REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 111 OF 2017

PETER MUTUKU MUSYOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the sentence by Hon. D. Orimba (SPM) in Kangundo SPMC

Cr. Case No. 1051 of 2016 on 7th October, 2016)

JUDGEMENT

1. Peter Mutuku Musyoka was convicted of the offence of grievous harm contrary to section 234 of the Penal Code and was fined KShs. 100,000/- in default to which he was to serve 6 years imprisonment. The appellant lodged this appeal seeking revision of the sentence. He sought leniency stating that he is a first offender and that he is remorseful and reformed. That he is a citizen with potential since he is still a youth and needs to establish a family. That he has five (5) siblings who he is taking care of. He prayed for a lesser or non- custodial sentence.

2. The appeal was opposed on the basis that the appellant entered an unequivocal plea of guilty. The respondent cited **Olel v. Republic [1989] KLR 444** where the court held as follows:

"Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (cap 75) does not merely limit the right of appeal in such cases but bars it completely."

That the appellant is therefore barred from appealing against the conviction and can only challenge the sentence. It was the respondent's submission that there was a mistrial since the trial magistrate merely indicated that the charge was read to the appellant in a language he understood rather than specifically indicate what the language was and that a retrial should be ordered. To support the argument, the respondent relied on **Adan v. Republic [1973] EA 445** and **Makupe v. Republic, Mombasa C.A. Criminal Appeal No. 98 of 1983**.

3. In **Adan v. Republic** (supra), the Court of Appeal set out the procedure for taking plea where an accused person pleads guilty. It stated:

> ***"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."***

In **Criminal Appeal No. 73 of 2016 (Nakuru), Elijah Njihia Wakianda v. Republic**, the Court of Appeal separately constituted stated:

> ***"Court: the substance of the charge(s) and every element thereof has been stated by the court to the accused person in a language that he understands who being asked whether he admits or denies the truth of the charge replies in Kiswahili: - it is true…With respect, we find this disturbing. It seems to us that this part of a template used by courts at plea taking. That is why it speaks of "charge(s) when there was a single charge and the rather odd "in a language he understands", when it is more normal and logical to simply state the language used. This smacks of a mere going through the motions, a recital of ritual. While that***

may not much matter when the plea entered is one of not guilty followed by a trial with all its attendant safeguards, it assumes a critical dimension when the plea is one of guilty and leads to conviction. 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…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 officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often-intimidating judicial process."

4. Applying the test, it is a mistrial where the language used is not specifically indicated. I have however taken into consideration the circumstances of this case. The appellant in this case does not appeal against the conviction rather the sentence. The appellant in his mitigation was remorseful and thereby an inference is made that he committed the offence no wonder he pleaded guilty and thus understood the charges he faced. In the circumstances, I am unable to find that there was a mistrial.

5. The principles that an appellate Court will act upon in exercising its discretion to interfere with a sentence imposed by the trial court are now sell settled. The Court of Appeal in the case of **Ogolla s/o Owuor vs Republic, [1954] EACA 270**, pronounced itself on this issue as follows:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"

6. The P3 form filled by Dr. Mutua reveals that the complainant suffered swollen lower lip at the right side of the mouth and that there was bleeding in the socket of 11, 21 and avulsed 11, 21 bruised lower lip. In further consideration to the fact that the appellant is a first offender and that he is remorseful, I find that the sentence is lawful. Further the maximum sentence imposed under Section 234 of the Penal Code is life imprisonment. I find the sentence imposed by the trial court to be reasonable since the trial court had considered the Appellant's mitigation as well as the injuries sustained by the Complainant. It is also noted that the Appellant had viciously attacked the complainant for no apparent reason and without any provocation whatsoever. This appeal therefore fails. The trial court's sentence is hereby affirmed.

Orders accordingly.

Dated and delivered at Machakos this **13th** day of **December, 2018.**

D. K. KEMEI

JUDGE