REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 122 OF 2018

MWAVUE RUGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the decision of Hon. P. Wambugu, Senior Resident Magistrate,

delivered on 26th February, 2018 in Kwale Chief Magistrate's Court

Criminal Case No. 836 of 2017)

JUDGMENT

1. The appellant was convicted for the offence of causing grievous harm contrary to Section 234 of the Penal Code. The particulars of the charge were that on the 30th day of March, 2017 at Mahoyo village, Dzombo location of Kwale County within Coast region, unlawfully did grievous harm to Loice Chinyavu.

2. The appellant was also charged with the offence of disobeying a lawful order contrary to Section 131 of the Penal Code. The particulars of the charge were that on the 22nd of August, 2017 at Kwale Law Courts in Kwale District within the Coast region disobeyed a lawful order issued by the CM's Court Kwale and duly signed to attend court ref. CR 324/37/2017 court file 326/2017 and warrant of arrest was issued against him.

3. The appellant was arraigned in court on 11th December, 2017. The charge was read and explained to him in Kiswahili language. He pleaded not guilty to count I and guilty to count II. The case was mentioned several times for different reasons. On 3rd January, 2018, the appellant informed the Trial Court that he wanted to change the plea.

4. On 8th February, 2018 he expressed the wish to have the charges read to him afresh. He pleaded guilty to both counts I and II. The Trial Court entered a plea of guilty against him. The facts were read out to him. He admitted that the facts were correct. He was convicted on his own plea of guilty. When asked to mitigate, he said he knew that he did something wrong and asked for a non- custodial sentence. The prosecution Counsel informed the Trial Court that that the appellant was not a first offender.

5. A pre-sentence report which was prepared and produced by a Probation Officer was unfavorable to the appellant. The Hon. Magistrate considered the facts of the case and the pre-sentence report and sentenced the appellant to 30 years in jail on 26th February, 2018.

6. The appellant was aggrieved by the decision of the lower court and filed a petition of appeal to this court. In his submissions filed on 8th October, 2019 he submitted that he was incarcerated for 72 hours before being taken to court thus his rights under the provisions of Article 49(1)(f) of the Constitution of Kenya were contravened.

7. The appellant further submitted that the charges were not read out to him in a language which he understood, and more particularly when he took the plea for the 2nd time. He relied on the decisions in **Joseph Kamau Gitau v Republic** [2006] eKLR and **Swahibu Simbauni Siminyu and Another v Republic**, Criminal Appeal No. 243 of 2005 (unreported).

8. In his submissions the appellant stated that he was not contesting the conviction and sentence against him but was only seeking his constitutional rights guaranteed under the Constitution. In the same breath, he prayed for this court not to order a retrial, which he thought was the likely outcome of his appeal. He wound up his submissions by praying for his appeal to be allowed.

9. On 14th October, 2019, Ms Mwangeka, Prosecution Counsel, filed submissions on behalf of the Director of Public Prosecutions. She opposed the appeal. She submitted that on 11th December, 2017 the particulars of the two counts which the appellant had been charged with were read out to him and explained in a language he understood. A plea of not guilty was entered.

10. The Prosecution Counsel correctly pointed out that on 3rd January, 2018 the appellant informed the court that he wished to change his plea and on 8th February, 2018 the charges were read out to him and he pleaded guilty.

11. On the issue of the language of the court, Ms Mwangeka indicated that the charge was read out and explained to the appellant in Kiswahili language and he pleaded not guilty at the first instance. It was submitted that the record bears witness that the appellant understood the language used, he followed the proceedings, mitigated and gave the reason for an unfavourable pre-sentence report as being his inability to agree with the complainant. The Prosecution Counsel relied on the case of **David Njuguna Waithera vs Republic** [2018] eKLR to demonstrate that the appellant in this appeal did not complain that he did not follow the proceedings in the lower court. Further, it was argued that he did not allege on appeal that he raised the said issue with the Trial Court and it was ignored.

ANALYSIS AND DETERMINATION

12. The issues for determination are:_

(i) If the plea was clear and unequivocal;

(ii) If the appellant's rights were contravened; and

(iii) If the sentence was harsh or excessive

13. The leading authority on how pleas should be taken is **Adan vs Republic** [1973] EA 445. The said decision was adopted in **Kariuki vs Republic** [1984] KLR 809 where the procedure for plea taking was reiterated as -

"(i) the trial magistrate or Judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands;

(ii) he should then record accused's own words and if they are an admission, a plea of guilty should be recorded;

(iii) the prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts; and

(iv) if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused reply."

14. When the plea was taken for the first time, the appellant appeared before Hon. Koech, Senior Resident Magistrate. The language of the court was indicated as Kiswahili and the appellant responded to the charge in Kiswahili. When the appellant decided to change his plea, he appeared before Hon. Wambugu, Senior Resident Magistrate. The language of the court was not captured in the proceedings. However, as at that time, the appellant had attended court on 5 occasions. He addressed the court on 4 occasions out of the 5. It cannot therefore be said that as at 8th February, 2018 it was not known that the appellant understood Kiswahili language. The record clearly demonstrates that he participated fully in the proceedings of the lower court. He mitigated after being convicted. After an unfavaourable pre-sentence report was presented in court on 26th February, 2018, the appellant stated as follows:-

"*It's because we could not agree with complainant. That the reason of the report (sic).*"

15. This court is satisfied that the record brings out the fact that the appellant was vocal during the proceedings in the lower court. He was not a bystander.

16. Ms Mwangeka submitted that the language of the lower court is English and Kiswahili and in the High Court it is English as provided in the Criminal Procedure Code. To set the record straight, the language of the High Court is both English and Kiswahili as per the provisions of Section 34 of the High Court (Organization and Administration) Act No. 27 of 2015, which stipulate as follows:-

"(1) <u>The official languages of the court are English and Kiswahili</u>.

(2) The court shall, in appropriate cases, facilitate the use of other languages, by parties, including the Kenyan sign language, Braille and other communication formats; and technologies accessible to persons with disabilities;

(3) Where it is expedient and appropriate to do so, the court may direct that proceedings be conducted and appearances made through electronic means of communication, including tele-conferencing, or other modes of electronic or digital communication." (emphasis added).

17. This court's finding with regard to count I is that the plea was properly taken. The appellant participated in the proceedings. The language of the Trial Court was Kiswahili, which the appellant understood. The plea was clear and unequivocal.

18. The Hon. Magistrate convicted the appellant in both counts. When it came to sentencing, he only sentenced him for the offence in count I, of causing grievous bodily harm. He did not sentence the appellant for the offence in Count II. The prosecution Counsel did not urge this court to impose a sentence against the appellant for the said conviction. This court therefore sets aside the conviction in count II and upholds the conviction in count I.

19. The appellant contended that after he was arrested, he was incarcerated for 72 hours instead of 24 hours as provided by the Constitution. The charge sheet indicates that he was arrested on 8th December, 2017 and arraigned in court on 11th December, 2017. This court has made reference to the calendar of the year 2017 and noted that the 8th of December, 2017 was on a Friday. The next working day was the 11th of December, 2017, which was on a Monday. The appellant's constitutional rights were therefore not violated as alleged.

20. The pre-sentence report filed in the Trial Court captures in detail the impact the offence the appellant committed against the complainant has had on her. She was left with scars on her face and other parts of her body, the injury in one of her eyes affected her eye sight, she cannot withstand sunlight, she is unable to fend for herself by doing the tailoring work she used to do due to the injury she sustained in her hand. The pre-sentencing report indicates that the complainant relies on her cousin to provide for her and her children. The above cuts the image of a person whose life took a dramatic turn for the worse due to the injuries she sustained in the hands of the appellant.

21. There is no justifiable reason for this court to reduce the sentence of 30 years imprisonment which was imposed against the appellant in count I. I decline to interfere with the same. The appeal succeeds only in regard to count II as no sentence was imposed against the appellant by the Trial Court. The appeal in regard to count I is dismissed. The appellant shall serve 30 years imprisonment as ordered by the Trial Court. The appellant has 14 days right of appeal.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **7th** day of **February, 2020.**

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Mwangeka, Prosecution Counsel for the DPP

Mr. Oliver Musundi - Court Assistant