REPUBLIC OF KENNYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.3 OF 2017

(An appeal from original conviction and sentence of Kilgoris SRM's Case No. 1750 of 2014by Hon. A.K. MOKOROS AG. (PM) – Principal Magistrate dated 25th December, 2014)

KENNEDY OGACHI MATARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellants herein,**KENNEDY OGACHI MATARA,** was charged with the 1st count of attempted murder contrary to Section 220 (a) of the Penal Code. The particulars of the offence were that on 14th December 2014 at Borangi, Sub-location, Nyacheki Location in Nyamache District within Kisii County, attempted to unlawfully cause the death of **ISABELLA KEMUNTO** by cutting her severely with a panga.

2. The appellant faced the 2nd count of Grievous harm contrary to Section 234 of the Penal Code, the particulars being that on 14th December 2014 at Borangi Sub-location, Nyacheki Location in Nyamache District within Kisii County unlawfully did grievous harm to **ISABELLA KEMUNTO**.

3. The appellant pleaded guilty to both counts of attempted murder and grievous harm and was consequently convicted on his own plea of guilty and sentenced to life imprisonment on both counts with a rider that the life sentence on the 2nd count would remain in abeyance as a convicted person cannot serve 2 life sentences.

4. Aggrieved by both the conviction and sentence, the appellant filed the instant appeal in which he faulted the trial magistrate for passing a sentence that was manifestly harsh and excessive given the circumstances of the case and the fact that he was a first offender with no previous criminal record.

5. In his supplementary grounds of appeal filed on 6th October 2017, the appellant contended that his guilty plea was not unequivocal in view of the fact that the language used by the court was not stated and further that the appellant did not affirm the facts of the case when read out to him.

6. At the hearing of the appeal, Mr. Kaburi learned counsel for the appellant submitted that the appellant did not understand the Kiswahili language used by the court during the plea taking as the proceedings did not show in which language the appellant answered to the charge. He therefore maintained that the plea was not properly taken and therefore the appeal ought to be allowed, conviction quashed and the sentence set aside.

7. On whether or not this court should order for a retrial, the appellant's counsel submitted that the appellant has been in custody since 23rd December 2014 when he was convicted and therefore, he had suffered enough punishment during the said period and should not be subjected to the inconvenience of a fresh trial.

8. On his part, Mr. Otieno, Learned counsel for the state conceded to the appeal on the basis that the charge was defective in view of the fact that the 2 counts were based on the same facts in which case, the 2nd count ought to have been and alternative count.

9. Mr. Otieno further observed that the plea was not properly taken as the appellant retracted his guilty plea during mitigation when he qualified it by saying that he did not know what he was doing.

10. On whether or not this court should order for a retrial, Mr. Otieno submitted that the offence committed by the appellant was serious as he chopped off the complainant's hand at the wrist.

11. As the first appellate court, this court is under a duty to re-analyze and re-evaluate the evidence tendered before the trial court afresh with a view to arriving at its own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify. (See **Okeno vs Republic (1973) E.A 353).**

12. In the instant case however, the appellant pleaded guilty to the charge in which case, witnesses did not testify before the lower court. Under the above circumstances, the court is still under a duty to review the manner in which the plea was taken with a view to determining if the trial court adhered to correct procedure for recording and taking a guilty plea.

13. Section 207 of the Criminal Procedure Code (CPC) stipulates as follows on the procedure to be adopted in recording a guilty plea.

> **"207. Accused to be called upon to plead**
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> **(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) If the accused pleads—**
>
> **(a) that he has been previously convicted or acquitted on the same facts of the same offence; or**
>
> **(b) that he has obtained the President's pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge."**

14. The above provisions of Section 207 of the CPC on the steps to be followed in recording a plea of guilty were captured and emphasized in the celebrated case of **Adan vs Republic [1973] E.A. 446** as follows:

> ***"When a person is charged, the charge and the particulars should be read out to him so far as possible in a language which he can speak and understand. The magistrate should explain to the accused person all the 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."***

See also **Korir vs Republic [2006] E.A. 124** and **Kariuki vs Republic (1984) 809**.

15. The question which then arises in this appeal is whether the trial court followed the above procedure when taking the appellant's plea especially in respect to the language used at the time of recording the and taking the plea.In other words, did the trial court follow the procedure that has been consistently established by the courts where an accused person pleads guilty to an offence charged.The appellant raised the issue of the language used during the trial and maintained that he was not conversant with the Kiswahili language that the court used at the time the plea was taken.

16. I note that the trial court noted the language used in recording at taking plea as follows:

> **"The substance of the charge (s) and every element thereof has been read by the court to the accused person, in Kiswahili language that he/she understands who being asked whether he/she admits or denies the truth of the charge (s) replies:**
>
> **Count 1**
>
> **Accused- it is true.**

Count II.

Accused – it is true."

17. From the above extract of the proceedings, it is clear that Kiswahili language was used at the time of recording the plea and the trial magistrate noted that the appellant understood the said language. Upto this point in the plea taking process, I am satisfied that the plea was properly taken in the language that the appellant was conversant with ant I therefore do not agree with the appellant's submission that he did not understand the language used by the court at the time the plea was taken.

18. Turning to the issue of whether or not the guilty plea was unequivocal on account of the appellant's mitigation after his conviction, I note that the appellant stated as follows in his mitigation.

"I committed the offence when I had run mad. I did not know what I did."

19. My finding is that the appellant retracted his guilty plea during mitigation when he attributed his actions to his compromised state of mind and lack of knowledge of his own actions. Upon qualifying the guilty plea, the trial court ought to have changed the guilty plea to a plea of not guilty and set down the case for a full trial. It is thus clear to me that the trial court did not adhere to the laid down principles for taking plea and for that reason, the conviction and sentence that followed the flawed guilty plea illegal as the guilty plea was not unequivocal.

20. I also concur with the submissions by Mr. Otieno, learned counsel for the state, that there was a defect in the charge sheet in view of the fact that the appellant faced two separate counts of attempted murder and grievous harm instead of the second count being an alternative charge as the charges were based on the same facts. I however find that this defect on the charge sheet was not fatal to the entire case as it did not prejudice the appellant in any way. The test applicable by an appellate court when determining the existence of a defective charge and its effect on the appellant's conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice thereby resulting in great prejudice to the appellant.

21. In the case of **JMA vs Republic (2009) KLR 671** it was held:

"it is not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible."

22. Section 382 of CPC provides:

"382. Finding or sentence when reversible by reason of error or omission incharge or other proceedings

Subject to the provisions hereinbefore contained, no finding, sentence or orderpassed by a court of competent jurisdiction shall be reversed or altered on appeal orrevision on account of an error, omission or irregularity in the complaint, summons,warrant, charge, proclamation, order, judgment or other proceedings before orduring the trial or in any inquiry or other proceedings under this Code, unless theerror, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity hasoccasioned a failure of justice the court shall have regard to the question whetherthe objection could and should have been raised at an earlier stage in the Proceedings."

23. In the present case, I am satisfied that failure to indicate that count 2 was an alternative charge to count 1 was an omission or discrepancy that did not prejudice the appellant and I find that no miscarriage of justice resulted from the inclusion of the 2nd count as a separate count. I further find that the error of listing the second count as a separate charge instead of an alternative charge cannot make the charge defective or the conviction a nullity as the defect is curable under **Section 382 of the CPC**.

1. What orders should this court make in the circumstances of the case? Having found that the conviction was illegal in view of the fact that the guilty plea was not unequivocal coupled with the finding that the charge was defective albeit curable, I find that the instant appeal is merited and I allow it with the result that the conviction is hereby quashed and the sentence imposed on the appellant set aside.

2. Having quashed the conviction, should this court then order for a retrial as requested for by Mr. Otieno, learned counsel for the state? I am aware that an appellate court can only order for a retrial where the following factors exist: that the prosecution will be able to trace and produce witnesses when retrial is ordered, that the order of retrial should not be used as an opportunity by the prosecution to plug the gaps in its case; that taking into consideration all the circumstances of the case, it would be just and fair for the court to order the appellant to be tried.

3. In **M Kanake Vs Republic [1973] EA 67** at page 68 the court of Appeal held:

"A retrial was not sought by the prosecution to fill up gaps in the evidence adduced at the first trial or to enable the prosecution correct mistakes for which it was to blame,…"

4. In the instant case, the state sought for a retrial citing the seriousness of the case against the appellant, the sentence imposed against him. Generally, where a suspect has not had a satisfactory trial, the fairest and proper order to make is an order for retrial. A

retrial will, however, only be ordered where the interests of justice require it and it is unlikely to cause an injustice to the appellant.In the case of **Muiruri vs Republic (2003) KLR** 552, a similar situation arose and the court held:

"Generally whether a retrial should be ordered or not must depend on the circumstances of the case.

It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having 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."

5. In our criminal justice system, the law requires that the right of the appellant must be weighed against the victim's rights. In the instant case, the state sought orders for the retrial of the appellant on the basis that he faced a serious charge of attempted murder or its alternative of grievous harm. The facts of the case show that the complainant's left hand was chopped of at the wrist following an attack in which she was hacked several times with a panga. Needless to say, the injuries that the complainant sustained were so serious that they could have resulted in her death. The appellant has been in custody for slightly over 3 years out of the life imprisonment term that was imposed on him by the trial court following his conviction and I note that a retrial will not prejudice him in any way considering that the offence was committed in 2014, in which case, the witnesses may still be availed in court to testify as the case did not go for a full trial following the appellant's guilty plea.Under the above circumstances, and balancing the completing interests of the appellant and the victim, this court is of the view that the justice of this case demands that it be submitted for a retrial before the Subordinate Court. I find that a retrial will beneficial to the appellant as it will afford him an opportunity to go for a full trial and possibly clear his name.

6. Consequently, having allowed the appeal, Idirect that the appellant shall be retried on the same charge before a magistrate of competent jurisdiction other than Hon. A. K. Mokoross Ag. SRM. I further order that the appellant be produced before the said court within 7 days from today's date. He shall thereafter be tried in accordance with the law. The case shall be mentioned before Kilgoris Court on 12th March, 2018.

7. It is so ordered.

Dated, signed and delivered in open court this 5th day of March, 2018

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Otieno for the State

Mr. Kaburi for the appellant

Omwoyo court clerk