REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 71 OF 2015

PATRICK MUCHIRI MWANGI.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an appeal against both the conviction and the sentence of Hon. Elizabeth Usui [CM] delivered on 18th November, 2019 in Nakuru Chief Magistrate's Court Criminal Case No. 3732 of 2019)

JUDGMENT

1. The Appellant herein was presented before the Nakuru Chief Magistrate's Court charged with a single count of wounding with intent to maim contrary to section 231(a) of the Penal Code. The particulars alleged in the charge sheet were that on 15/09/2019 at Sunset Bar in Mirangine Sub-county within Nyandarua County, the Appellant wounded Jeremiah Kariuki Kamuri with the intent to maim him.

2. The Appellant was arraigned on 18/11/2019. The Trial Court record shows that the trial was conducted in English with translation into Kiswahili which the Appellant indicates he understood. The Trial record indicates that the "charge and every element thereof was stated by the Court to the Accused Person, in the language he understands, who being asked whether he admits or denies the truth of the charge" replied: "kweli."

3. The Trial Court proceeded to enter a plea of guilty and asked the prosecutor to read out the facts. The facts as read are short enough to reproduce here:

> *On the night of the 15th September, 2019 at 9:00pm, the Complainant was on his way home when he met the Accused at Kirima. Accused then attacked him by hitting him on the mouth and ran away. Matter was reported at Mirangine Police Station. Accused was arrested and charged. Complainant identified Accused through street light. Complainant was treated at Dundori Health Centre. Police issued him a P3 Form. Degree of injury assessed at grievious harm. Accused was arrested and charged. P3 From exhibit 1.*

4. Upon being asked if the facts were true, the Trial Court record indicates that the Appellant said: "facts are true." The Trial Court proceeded to convict the Appellant on his own plea of guilty.

5. The Court proceeded sentence was passed. repeat the offence." to ask the Appellant to mitigate before The Appellant said: "I seek mercy. I will not

6. The Court proceeded to sentence him to three and a half (3 ½) years imprisonment. The Learned Trial Magistrate noted that she had noted the mitigation but that the offence was serious and must be discouraged in imposing the sentence.

7. The Appellant is dissatisfied. Through his Counsel, he filed a Petition of Appeal enumerating four grounds of appeal as follows:

> *1) The Learned Trial Magistrate erred in law in holding that the Appellant had committed the offence charged of.*
>
> *2) The Learned Trial Magistrate erred in law and fact in holding that the Appellant had pleaded guilty through the Appellant did not understand clearly the language used.*
>
> *3) The Learned Trial Magistrate erred in law and fact as the Appellant's admission was out of misinformation.*
>
> 4) *The Learned Trial Magistrate erred in law and facts in convicting and sentencing the Appellant to serve seven (7) years imprisonment with a remission of 3 ½ years without an option of a fine considering the mitigation given*.

8. Under section 348 of the Criminal Procedure Code, a person convicted of his own plea of guilty can only appeal against sentence. The only other circumstances under which Courts will allow a person who pleaded guilty to challenge his conviction is where the Appellant insists that the plea of guilty was not unequivocal; was entered under duress; or the facts as read out and recorded by the Trial Court did not disclose the offence of which the Appellant has been convicted of. See ***Nyawa Mwajowa v R (Court of Appeal at Mombasa Criminal Appeal No. 46 of 2015***) and ***John Gupta Nganga Thiongo v R (High Court at Nairobi Criminal Appeal No. 669 of 1986***).

9. On appeal in this case, Counsel for the Appellant, Mr. Bosire, argues that the plea of guilty should be set aside because the Appellant was not in the right state of mind to plead guilty. Mr. Bosire argued that when the Appellant was presented for plea, his father was gravelly ill and that this must have acted on his mind. Mr. Bosire submitted that the Appellant's father died the next day; and that the Appellant had this matter weighing on his mind when he was pleading guilty. By virtue of this, Mr. Bosire argued, the plea was not unequivocal and the Appellant should be given an opportunity to take plea again.

10. Ms. Rita Rotich, the State Counsel, supported both the conviction and sentence. He argued that the plea was unequivocal and that it was taken in Kiswahili, a language the Appellant understood. It was, also, he argued, explained in Kiswahili. Ms. Rotich argued that the Court record reflects that the Appellant understood Kiswahili and the fact that the Appellant mitigated in Kiswahili was proof enough that he understood what he was doing.

11. This is a first appeal. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See ***Okeno v Republic*** **[1973] E.A. 32**; ***Pandya vs. R*** (1957) EA 336, ***Ruwala vs. R*** (1957) EA 570.

12. The law and practice related to the taking and recording of pleas of guilt was stated in the following iconic paragraph in the decision in ***Adan v Republic*** *(1973) EA 445* at 446:

> *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 guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged 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, off course, be recorded.*

13. The first point for analysis is an important point of departure namely the trite law stated by the Court in ***Ombena v Republic 1981 KLR 450*** to the effect that whether a guilty plea is unequivocal or not depends on the circumstances of the case. Differently put, an appellate or a revising court must take the totality of circumstances into account in determining the equivocality or otherwise of a guilty plea.

14. In the present case, I am persuaded that the Appellant understands and speaks Kiswahili. Indeed, in his oral submissions Mr. Bosire no longer insisted on this point. The Trial Court record is quite clear on that; and the Learned Trial Magistrate follows good practice to record the actual language spoken by the Appellant. The Appellant said: "ni ukweli." I do not entertain any doubt that the Appellant understood exactly what he was saying when he pleaded guilty. That the Appellant clearly understood the effects of what he was saying is reflected in his mitigation. He pleaded with the Court to have mercy on him; and stated that he would never repeat the offence. Those are hardly words of someone who did not understand that he was pleading guilty and the consequences of doing so.

15. What about the argument that the illness of the Appellant's father was weighing down on him sufficiently to vitiate the guilty plea? The argument simply does not wash. The only mental conditions on an Accused Person which would vitiate an otherwise unequivocal guilty plea are those that would verge on his sanity as defined by law and those verging on duress or undue influence. None of these factors are pleaded or proved in the present case. A rule of law that the illness of a family member which was not made known to the Trial Court at the time of the plea is sufficient to vitiate an otherwise unequivocal guilty plea would potentially invalidate many if not most validly entered guilty pleas and make the Court process a turn-tile machine for recycling finalized judicial processes. The correct rule of law is still the traditional one: for one to succeed in setting aside a guilty plea on the ground that he was not in the right state of mind, he must demonstrate either that he had a disease of the mind that made the person mentally infirm and incapable of understanding the nature and consequences of his guilty plea or that he was acting under improper threat; physical compulsion; or undue influence borne of improper persuasion. None of these factors are present here.

16. Consequently, all considered, the guilty plea entered by the Trial Court was unequivocal and it is hereby upheld.

17. Was the sentence imposed harsh and excessive? Counsel for the Appellant did not take up this argument in his submissions but I have considered this in view of all the circumstances in the case.

18. Section 231 of the Penal Code provides that a person convicted of the offence of causing grievous harm with intent to main is "liable to imprisonment for life." In other words, the legislature has categorized the felony as so serious that it attracts the maximum sentence of life imprisonment. In this case, the P3 Form shows that the Complainant suffered a fractured jaw as a result of the wounding by the Appellant. The offence is not only serious but the offence had a serious impact on the victim.

19. Even considering the mitigation provided by the Appellant which includes remorse and the fact that he is a first offender, there is no proper sense in which we can term the sentence imposed – imprisonment for 3 ½ years as harsh or excessive in any sense. Indeed, another Trial Court might find the sentence lenient. Consequently, the appeal against sentence is, therefore, equally without merit.

20. **The upshot is that both the appeals against conviction and sentence are without merit. The entire appeal is dismissed and both the conviction and sentence upheld**.

21. Orders accordingly.

Dated and delivered at Nakuru this 4th day of June, 2020

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Vena Odero, and the Court Assistant were in attendance by video-conference set up at the Court's Boardroom. Representatives of the media were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.