Case Number:	Criminal Appeal 185 of 1981
Date Delivered:	26 Mar 1981
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	John Mwangi Gachuhi, Alan Robin Winston Hancox
Citation:	Griffin v Republic [1981] eKLR
Advocates:	RO Kwach for Appellant B Chunga for Respondent
Case Summary:	**Griffin *v* Republic** High Court, at Nairobi March 26, 1981 Hancox & Gachuhi JJ Criminal Appeal No 185 of 1981 ***Plea of guilty*** *- deprivation of freedom of choice in pleading guilty - induced by a plea bargain for leniency – subsequent custodial sentence allegedly not sufficiently lenient.* ***Sentencing*** *- appeal against sentence - sentence manifestly harsh and severe - factors to be considered when sentencing.* ***Criminal Law*** *- assault occasioning actual bodily harm – blow by appellant not the ultimate cause of the injury – injury occasioned by hard object on which the complainant fell as a result of blow.* The appellant a first offender, pleaded guilty to a charge of assault, occasioning actual bodily harm and was sentenced to eighteen months imprisonment and ten strokes. He now appeals

against the sentence only, on the grounds that: it is manifestly excessive, it took into account extraneous matters, the plea of guilty was induced upon him with a promise of leniency and corporal punishment was an inappropriate sentence.

Held :

1. The mere fact that the magistrate participated in the plea bargain discussions is not enough to prove that the appellant was deprived of his freedom of choice in pleading guilty. Participation by the magistrate although frowned upon cannot be completely avoided. The guiding factor would be the court records which in this case, has no evidence or suggestion that the appellant was deprived of his freedom of choice.

2. The court of appeal cannot interfere with the sentence solely on the ground that it was heavy, unless, it was also manifestly excessive. In sentencing the court must exercise its discretion depending on the circumstances of the case.

3. The custodial sentence is appropriate but 18 months is too severe and it is reduced to twelve months, but corporal punishment was in fact inappropriate.

Appeal succeeded to a limited extent.

Cases

1. *Ogola Owuora v Republic* [1954] 21 EACA 270

2. *Nilson v Republic* [1970] EA 599.

3. *Lebiringin v Republic* [1974] EA

4. *Mohamedali v Republic* 15 EACA 126

5. *Wanjema v Republic* [1971] EA at page 494D

6. *Republic v Turner* [1970] 2 All ER 281 at 285

7. *Republic v Atkinson* [1978] 2 All ER at page 462

8. *Republic v Coward* [1979] Law Gazette of November 14

	9. *Republic v Winterflood* LG 29.11.78 **Statutes** Penal Code (Cap 63) Section 251 **Advocates** *RO Kwach* for Appellant *B Chunga* for Respondent
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal succeeded to a limited extent.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE IGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 185 OF 1981

GRIFFIN.....APPELLANT

VERSUS

REPUBLIC.....RESPNDENT

JUDGMENT

The appellant, a British soldier serving in Kenya with the Royal Engineers, was convicted by the learned Resident Magistrate, Eldoret, on February 16, last of an assault, occasioning actual bodily harm on one Noorden Gullan Mohamed, contrary to Section 251 of the Penal Code. The appellant pleaded guilty to the charge, and in our view validly pleaded guilty, and Mr Kwach, who now appears for him, does not seek to appeal against the conviction.

However, the Appellant, a first offender, was sentenced to suffer eighteen months' imprisonment and ten strokes corporal punishment, which, we observe, is a lawful sentence within the terms of Section 251. Neither in our view is there anything necessarily inconsistent between it and the terms of the exchange of letters between the two Governments to which Mr Kwach referred.

The brief facts were that this was a bar brawl and that both parties had consumed a considerable amount of drink. It was just about dawn (5.30 am) on the preceding Saturday night/Sunday morning when the Appellant butted the complainant with his head (it is not stated where on the complainant's body that he did so) with the unfortunate result that the latter fell and hit his head on some hard object, possibly the floor or a wall, and became unconscious. The Appellant was taken before the magistrate at the earliest possible moment on the succeeding Monday, with the consequences we have stated.

Mr Kwach attacks the sentence in several respects. He said that it is manifestly harsh and severe; that it is evident the magistrate took into account extraneous matters in passing this excessive sentence; that no weapon was used; that the force of the blow was not the ultimate cause of the injury; that in the country from which the Appellant comes he would not be liable to corporal punishment; and finally that there was a plea bargain in which, according to Mr Kwach's affidavit, the magistrate participated, which operated as an inducement on the Accused to plead guilty, by the promise, express or implied, of leniency. Certainly, he said, the Appellant did not expect to serve a jail sentence. In the course of the submissions we were informed that the Appellant's then Advocate, but not the Appellant, was present at the plea bargain.

Both Mr Kwach and Mr Chunga for the Republic referred us to several authorities on the principles of sentencing, notably *Ogalo Owuora v Republic* 21 EACA 270, followed by Harris, J in *Nilson v Republic* [1970] EA 599, and nothing we have said or are about to say in any way detracts from those principles, either at first instance or on appeal, and we accept them. In addition there is the case of *Lebiringin v Republic* [1974] EA in which the principles of accepting pleas of guilty and the dangers of depriving an accused person of the free choice whether to do so or not are emphasized. Here there are

no grounds in our view for thinking, and no suggestion, that what occurred deprived the Applicant of his free choice whether to plead guilty or not. In addition to the above authorities Mr Chunga, who appears for the Respondent, referred us to *Mohamedali v Republic* 15 EACA 126 and, more recently, *Wanjema v Republic* [1971] EA at page 494D, where Trevelyan J, set out the principles most succinctly as follows:

“A sentence must in the end, depend upon the facts of its own particular case. In the circumstances with which we are concerned a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand. An appellant 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 factors, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

We are content wholly to adopt this passage as epitomizing the principles by which we must be guided, and indeed, which Mr Chunga has enumerated in his submissions. Mr Chunga continued on behalf of the Republic and said that he left the corporal punishment part of the sentence entirely to us. But he strenuously maintained that the custodial sentence of eighteen months, though it might be said to be heavy, was not manifestly excessive. He instanced *Mohamedali’s* case (supra), in which the court quite clearly said that the Court on appeal cannot intervene in the ground only that the sentence was heavy unless it was also manifestly excessive. Mr Chunga dwelt on the facts as stated by the prosecution to the Resident Magistrate. He pointed out that the complainant was attempting to leave the bar and was restrained by the Appellant, indicating that if anything the Appellant was the aggressor. It must have been a forceful butt with the head, else the complainant would not have fallen down and become unconscious. He cannot now be heard to say that it was the fall rather than the assault which was the cause of the injury, for the Appellant himself initiated it.

Again Mr Chunga said, there was no extraneous matter on which the Magistrate acted - the record speaks for itself, and the fact that the sentence followed immediately showed inevitably that the magistrate took everything into account. Mr Kwach in reply said it was dangerous to assume this, and that the brevity of the magistrate’s sentence indicated that he did not take the mitigation into account.

A certain amount is made by Mr Kwach of the plea bargain, but as we have already said, there is no suggestion the Appellant was deprived of his freedom of choice in the matter of his plea. There have been many cases in the UK reports regarding plea bargaining and the Court of Appeal issued a practice direction as a result of *Republic v Turner* [1970] 2 All ER 281 at 285, to which reference is made in *Republic v Atkinson* [1978] 2 All ER at page 462, referred to by both counsel before us.

The tenor of all those cases is that one cannot very well prevent a certain amount of discussion between counsel as to what will happen if the accused person pleads guilty. But the undesirability of the Court taking part in it is explained in particular in *Republic v Coward* [1979] Law Gazette of November 14, where Lawton, LJ said:

“Counsel advising defendants had to make up their own minds about the advice to give. They could not and should not expect, except in wholly exceptional circumstances, to be given guidance by a judge about the sentence to be passed. Discussion behind the scenes might deprive the public in open court of information to which they were entitled about the reasoning behind a judge’s sentence. Prosecuting counsel had to make up their own minds about the plea to accept, and if a judge did not approve in open court of a plea acceptable to the prosecution he could say so and the course to be taken could be decided on by prosecuting counsel. It was bad practice for counsel almost as a matter of course to go and see the judge behind the scenes, and such coming and going was to be confined to really exceptional cases.”

See also *Republic v Winterflood* LG 29.11.78 to the same effect. But in the last resort, as Lord Scarman said in Atkinson's case, the question remains: "What is the appropriate sentence""

In this case, after considering all the facts before us and the submissions of both counsel, we are satisfied that the sentence of corporal punishment is inappropriate and must be set aside. But a custodial sentence was in our view not inappropriate and the magistrate did not act on any wrong principle, or take into account anything he should not have done, or leave out of account anything he should have done, in imposing one.

Nevertheless, after due consideration we think eighteen months was, on the facts of this case, too severe, and we reduce it to twelve months' imprisonment.

In the result the appeal succeeds only to the limited extent we have indicated.

Dated and Delivered at Nairobi this 26th day of March 1981.

A.R.W.HANCOX **J.M.GACHUHI**

JUDGE **JUDGE**