REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEALS NOS. 157, 158 AND 159 OF 2018

(From Original Conviction and Sentence in Kakamega CMCCRC No. 2609 of 2018,

by Ho. E. Malesi, Senior Resident Magistrate (SRM), of 29th October 2018)

FELIX LUMWACHI.....1ST APPELLANT

FREDRICK OKONYO.....2ND APPELLANT

FRANCIS SHIBANDA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellants were convicted by Hon. E. Malesi, Senior Resident Magistrate, on one count of assault causing actual bodily harm contrary to section 251 of the Penal Code, Cap 63, Laws of Kenya, and were accordingly sentenced to serve 18 months' imprisonment. The particulars of the offence charged that the appellants had on the 27th October 2018 at Shagugu Village, Shiasava Sub-Location, Shibuye Location in Kakamega East Sub-County within Kakamega County jointly and unlawfully assaulted Charles Shabesta occasioning on him bodily harm.

2. They pleaded guilty to the charge before the trial court on 29th October 2018, a plea of guilty was entered and they were sentenced to serve the terms stated in paragraph 1 of this judgment.

3. They were dissatisfied with the conviction and sentences, and have appealed to this court and raised several grounds of appeal. They aver that the plea was equivocal, it was presumed that they understood Kiswahili, the sentence was excessive, and alternative sentences were not considered.

4. Being the first appellate court, I have been mindful of the duty defined in ***Okeno vs. Republic*** **(1972) EA 32 (Sir William Duffus P, Law & Lutta JJA), for me to reevaluate the record of the trial court, and to arrive at my own conclusions based on the facts on record.**

5. The appellants case was presented in writing by Mr. Manyoni, Advocate, through submissions filed on 27th October 2020. The State asked me to look at the record of the trial court.

6. The law that guides the taking of plea by a trial court is set out in section 207 of the Criminal Procedure Code, Cap 75, Laws of Kenya. The said provision states as follows –

> *"(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;*
>
> *(2) If the accused person admits the truth of the charge otherwise than by 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 an order the court may permit or require the complainant to*

outline to the court the facts upon which the charge is founded."

7. The Court of Appeal in *Adan vs. Republic* (1973) EA 445 (Sir William Duffus P, Spry VP & Mustafa JA), explained the application of section 207 of the Penal Code in cases where an accused pleads not guilty. The court said:

> *"When a person is charged 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 or 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 assert 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 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."*

8. In *Elijah Njihia Wakianda vs. Republic* [2016] eKLR (Waki, Nambuye & Kiage JJA), it was said:

> *"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 specially 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."*

9. I have gone through the record of the trial court to satisfy myself that the requirements of section 207 had been complied with, and that the test set out in *Adan vs. Republic* (supra) and *Elijah Njihia Wakianda vs. Republic* (supra) had been met. I have not found anything untoward about the process of plea taking in this particular case. The language used in the reading and explanation of the charge is indicated. The plea taking process was not ambiguous. The appellants argue that they were not familiar with Kiswahili. Kiswahili is one of the national languages, under the Constitution of Kenya. Unlike English, it is indigenous, being a blend of Arabic and Bantu languages. From the names of the appellants it would appear that they are Luhya, and, therefore, Bantu speakers. Kiswahili is a language of instruction in Kenyan schools, and the High Court can take judicial notice of that. The appellants have not demonstrated that they are illiterate, that they never went to school, and have never interacted with Kiswahili, a national language. I am not persuaded that the reading of the charges in Kiswahili prejudiced them in any manner.

10. The other issue relates to the sentence imposed being excessive. The offence charged was assault causing actual bodily harm, which is defined in section 251 of the Penal Code. That provision provides for a penalty of up to 5 years in prison. The court imposed 18 months only. It cannot be correct to say that the sentence was excessive.

11. On whether the court should have considered alternatives, the short answer is that the court has absolute discretion when it comes to sentencing, after taking into account the circumstances, including mitigation. The appellants were brothers of the complainant. They assaulted him with fists. They all pleaded guilty, and asked for forgiveness in mitigation. The State did not have previous records with respect to them. There could be merit in the plea that the trial court should have considered alternative non-custodial sentences, such as fine, probation or community service.

12. After taking everything into account, I find that the appeal fails on conviction, but on sentence I shall interfere. I shall set aside the sentences of imprisonment imposed, and substitute them with a sentence that each of the appellant pays a fine of Kshs. 20, 000.00. The appeal is disposed of in those terms. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17th DAY OF SEPTEMBER 2021

W MUSYOKA

JUDGE