that the charge was irregularly amended and that the plea was not correctly taken, I find that this contention is not supported by the record. The appeal cannot turn on this point.

12. Once an accused has pleaded guilty, the court has no other option but to call for the facts. Again, if the accused confirms that the facts as read to the court were correct, the duty of the court is to convict. There is no provision for warning about the consequences of such a plea. All the court is required to do is to ensure that the plea was correctly taken, which was done in this case.

13. Section 234 of the Penal Code provides:

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

The appellant was sentenced to serve thirty years imprisonment. He contends that this sentence was harsh.

14. The circumstances under which an appellate court would interfere with the sentence of trial court were spelled out in the case of in the case of **Nelson vs. Republic [1970] E.A. 599** as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewsity (1912) C.CA 28 T.LR 364.

15. In the instant case, the complainant sustained the following injuries:

a) Blunt injury on the right flank;

b) A deep cut wound on the left upper limb; and

c) Weakness of the thumb and 1st finger with reduced mobility.

These injuries were classified as "maim harm" [sic]. This is a strange classification. The P3 form classifies injuries as; harm, maim or grievous harm.

16. The appellant was a first offender though he was the aggressor. I have also taken note of the injuries sustained. I am persuaded to interfere with the sentence of the learned trial magistrate. I therefore set aside the sentence of 30 years imprisonment and substitute it with a sentence of five years imprisonment. Since the appellant has been on bond, he ought to start serving the sentence forthwith.

DELIVERED AND SIGNED AT HOMA BAY THIS 22ND DAY OF JULY, 2021

KIARIE WAWERU KIARIE

JUDGE