



**IN THE HIGH COURT AT KIAMBU**

**CRIMINAL APPEAL NO. 39 OF 2016**

**BETWEEN**

**D C M .....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against the original conviction and sentence dated 1<sup>st</sup> July 2013 in Criminal Case No. 917 of 2010 at Gatundu Principal Magistrates Court before Hon. Nyangena, Ag. PM)***

**JUDGMENT**

1. The appellant, **D C M**, was charged with the offence of causing grievous harm contrary to **section 234** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. It was alleged that on 5<sup>th</sup> December 2010 in Kiambu County, he unlawfully did grievous harm to Magdalene Wanjiku Mworira. He was convicted and sentenced to 10 years' imprisonment.
2. At the hearing of this appeal, the state produced a report dated 19<sup>th</sup> February 2018 prepared by Dr. J.M Mburu, a Consultant Psychiatrist from Mathari National Teaching and Referral Hospital. He examined the appellant and concluded that he has auditory hallucinations and that he is mentally sick and unable to plead his case.
3. I have looked at the record of proceedings before the trial court and it is evident that at some point the trial magistrate noticed that he was unwell and directed that he be examined. The medical report stated that he had depressive psychosis. He underwent treatment and the psychiatrist certified on 13<sup>th</sup> July 2011 that he was fit to plead. The trial continued thereafter.
4. It is apparent from the proceedings that the appellant did not contest the evidence of the prosecution witnesses that he pushed the complainant into the fire. In his defence, he stated that he was sick and never knew what took place.
5. In the judgment, the trial magistrate did not consider the nature of illness the appellant was suffering from and whether the evidence would support a plea or defence of insanity. There was already evidence of his mental condition and the trial magistrate was duty bound to consider the possibility of this defence (**Leonard Mwangemi Munyasia v Republic MSA CA Criminal Appeal No. 112 of 2014[2015]eKLR** and **Karisa Masha v Republic MSA CA Criminal Appeal No. 78 of 2014[2015]eKLR**). By failing to consider this possibility, I quash the conviction and sentence.
6. Given the circumstances of the case and the fact that the offence involved members of the appellant's family, I do not think a re-trial would be difficult as witnesses are still available. For the record, trial magistrate is directed to pay attention to the provisions of **sections 162 -167** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**.
7. The appeal is allowed and the conviction and sentence quashed. I order a re-trial of the appellant and direct that he shall remain in custody pending taking of the plea at **Thika Chief Magistrates Court** on **28<sup>th</sup> February 2018**.

**DATED and DELIVERED at KIAMBU this 21<sup>st</sup> day of February 2018.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Maundu, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.