



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL NO. 208 OF 2011**

**GEOFFREY KIPKORIR.....APPELLANT**

**VERSUS**

**REPUBLIC.....DEFENDANT**

*(Being an appeal from the original conviction and sentence in Criminal*

*Case No. 3706 of 2011 at the Chief Magistrate's Court, Eldoret ( Hon. N. Shiundu, SRM) dated 13 October 2011)*

**JUDGMENT**

[1] On the **13 October 2011**, the Appellant herein, **Geoffrey Kipkorir**, was arraigned before the lower court on a Charge of Grievous Harm contrary to **Section 234** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. It was alleged that on the **10 October 2011** at Nganiat Village in Wareng District within Rift Valley Province, he unlawfully caused grievous harm to **Kiprono Kogo**. He admitted the Charge and was consequently convicted on his own plea of guilty and sentenced to 3 years' imprisonment. Being aggrieved by the sentence imposed on him, the Appellant preferred this appeal on **24 October 2011**, contending that:

[a] The Learned Trial Magistrate erred in law and in fact in imposing a harsh and excessive sentence on him;

[b] That the Learned Trial Magistrate erred in law and in fact in not considering that he was a first offender;

[c] That the Learned Trial Magistrate erred in law and in fact in not considering a non-custodial sentence, given the fact that he is a young man and the complainant is his father;

[d] That the Learned Trial Magistrate erred in law and in fact in drawing unfavourable inference from the fact that he said nothing in mitigation;

Accordingly, the Appellant prayed that the sentence be set aside and substituted with a non-custodial sentence and/or grant such other order or orders as it deems fit in the interest of justice.

[2] In his submissions in support of the appeal, the Appellant relied on his Grounds of Appeal and asked the Court to release him or otherwise reduce the sentence to a non-custodial sentence, granted that they have sorted out this case at home with his father. His appeal was however opposed by **Mr. Mulamula**, Learned Counsel for the State, whose view was that, if anything, the sentence of 3 years imprisonment was lenient, considering that the offence carries up to life imprisonment. He urged the Court to note that the Appellant was not remorseful; and that it was within the discretion of the lower court to impose the sentence that it imposed. He accordingly urged for the dismissal of the appeal.

[3] The Appellant having pleaded guilty, **Section 348** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya** is explicit that:

**“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence.”**

[4] Accordingly, the duty of the Court in this appeal is limited to ascertaining that the Appellant's plea was otherwise unequivocal; and that the sentence imposed on him was not only legal but also merited. To this end, **Section 207** of the **Criminal Procedure Code** 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 any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.

[5] A reiteration of the aforesaid provision is to be found in Adan vs. Republic [1973] EA 446 wherein Spry, V.P. explained 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 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 of course be recorded.”*

[6] The record shows that after the Charge was read over to the Appellant and his response noted. However, the lower court did not formally record a Plea of Guilty as required by the law, before the facts were narrated by the Prosecution. Similarly, the lower court record shows that after the facts were given, the Appellant was not given an opportunity to respond thereto before his conviction was recorded. Needless to say that the steps aforementioned are so critical to the plea-taking process that failure in terms of compliance would undoubtedly vitiate the entire process. Indeed, in the case of Adan vs. Republic (supra) the rationale for the requirement that an accused person be afforded an opportunity to respond to the facts was explicated thus:

*“...The statement of facts serves two purposes; it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty; it is for this reason that it is essential for the statement of facts to precede the conviction...”*

[7] Granted the failure by the Learned Trial Magistrate to give the Appellant an opportunity to respond to the facts, it cannot be said that the plea was unequivocal. In the premises, it would be pointless looking at the propriety of the sentence if, as I have found, the underlying plea was not properly taken. This being my view of the matter, I would allow the appeal, set aside the conviction and sentence passed against the Appellant in Eldoret Chief Magistrate's Court against the Appellant in **Criminal Case No. 3706 of 2011** by **Hon. N. Shiundu** on the **13 October 2011**, and order that he be released forthwith, unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 16<sup>TH</sup> DAY OF MAY, 2019

OLGA SEWE

JUDGE