REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 25 OF 2019

WALTER OTISO MOSOMI.....APPELLANT

- VRS -

THE REPUBLIC....................PROSECUTOR

{Being an Appeal against the Judgement of Hon. B. M. Kimtai – SRM Keroka dated and delivered on the 15th day of November 2019 in the original Keroka Principal Magistrate's Court Criminal Case No. 964 of 2017}

JUDGEMENT

On 15th November 2017 the appellant was arraigned before the Senior Resident Magistrate at Keroka for the offence of grievous harm contrary to Section 234 of the Penal Code whose particulars were that on 8th November 2017 at Riabore village in Masaba North Sub-county he unlawfully did grievous harm to Samuel Mokamba. After the charge was read to him he pleaded it was true and the facts were then stated to him. He admitted the facts whereupon the trial Magistrate entered a plea of guilty, convicted him and after hearing his mitigation sentenced him to twenty (20) years imprisonment.

The appellant has with the leave of this court appealed against the conviction and sentence out of time.

The appellant canvassed his appeal through written submissions and stated that his rights guaranteed under Articles 47, 48 and 50 (2) (k) (g) (h) of the Constitution were violated and that he pleaded not guilty out of ignorance as he did not understand the language used by the court. He also claimed to have been beaten in order to plead guilty and to have been drunk when he committed the offence. The appellant also contends that he was not warned of the consequences of pleading guilty by the court. Regarding the sentence, he submitted that the same is excessive, harsh and oppressive and that the trial Magistrate overlooked the spirit of the Constitution in sentencing him to twenty years in prison yet he was a first offender. He submitted that the charges were not explained to him in a language he could understand and that the complainant who is his father did not turn up in court to testify. He urged this court to allow the appeal and set aside the sentence.

Mr. Majale, Senior Prosecution Counsel, opposed the appeal under Section 348 of the Criminal Procedure Code which bars appeals on conviction upon a plea of guilty. He submitted that moreover the court complied with the requirements of Section 207 of the Criminal Procedure Code and therefore the plea was unequivocal. Counsel contended that the charge was read to the appellant in Kiswahili a language which he understood. To support his submissions, Counsel relied on the case of **Balunye Ole Kortoi v Republic [2018] eKLR.** In regard to the sentence, Mr. Majale submitted that the same was lenient given the injuries inflicted to the complainant and also because the appellant was liable to a sentence of life imprisonment as provided in Section 234 of the Penal Code. Counsel contended that a deterrent sentence was necessary and is a tenet of the sentencing guidelines. He urged this court to dismiss the appeal.

In reply, the appellant submitted that he was arrested, arraigned and imprisoned on the same day and the complainant was not even in court. He urged this court to order that he be tried.

It is now settled that an appellate court can entertain an appeal even where an accused has pleaded guilty to the charge. In the case of **Nyawa Mwajowa v Republic [2016] eKLR** the Court of Appeal stated: -

> **"……….as a general rule, by dint of** *section 348* **of the Criminal Procedure Code, no appeal is allowed from a conviction arising from a plea of guilty. However, it is settled that the provision is not an absolute bar to all and sundry appeals challenging conviction from a plea of guilty. Where for example the appellant has pleaded guilty to a non-existent offence; where the facts admitted by the appellant do not disclose the offence; or where there are unusual circumstances surrounding the plea of guilty, the appellant is not precluded from appealing. See** ***Ndede v. Republic, (1991) KLR 567; John Muendo v. Republic, Cr. App. No. 365 of 2011*** **and** ***Kilingo Ngome v. Republic, Cr. App. No. 69 of 2014 (Malindi). ……...."***

This appeal is therefore competently before this court and the only issue is whether it is merited.

The manner of recording pleas is provided in **Section 207 of the Criminal Procedure Code.** That procedure was explained in the case of **Adan v Republic [1973] EA 445** where the East African Court of Appeal (as it then was) stated: -

> **"When a person is charged with an offence, the charge and the particulars thereof should be read out to him, so far as possible in his own language, but if that is not possible in the language which he can speak and understand. Thereafter the Court should explain to him the essential ingredients of the charge and he should be asked if he admits them. If he does admit his answer should be recorded as nearly as possible in his own words and then plea of guilty formally entered. The prosecutor should then be asked to state the facts of the case and the accused be given an opportunity to dispute or explain the facts or to add any relevant facts he may wish the court to know. If the accused does not agree with the facts as stated by the prosecutor or introduces new facts which, if true might raise a question as to his guilt, a change of plea to one of not guilty should be recorded and the trial should proceed. If the accused does not dispute the alleged facts in any material respect, a conviction should be recorded and further facts relating to the question of sentence should be given before sentence is passed."**

The record indicates the languages used by the court were English, Kiswahili and Ekegusii and that after the charge was stated to the appellant he replied/pleaded in Kiswahili. This being the language he elected to use in this appeal therefore means that he understood the language used by the court. It is also clear from the record that the steps for recording a plea of guilty set out in the case of **Adan v Republic (supra)** were strictly followed by the trial court. The charge sheet also disclosed the offence charged and I am therefore satisfied that the plea was unequivocal. In the premises the appeal against conviction is dismissed.

In regard to the sentence, the principle that guides this court is that: -

> **"The appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence, unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."** ***(See Kiwalabye Bernard v Uganda SCCA No. 143 of 2001).***

The appellant herein was a first offender and while the injuries inflicted upon his father were so serious as to amount to grievous harm they were not life threatening a factor the trial Magistrate should have taken into account in sentencing the appellant. I find the term of imprisonment for twenty years excessive in the circumstances of the case. Accordingly, while the conviction is upheld, the sentence of twenty (20) years imprisonment is set aside and substituted with one for a term of imprisonment for five (5) years from the date the appellant was sentenced by the lower court. It is so ordered.

Signed, dated and delivered in open court this 5th day of March 2020.

E. N. MAINA

JUDGE