No. 298/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 99 OF 2012

JUMA MAKOVU……..……..…APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

(Being an appeal from the original Conviction and Sentence in Mutomo Resident Magistrate's Court Criminal Case No. 137 of 2012 by Hon. S.K. Mutai, SRM on 9/7/2012)

JUDGMENT

1. The Appellant was charged with the offence of causing grievous harm contrary to **Section 234** of the **Penal Code.**

Particulars thereof being that on **31st** day of **March, 2012** at about **6.30pm** at **Muthue** Village **Kanziku Location** in **Ikutha District** within the **Kitui Country** did grievous harm to **Shadrack Mwanthi Musya.**

2. The appellant on being arraigned before court pleaded guilty to the charge. He was convicted and sentenced to serve life imprisonment.
3. Being aggrieved by the decision of the court he appealed on the grounds that:-

v. The learned trial magistrate erred in law when he failed to state the substance of the charge to the appellant, a failure that prejudiced the appellant.
v. The learned trial magistrate erred in law when he failed to take a proper plea from the appellant, failure that rendered the plea equivocal.
v. The conviction was entered erroneously and the sentence was an error.

4. **Mr. Mogikoyo,** counsel for the appellant submitted that the answer to the charge did not amount to a plea of guilty. He argued that to have been found guilty, it must have been specified that the appellant unlawfully did grievous harm. Therefore it could not be comprehended whether or not the appellant understood the gravity of the charge before pleading to it. Further, he submitted that the accused having said nothing in mitigation, it was unusual as the dispute did not involve the appellant alone. The appellant having been a 1st offender, the sentence was excessive. He called upon the court to order a retrial.
5. **Mrs Abuga,** the learned State Counsel opposed the appeal. She stated that the plea was taken in a language the appellant understood. Facts were read to him. They provided chronological events that confirm that the appellant injured the complainant. Further she argued that the appellant

understood and followed proceedings, therefore the plea was unequivocal. She argued that the sentence imposed was lawful and asked the court to dismiss the appeal.

6. This being the first appeal, I am enjoined to scrutinize the record and come up with my own conclusions.
7. This is a case where the appellant at arraignment admitted the charge. According to the provisions of the law such a person cannot appeal against the conviction. He can only question the legality of sentence. (***see Section 348 of the Criminal Procedure Code).*** However, in the case of ***Laurent Mpinga versus Republic [1983] TLR 166-*** the court pronounced the criteria for interfering with a plea of guilty namely;

"i) That even taking into consideration the admitted facts, the plea was imperfect, ambiguous or unfinished and for that reason, the lower court erred in law in treating it as a plea of guilty.

ii) That the appellant pleaded guilty as a result, of mistake or misapprehension;

iii) That the charge laid at the appellant's door disclosed no offence known to law; and

iv) That upon the admitted facts the appellant could not in law have been convicted of the offence charged".

8. In the present case the charge was read to the appellant in a language that he understood. The language is indicated as English/Kikamba. There was a court interpreter in court who discharged his interpretation duties appropriately. (***See Said Hassan Nuno versus Republic [2010] eKLR).***
9. The charge was read to the appellant. The charge sheet clearly shows the charge and particulars thereof which the appellant admitted. It is not in dispute that he understood Kikamba language; therefore he did understand the particulars of the offence as stated.
10. Facts of the case were presented by the Court Prosecutor. It was stated that the complainant, a father to the accused was called to settle a dispute between the accused and his siblings. They could not agree. The complainant decided to walk away. Accused followed him and hit him with a piece of wood. He collapsed. He was taken to **Mutomo Mission Hospital** and later to **Nairobi Hospital** in a critical condition. The degree of injury sustained was classified as grievous harm. Per the P3 form produced, the complainant sustained a depressed skull fracture on the left temporal region. A CT scan done showered a left temporal concussion.
11. These were facts that the appellant admitted as being true. The court subsequently convicted him and sentenced him to life imprisonment as provided by the law.
12. There was no ambiguity in the plea. The Lower Court directed itself properly in treating the plea as a plea of guilty. There was absolutely nothing to imply that the appellant misapprehended the facts as presented. The charge disclosed an offence known in law and the facts presented captured ingredients of the offence of causing grievous harm.
13. With regard to the sentence imposed, this court can only interfere with it if it is evident that the trial court acted upon some wrong principle or overlooked some material facts or if the sentence was manifestly harsh or excessive in the circumstances. (***see Waguda versus Republic 1993 KLR 569).***
14. The appellant was given an opportunity to mitigate. He declined to mitigate. The Lower Court noted his demeanor and remarked that he was not remorseful. Having not advanced any factors in mitigation, the learned magistrate could not exercise his discretion by imposing a lesser sentence. However, the court in the circumstances ought to have considered the fact that the appellant was a first offender.
15. In the circumstances, the appeal against the conviction is confirmed. The appeal against sentence is allowed. The sentence imposed is set aside and substituted with a sentence of ten (**10) years** imprisonment.
16. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **3RD** day of **JUNE, 2014**

L.N. MUTENDE

JUDGE