



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 62 OF 2017

ELIAS KIMELI KEMBOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from Senior Principal Magistrate's Court at Kapsabet by Hon. D. Alego Senior Principal Magistrate dated 25th May 2017 the original conviction in Criminal Case No. 689 of 2017]

JUDGMENT

1. The appellant (**ELIAS KIMELI KEMBOI**) was convicted on a charge of grievous harm Contrary to Section 234 pf the Penal Code and sentenced to serve life imprisonment.

The particulars of the charge were that on 19th March 2017 at **KIPLOKEK** village, **LOLMINGAI** Location, the appellant unlawfully assaulted **HILLARY BIWOTT** by biting him on the lower lip thereby occasioning him grievous harm.

2. The appellant admitted the offence whose particulars as narrated by prosecution were that on 19.03.17 at around 8.00 am, **HILLARY BIWOTT** (complainant) was at his home in the company of his wife **MAGDALLIN** and children, when the appellant got into the former's compound and begun spewing insults at the complainant without any provocation. He got wild, charged at the complainant, held him then felled him down.

3. The appellant bit the complainant's lower lip before members of the public rushed in and apprehended him. The complainant was taken to **ELDORET's MEDIHEAL** hospital where he was admitted for 5 days subsequently, a P3 form was filled which indicated the degree of injury as grievous harm.

4. The appellant confirmed that the facts were correct ad was thus convicted on his own plea.

In mitigation he stated:

"Niko tayari kunyongwa"

(I am prepared to be hanged)

This prompted the trial magistrate to observe that a letter had been sent to the court at an earlier date when the court had required a mental assessment report, and the report from **KAPSABET** county hospital confirmed the appellant was of sound mind. For good measure, the trial magistrate then called for a Probation Officer's report before sentence, the trial magistrate ordered the appellant to serve a life sentence.

5. The appellant contests that the trial magistrate failed to reconsider the plea of guilty and determine whether the plea was unequivocal.

Also that the trial magistrate failed to consider the appellant's mental illness akin to render paranoid schizophrenia borne out of what he said in his mitigation. That in any event the trial magistrate relied on a scanty probation report and failed to fathom that the appellant was in a confused state and at worst a finding of guilty but insane should have been made.

6. At the hearing of the appeal, Miss Kibichi submitted on behalf of the appellant that the plea was not unequivocal because when the charge was read to him entirely he denied, but on 03.05.2017 he changed and admitted the charge. According to counsel this was ambiguous and the court ought not to have entered a plea of guilty. The court is urged to be guided by the decision in **SIMON GITAU KINENE V R, Kiambu Cr. Appeal No. 9 of 2016** which pointed out that the court has a duty to ensure that the plea is unequivocal.

7. In opposing the appeal, **MISS ODUOR** on behalf of the State submitted that the plea was unequivocal and the charge was read to the appellant in a language he understood, both on 20.03.17 when he initially denied the offence and on 03.05.2017 when he changed his plea and admitted the charge. However she acknowledged that this change of plea was at a date set for mention and in fact the trial court convicted the appellant on the magnitude of the offence and sentence.

I do not think there is anything procedurally irregular if an accused person wishes to change his plea at any stage of the criminal proceedings – he can even change it at conclusion of the hearing, just before judgment and sentence are pronounced.

8. The locus classicus case of **ADAN V R (1973) EA 445** is very clear on what amounts to an unequivocal plea –when the appellant admitted the charge, he did not attempt to qualify it with any statement which could have negated that admission – not even at the stage of mitigation. The charge and facts were read in a language appellant understood and I do not find any fault in the procedure adopted by the trial magistrate.

9. As regards mental status, Miss Kibichi argues that although the letter from **KAPSABET COUNTY HOSPITAL** indicated that the appellant was fit to stand trial, the Probation Officer's report indicated that the appellant had been displaying weird behaviour at home, which is what translated into the incident for which he was charged, and the trial magistrate ought to have found that no malice aforethought was established against the appellant. That this coupled with the appellant's plea in mitigation ought to have propelled the court into probing further the appellant's mental state.

10. The medical report is criticized as not having been prepared by a qualified psychiatrist, and that it did not have any analysis, but simply a conclusion.

11. Miss Oduor in response to this submitted that the letter from the hospital confirmed that the appellant was fit to plead, and the burden of proving otherwise shifted onto the defence yet not a single document has to date been presented to this court to rebut what the medical Superintendent stated.

12. I concur with Miss Oduor on this limb – indeed the issue of the appellant's mental state was not raised at the trial by the defence, rather, it was the trial magistrate who out of abundance of caution – probably having observed the appellant's conduct or demeanour (although the record does not reflect this) ordered for the appellant to undergo psychiatric assessment –and the result was a clean bill of health dated 28.03.2017. To now cry wolf at this point – with nothing else to rebut these findings is expecting the court to re-open the proceedings at the trial stage and over-indulge the appellant. Indeed the trial magistrate lived to the very sentiments expressed by Ngugi 'J; Kiambu in **Criminal Appeal No.9 of 2016 SIMON GITAU KINENE V R**, by being extra cautious and recommending for a psychiatric examination without any prompting by a third Party.

13. Were there acts that clearly indicated abnormal behavior on the part of the appellant, was his history disclosed to the trial court before a finding of guilt made? I think this question could not have clouded the trial magistrate's mind in view of the medical report presented. Even now at the appeal stage, the appellant has remained as calm as the dead sea he has not displayed anything to suggest a raging mind. Of course he may be having lucid moments, but there isn't even a report from the Officer in Charge of the correctional facility where he is held which suggests abnormal behaviour.

14. I have perused the Probation Officer's Report which indicated the information obtained from the appellant's family was that he may have joined a cult in the year 2015 when at school in **West Pokot** and that he had displayed weird behaviour at home, and had become nocturnal, to the extent that his family members feared for their lives. The report by the Probation Officer was not favourable, stating that he could easily be adversely dealt with by members of the public as the offence was committed against the area chief, and he also posed a threat to the community.

15. Though the appellant's counsel insists that the trial magistrate ought to have found the appellant guilty but insane this is hard to fathom – when medical evidence ruled out the challenged mental state. The State counsel has pointed out that the appellant got what he deserved as he was not remorseful defiantly saying he was ready to be hanged. The trial magistrate probably irked by his brazenness then meted the maximum sentence of life. The P3 form did not form part of the record of appeal to enable me assess the extent of the bite, and the residual effects if any.

However I think life imprisonment was a rather harsh sentence, and for his own benefit before I pronounce the next step I think that the appellant be subjected to a comprehensive mental examination at Moi Teaching and Referral Hospital detailing his orientation and comprehension of events, time space etc, and the report be filed in this court before 16th October 2018.

DELIVERED and DATED this 1st day of October 2018 at Eldoret.

H. A. OMONDI

JUDGE