**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 48 OF 2019**

**NOBERT SORE .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(from the original sentence in Kakamega CMC Criminal Case No. 810 of 2019 by B. Ochieng, CM, delivered on 30/4/2019)*

**JUDGMENT**

1. The appellant pleaded guilty to the offence of causing a person grievous harm contrary to Section 234 of the Penal Code and sentenced to serve 2 ½ years imprisonment. He was dissatisfied with the plea of guilty entered against him and the sentence meted out on him and has thus filed this appeal. The grounds of appeal are that:-

*(a) The learned trial magistrate erred in law and in fact in sentencing the appellant to serve two and half years imprisonment in contravention of his constitutional rights in particular Article 49 (1) (f) of the Constitution of Kenya of 2010.*

*(b) The learned trial magistrate erred in law and in fact in failing to accord the appellant a fair hearing as enshrined in Article 50 (2) (g) of the Constitution of Kenya of 2010.*

***(c)*** *The learned trial magistrate erred in law and in fact in sentencing the appellant on an equivocal plea.*

*(d) The learned trial magistrate erred in law in passing an illegal sentence of two and half years imprisonment by failing to comply with the mandatory provisions of Section 207 (2) of the Criminal Procedure Code in that he never convicted the appellant before sentencing him.*

*(e) The learned trial magistrate erred in law in sentencing the appellant to serve two and half years imprisonment without taking into account his mitigation.*

2. The grounds of appeal were expounded by the written submissions of the advocate for the appellant **Mr. Ombaye**. The prosecution counsel did not make any submissions in the appeal. He instead relied on the record of the lower court.

3. The particulars of the charge against the appellant were that on the 2nd day of April, 2019, at Burimburi Village, Shiruru Sub-location in Kakamega East Sub-County within Kakamega County, unlawfully did grievous harm to Joseph Shiverenje Lubulela (herein referred to as the complainant).

4. The appellant was arraigned in court on the 4/4/2019 when the charges were read over to him in a language that is not stated. The appellant all the same replied that:-

***"It is true."***

The prosecutor then proceeded to give the facts of the case that the complainant was a step-father to the complainant. That on the material day the appellant went to the home of the complainant while armed with a stick. He asked the complainant whether he had met their brother called Peter Lubale over a land dispute. He asked the complainant why he had not brought back his wife with whom he had separated. The complainant told him that if he had any issues to report to the Assistant Chief. On hearing that the appellant got angry and vowed to teach the complainant a lesson. He attacked him with the stick and hit him on the thigh of the left leg. The complainant fell down. While sprawled on the ground he hit him on the head and right hand. The complainant was injured. The appellant left the scene. The complainant reported the incident at Shisasari Police Post. He was treated at Kakamega County Referral Hospital. He was issued with a P3 form. It was completed by a doctor. The degree of injury was classified as maim. The P3 form and the treatment notes were produced as exhibits, P.Ex 1 and 2 respectively.

5. On being asked whether the facts were true, the appellant answered that:-

> ***"Facts are true."***

The court then entered a plea of guilty. The state prosecutor asked the court to treat the appellant as a first offender. The appellant mitigated that:-

> ***"The complainant is my grandfather and I acted in self defence when I assaulted him."***

6. The trial magistrate then called for a probation report. It was prepared by a probation officer Mr. Humphrey Njeru. The report indicated that the appellant suffers from bipolar mood disorder. The appellant further mitigated that:-

> ***"I have been undergoing psychiatric treatment and was due for review in a month's time."***

7. When sentencing the appellant of the offence, the trial magistrate stated that:-

> ***"I have taken into consideration the fact that the accused is a 1st offender and what he said in mitigation. I have also taken into consideration what is contained in the Probation Officer report. The offence is serious and going by the report that the accused suffers a medical condition that predisposes him to violence a non-custodial sentence is inevitable. I hereby sentence the accused to two and a half years (2 ½) imprisonment."***

8. The advocate for the appellant submitted that the appellant was arrested on 2/4/2019 and arraigned in court on 4/4/2019. That he remained in custody beyond the 24 hours which was a contravention of Article 49 (1) (f) of the Constitution of Kenya 2010. That no explanation was given why he remained in custody beyond the period of 24 hours before being arraigned in court.

9. Counsel submitted that the appellant was unrepresented when he appeared in court. That he was not informed of the right to legal representation as required by Article 50 (2) (g) of the Constitution of Kenya 2010. Neither was he assigned an advocate at state expense as required by Article 50 (2) (h) of the Constitution. That there was substantial injustice for lack of representation by an advocate. That the appellant's right to fair hearing was contravened.

10. Counsel submitted that the language of the court was not indicated during plea taking. That by failing to indicate the language it was not clear whether or not the appellant fully understood the charges.

11. It was submitted that the appellant negated the plea during mitigation when he stated that he acted in self-defence and that he had been undergoing psychiatric treatment.

12. Counsel submitted that on the applicant admitting the facts of the case the trial magistrate only entered a plea of guilty and did not convict him as required by Section 207 (2) of the Criminal Procedure Code. That the section does not give the court the discretion to pass sentence without conviction.

13. It was submitted that the trial court failed to take into account the appellant's mitigation that he suffered from a mental problem which was confirmed by the probation report.

14. This being a first appeal, the duty of the court is to analyse and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – See **Okeno –Vs- Republic (1972) EA 32**.

15. The appellant was not produced in court within 24 hours as required by Article 49 (f) of the Constitution. However failure to comply with the said provision of the Constitution is not fatal to the case. In **Julius Kamau Mbugua –Vs- Republic (2010) eKLR**, it was held that violation of that right would not automatically result in the acquittal of the appellant. Instead the appellant would be at liberty to seek remedy in damages for violation of his constitutional rights - See also the Court of Appeal decision in **Fappy Mutuku Ngui –Vs- Republic (2014) eKLR**. That ground of appeal therefore does not stand.

16. The procedure of taking pleas in criminal cases is set out in Section 207 of the Criminal Procedure Code that provides that:-

> ***"(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 a 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."***

17. The above was expounded in the case of **Adan –Vs- Republic (1973) EA 445** where the Court of Appeal stated that:-

***"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 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."***

**18. In the case against the appellant the language in which the plea was taken was not indicated. I take judicial notice that the language of the court at the lower court is English and Kiswahili. Where an accused person does not understand either of the languages, the language of the court is supposed to be interpreted to him in a language that he understands. In Elijah Njihia Wakianda –Vs- Republic, Criminal Appeal No. 73 of 2016 (COA, Nakuru), the Court held that:-**

***"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."***

19. On the other hand the same court in **Simon Kang'ethe –Vs- Republic (2014) eKLR** where the language of the proceedings was not stated it was held that:-

***"However, departing from the strict need to write down the language used at trial in order to substantiate whether the accused understood the language at proceedings, this court in Jackson Lelei –Vs- Republic, Criminal Appeal No. 313 of 2005 and also in Anthony Kibatha –Vs- Republic, Criminal Appeal No. 109 of 2005 stated that the issue of whether an accused person understood the language used in his trial is one of fact and so an appellate court in establishing compliance must examine the record. If the language used is not specifically stated in our view, the court must go a step further and consider the level of the accused's participation in the proceedings which will clearly show if he/she understood the same."***

20. The probation report filed in the case indicated that the appellant is a university graduate (BA Economics and Sociology) and a professional Chef. That he has been a Chef in many hotels across East Africa. That he was living in Nairobi with his family. I do not think that there is a Kenyan University graduate who is not conversant in English or Kiswahili. The appellant answered to the charge. He mitigated. He must have done so in a language that was understood by the court which was either English language of Kiswahili language. The appellant therefore understood the charge. The fact that the language of the court was not stated was not fatal to the case.

21. The appellant was facing a charge of causing a person grievous harm that carries a sentence of upto imprisonment for life. In such a serious offence it was the duty of the trial magistrate to explain the severety of the sentence to the accused in case he pleaded guilty to the charge. In **Elijah Njihia Wakianda** case (supra), the learned Judges went further to emphasize the importance of explaining the severity of the sentence during plea taking. They said thus:-

***"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 trial court in this case did not comply with the above guide.

22. When the appellant was asked to mitigate he stated that he assaulted the defendant in self-defence. He also stated that he had been undergoing psychiatric treatment. This clearly meant that the appellant was negating a plea of guilty. As stated in the case of **Adan –Vs- Republic** (Supra) the trial magistrate should at that stage have recorded a change of plea to that of "not guilty". At the same time the trial court should have sent the appellant for mental examination to ascertain whether he was mentally fit to plead to the charge. The plea as taken was therefore not unequivocal.

22. Section 207 (2) of the Criminal Procedure Code requires the trial court to convict an accused person before passing sentence on him. This did not happen in this case. The sentence meted out was thus illegal.

23. In the foregoing it is clear that the plea was not taken as set out in Section 207 of the Criminal Procedure and as laid out in **Adan –Vs- Republic** (supra). The plea was not unequivocal. I accordingly declare the appellant's trial a mistrial. The sentence meted out on the appellant is set aside.

24. The question is whether I should order a retrial. In **Muiruri –Vs- Republic (2003) KLR 552**, the Court of Appeal held that whether a retrial should be ordered or not must depend on the circumstances of the case. It was observed that a retrial will only be ordered when it is in the interests of justice and if it is unlikely to cause injustice to the appellant. Among the factors the court ought to consider include the nature of illegalities or defects in the original trial, length of time that has elapsed since the arrest and arraignment of the appellant, whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.

25. In this case the mistake was by the trial court. The offence the appellant was charged with was serious. I am of the considered view that he should be retried of the offence. I direct that the appellant be tried afresh before another magistrate of competent jurisdiction other

than the one who tried him herein.

26. I further direct that the trial court makes appropriate orders for the appellant to be examined on his fitness to plead to the charge before a fresh plea is taken.

Delivered, dated and signed at Kakamega this 21st day of May, 2020.

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Ombaye for Appellant

Mr. Mutua for State/Respondent

Appellant - present

Court Assistant - Polycap

14 days right of appeal.