REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 87 OF 2014

ASBEL KIPKOECH……..……..……..……..……..APPELLANT

VERSUS

REPUBLIC…..……..……..……....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 1525 of 2014 Republic v Asbel Kipkoech in the Resident Magistrates Court at Kapsabet by C. M. Wattimah Resident Magistrate dated 22nd May 2014)

JUDGMENT

1. The appellant pleaded guilty to a charge of causing grievous harm contrary to section 234 of the Penal Code. The particulars were that on 5th November 2013 at Kipture Village, Kipture Location within Nandi County, he unlawfully assaulted Amos Kibet Lagat by stabbing him with a knife on the right cheek. He was sentenced to life imprisonment.
2. The appellant is aggrieved by the conviction and sentence. His petition of appeal urges two main grounds: First that that the plea was not unequivocal because he never understood the language used at his trial; and, secondly, that he did not get a fair trial. The appellant pleads for a fresh trial.
3. At the hearing of the appeal, the appellant relied on detailed hand-written submissions filed on 29th January 2015. He submitted that the trial court breached article 50 (2)(b) of the Constitution. He contended that when he offered to change his plea, the charge was read in Kiswahili language which he did not understand. He was of the view that the court failed to follow the procedure for plea agreements laid down in section 137 of the Criminal Procedure Code. The appellant said he is an orphan. I took the latter submission to be a plea for *clemency*.
4. The appeal is conceded by the State. That concession does *not* mean the appeal will be allowed. This Court has to subject all the evidence in the lower court to a fresh analysis. See *Odhiambo v Republic* [2005] 1 KLR 564. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
5. I have carefully studied the records of the trial court. The charge was first read to the appellant on 12th May 2014. The record indicates that the language was English with Kiswahili and Nandi translation. The appellant answered "*It is not true*". A plea of not guilty was entered. I am unable to fault the trial court up to that point. The appellant was granted bail.
6. On 22nd May 2014, the first and second prosecution witnesses testified. The appellant did not have any questions in cross-examination. At the close of the evidence of PW2, the appellant addressed the court as follows: "*I wish to change plea*". The charges were read to appellant in *Kiswahili*. The appellant answered in *Kiswahili* language as follows: "*Ni kweli*". It is thus not true that the appellant never understood *Kiswahili*. His answer to the charge betrays him. The facts were the read out at length to the appellant. They were straightforward. On the material day, the appellant

went to a *chang'aa* den at 7.30 in the evening. He saw the complainant seated with other people. The appellant left without uttering a word. He returned armed with a knife; he stabbed the complainant on the right cheek. The complainant's father took him to hospital and reported the matter to Kapsabet Police Station. A P3 form and treatment chit (exhibits 1 and 2) were produced in evidence. The degree of injury was assessed as *grievous harm*.

7. When the facts were read to the appellant, he replied- *"the facts are true"*. A final plea of guilt was then entered. The appellant was thus properly convicted of the offence of causing grievous harm contrary to section 234 of the Penal Code. I find the plea was *unequivocal*. Like I stated, the Court language was clearly stated to be English/Kiswahili/Nandi. The charge and facts were read in Kiswahili. The appellant replied in *Kiswahili* in his *own* words as follows; *"Ni kweli"*. Failure to state the language would have been fatal. See *Lusiti v Republic* [1976-80] 1 KLR 585, *Desai v Republic* [1974] EA 416, *Adan v Republic* [1973] EA 445, *Feisal Adan v Republic*, Mombasa High Court criminal appeal 77 of 2008 [2008]eKLR. The appellant even proceeded to address the court in mitigation. I thus disagree with the appellant that the language of the court was not certain or clear or that he did not follow the proceedings. What may have stunned the appellant was the sentence for *life*. That may explain the turnabout and challenge on the plea.
8. From my analysis above, the plea of guilt was *unequivocal*. There was no breach of procedure or violation of Article 50 of the Constitution. There is no basis for a retrial. There was no *plea agreement* made between the appellant and the State: the appellant changed his own plea of his own volition. The procedures for recording a plea agreement provided by section 137 of the Criminal Procedure Code were thus inapplicable in this case. The learned State Counsel was, with respect, *wrong* in conceding the appeal on conviction.
9. That leaves the matter of the sentence. After the conviction, the prosecutor informed the court that he had no records. The appellant was treated as a first offender. The appellant was given an opportunity to mitigate. He stated as follows-

> *"I seek court to forgive me"*.

10. The learned trial Magistrate observed that her hands on sentence were tied. She sentenced the appellant to life imprisonment. I think, with respect, that she misinterpreted section 234 of the Penal Code. The sentence provided there is not *mandatory*. Her hands were *not* tied.
11. Sentencing is at the *discretion* of the trial court. But power still reposes in an appellate court to *review* the sentence if material factors were overlooked; or, if the sentence was founded on erroneous principles. See *Amolo v Republic* [1991] KLR 392, *Omuse v Republic* [1989] KLR 214, *Macharia v Republic* [2003] 2 E.A 559.
12. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

> *"The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may…..…(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or….. "*

13. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

> *"The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors. …The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirely before settling for any given sentence."*

14. The charge facing the appellant was a *felony*. Section 234 of the Penal Code provides that any person who commits grievous harm to another is guilty of a felony and is liable to imprisonment for *life*. Although the offence was grave, the appellant was a first offender. From the committal warrant, the appellant was only twenty five years old. The sentence of *life*, though well within the

law, was in the circumstances too harsh. I will allow the appeal on sentence. The sentence passed against the appellant is set aside. The complainant suffered a vicious knife attack. It calls for a custodial sentence. The appellant shall now serve three year's imprisonment. For the avoidance of doubt, the term of imprisonment shall take effect from 22nd May 2014, the date of his original conviction.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 3rd day of March 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

Appellant (in person).

Mr. Job Mulati for the State.

Mr. J. Kemboi, Court clerk.