REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HIGH COURT CRIMINAL APPEAL NO.139 OF 2014

JOHN SHIKOLI ATSUNZI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No.3020 of 2014 in the Chief Magistrate's Court Kakamega, (J. Ong'ondo PM)

JUDGMENT

1. The appellant **John Shikoli Atsunzi** appeals to this Court against conviction and sentence imposed on him by (Ongondo PM) in **Criminal Case Number 3020 of 2014 at Kakamega Chief Magistrate's Court**. The appellant had been charged with the offence of attempted murder contrary to **section 220(a)** of the Penal Code. Particulars of the offence were that on the 21st day of June 2014 at Khayega Market in Kakamega East District within Kakamega County attempted unlawfully to cause the death of **Wycliffe Angwara** by inflicting grievious harm on his head. The accused pleaded guilty to the charge and was convicted on his own plea of guilty and sentenced to serve a prison term of 18 years. Aggrieved the appellant lodged an appeal against both conviction and sentence

2. In his petition of appeal the appellant has raised the following grounds:-

> "1) **THAT the trial court erred in both law and fact by not warning me of the consequences of pleading guilty of the above appended (sic) charges.**
>
> **2) THAT I was advised by the police to say yes before the court and I trusted them only to realise that I was being sent to prison.**
>
> **3) THAT I did not do the crime in question and request for a full trial.**
>
> **4) THAT the sentence meted was very harsh and excessive in the circumstances."**

The appellant therefore prayed that his conviction be quashed, sentence set aside and a full trial be ordered.

3. When the appeal came up for hearing on 14th March, 2016, the appellant was unrepresented and relied

on written submissions which he had prepared to urge his appeal. In his written submissions the appellant argued that he did not know what he was doing when he pleaded guilty to the charge. He blamed the police saying that he was advised that if he pleaded guilty he would be released. He also says that he did not know what he was pleading to and that he was confused during plea taking and was not in his right mind.

4. The appellant further submitted that the trial court acted without jurisdiction when sentencing him and was convicted on the strength of a defective charge sheet. He also said that particulars of the offence did not support the charge the trial court convicted him for. The appellant also faulted the trial court for handing him a very harsh sentence and never considered his mitigation.

5. Mr Oroni senior prosecution counsel who appeared for the State opposed the appeal and submitted that the appellant pleaded guilty to the charge even after he had been warned and was therefore convicted on his own plea of guilty and maintained the plea of guilty even after facts had been read to him. Learned prosecution counsel submitted that the appellant's submissions are an afterthought and that conviction was sound. On sentence, Mr Oroni submitted that the sentence is proper and merited. He therefore urged the court to dismiss the appeal.

6. As the first appellate court, this Court is required to look a fresh at the evidence presented before the trial court, and evaluate the same so as to determine whether or not the appellant was properly convicted (see **Okeno v Republic** [1972] EA 32). In this appeal, the appellant pleaded guilty and was thus convicted of his own plea of guilty. Section 348 of the Criminal Procedure Code bars appeals from subordinate courts where an accused was convicted upon a plea of guilty except on the extent and legality of sentence. It provides as follows:-

> **"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."**

7. In the case of **Olel v Republic [**1989] KLR 444, the court held:-

> **"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."**

8. The appellant is, by virtue of this section, and authority, barred from challenging the conviction and his only recourse was to challenge the extent or legality of the sentence imposed on him by the trial court.

9. The appellant in this appeal, has challenged both conviction and sentence. Conviction having been on a plea of guilty, the only way this Court can address itself on the issue is to determine whether the plea recorded by the lower court was equivocal which would make the conviction unlawful thus allow this Court to address itself on that issue of conviction.

10. The Court of Appeal gave directions on how a plea should be recorded in the case of **Aden v R** [1973] 443 when it held:-

> **i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;**
>
> **ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;**
>
> **iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or add any relevant facts;**
>
> **iv) if the accused does not agree with the facts or raises any question of his guilt his**

reply must be recorded and change of plea entered.

v) if there is no change of plea, a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

11. A perusal of the record shows that the charge was read to the appellant in kiswahili language which he understood and was warned of the severity of the penalty before he pleaded to the charge. The appellant is then recoded to have responded:

Accused:

"It is true. I hit him with a crate of tomatoes."

12. The court then entered a plea of guilty, and when facts were read to him the appellant again admitted those facts and the court convicted him on his own plea of guilty and sentenced him to 18 years imprisonment. I am satisfied that the trial magistrate complied with the directions given in the case of **Aden** (supra) on how a plea should be recorded. The learned trial magistrate recorded what the appellant said in response to the charge and when facts were read to him, he admitted those facts to be true thus the conviction on his own plea of guilty.

13. The appellant in challenging the plea of guilty has faulted the trial court saying that he was not warned of the consequences of pleading guilty to the charge. However the record shows that before pleading, the appellant was warned of the severe penalty he would face and it was after the warning that the court recorded the plea of guilty. At least from the record, the trial court cannot be faulted. The appellant was warned and pleaded guilty after that warning. The ground of appeal that he was not warned has no basis and it is rejected.

14. The appellant has also blamed the police for pleading guilty saying that he was advised by the police to plead guilty on the promise that he would be released. Having been warned, the appellant should have realised what he was about to enter into if he pleaded guilty, a lengthy jail term was staring at him. The appellant did not raise any issue of promise before the trial court and it is difficult to believe the appellant now that he pleaded guilty upon some promise by the police.

15. From the charge sheet, the appellant was arrested on 25th September, 2015 and appeared in court on 26th September, 2015 just a day after arrest. In the case of **Olel v Republic** (supra) where allegations, of torture and promise were made, the court stated as follows at page 450:-

"mere detention, long or short in itself, cannot be a factor in determining whether or not a plea is unequivocal. It is what may be done to the appellant while in detention that may affect the character of his plea. Since there is no material except the record of the proceedings on which we can judiciously determine the question, we must go by the record and accept as true the position stated herein. In our view, to do otherwise would be tantamount to substituting the known and admitted facts of this case with unjustifiable speculation."

16. The appellant did not stay in police custody for long and if any promise was made to the appellant to entice him to plead guilty, it was made in ignorance of the law and was therefore against public policy and should be discouraged. I agree with **Makau J,** who dealt with a similar issue in the case of **Ben Okello Onyango v Republic** [2015] e|KLR where police were said to have promised the appellant freedom to have him plead guilty to a charge of defilement, the learned Judge rendered himself thus:-

"The appellant in the lower court was not convicted on his own confession but on admission of the charge and facts as read and explained to him in the language that he understands. He did not state when admitting the facts who made the alleged promise to set him free and if so when. If any promise was made, it cannot be raised on appeal nor can such promise be enforced as it is against public policy."

17. I have carefully perused the record herein and I am satisfied that the plea of guilty recorded by the trial court was unequivocal, complied with the guidelines given in the case of **Aden** (supra) and statute pursuant to **section 207(1)** of the Criminal Procedure Code which provides as follows:-

> **"S.207(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."**

18. Having come to the conclusion that the plea of guilty recorded herein was unequivocal, means the appeal against conviction cannot stand by virtue of **section 248** of the Criminal Procedure Code. I am also satisfied that particulars of the offence supported the charge and the appellants submissions to the contrary are not correct. The appeal against conviction is therefore rejected.

19. Turning to the issue of sentence, the appellant has stated in his petition of appeal that the sentence meted out by the trial court was excessive in the circumstances of this case. The trial court sentenced the appellant to serve 18 years imprisonment. **Section 220** of the Penal code under which the appellant was charged provides as follows:-

> **"S.220 – Any person who**
>
> **a) attempts unlawfully to cause the death of another, or**
>
> **b) with intent unlawfully to cause the death of another does any act or omits duty, to do such act or omission being of such a nature as to likely to endanger human life, is guilty of a felony and liable to imprisonment for life."**

20. From the above section, the maximum sentence allowed for the offence of attempted murder is life imprisonment. The appellant was sentenced to 18 years imprisonment which he says is excessive. On conviction for attempted murder where the accused pleaded guilty **section 348** of the Criminal Procedure Code allows him to appeal on the extent and legality of sentence. To my mind, the sentence of 18 years is a legal sentence and therefore the issue of legality of sentence would not arise in this appeal. The only issue I have to consider is the extent of sentence and whether indeed it is excessive in the circumstances of this appeal.

21. The object of sentencing is primarily to punish for the offence and at the same time reform or rehabilitate the offender, in this case the appellant, in such a manner as appropriate in the circumstances of the case. It may similarly be aimed at deterring repeat offenders and other would be offenders while taking into account prevalence of similar offences as well as the situation of the appellant himself. Further more in considering the appropriate sentence to impose, it is important that similar offences attract fairly similar punishment in terms of sentences meted out so that there is uniformity and certainly in sentencing.

22. However while applying the above principles, it is important to remember that sentencing is at the discretion of the trial court and a court sitting on appeal should be slow in interfering with the discretion of the trial court on the issue of sentence unless there are reasonable grounds to do so.

23. In the case of **Wanjema v Republic** [1971] EA 493 the court stated at page 494:-

> **"An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case."**

24. In the present appeal, the trial court imposed a sentence of 18 years imprisonment for attempted murder. Even though sentence is at the discretion of the trial court, I am of the view that the sentence of 18 years imprisonment is excessive and that the court failed to take into account a certain factor it should

have taken into account. The appellant in this case pleaded guilty to the charge which was a factor that should have been taken into account. This is what the court in the case of **Wanjema** (supra) said:-

> **"The instant sentence merits this court's interference on ... these grounds. No account was taken, as it should have been, of the fact that the appellant pleaded guilty ..."**.

25. Although the law prescribes a life sentence, where there were no aggravating circumstances, the sentence of 18 years was fairly excessive in the circumstances of this case. There is need to have uniformity and certainty in sentences that courts met out on similar offences committed under similar circumstances. In the case of **Francis Muteti Kimanzi v Republic** [2015] eKLR where the appellant had been convicted for attempted murder and sentenced to life imprisonment, **Dulu J** reduced the sentence to 10 years imprisonment. And in the case of **Jane Koitee Jackson v republic** [2014] eKLR mks **Criminal Appeal No.140 of 2009, Gacheru** and **Jaden JJ** upheld a sentence of 10 years which the appellant had been sentenced to serve for attempted murder. In the case of **John Mithika v Republic** [2013] eKLR where the appellant had been sentenced to life imprisonment for attempted murder, **Makau J** reduced the sentence to 20 years imprisonment.

26. Going by the above decisions and taking into account the need for uniformity of sentence and the fact that the first two decisions are latter in time, I will allow this appeal on sentence and interfere with the trial magistrate's discretion I therefore reduce the sentence of 18 years to 10 years which means the appellant shall serve 10 years imprisonment. The sentence to run from the date of conviction.

Dated and delivered at Kakamega this 12th April, 2016.

E.C. MWITA

JUDGE