



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE NO. 66 OF 2014

(Being an appeal arising from Kitale chief Magistrate's court Criminal Case No. 2936 of 2012 delivered by C.N. Mugo - Resident Magistrate on 12/6/2014)

L K M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. **L K M** the appellant was charged and convicted of the offence of **grievous harm contrary to Section 234 of the penal code.**

He was sentenced to 15 years imprisonment.

2. When he first appeared before the lower court on 28th November 2012 for plea, the trial magistrate noted some behaviour in the appellant. He directed that he be subjected to a mental assessment. This was complied with and the appellant was found to be suffering from a mental illness and could therefore not plead. The report is dated 5th December 2012.

3. The appellant was eventually removed to Mathari mental hospital for treatment. He underwent treatment and was later found fit to stand trial. A letter dated 1st July 2013 from Mathari hospital was filed in court. The matter took some time to take off because the victim of the appellant's actions and who is his father was in an unstable condition.

4. On 12th June 2014 the charge was substituted to grievous harm contrary to Section 234 of Penal Code from assault contrary to Section 251 of penal code.

The charge was read and explained to him and he admitted, despite being warned of the penalty in the event of a conviction. He however maintained his plea of guilty. The facts were read and explained to him and he confirmed their correctness.

He was then convicted.

5. Before sentence, the trial court called for a victim assessment report. The appellant's mother came to court and gave her statement thereafter the appellant was sentenced to 15 years imprisonment.

6. The appellant filed this appeal citing the following grounds:

- i) That the learned trial magistrate erred in law and facts by convicting the appellant without observing that there was no any crucial evidence to support a conviction.**
- ii) That the learned trial magistrate erred in law and facts by convicting the appellant without noting that the prosecution evidence was contradicting and inconsistent.**
- iii) That the learned trial magistrate erred in law and facts by convicting the appellant in absence of key witness.**
- iv) That he was charged for the offence of assault but at judgment, he was convicted for grievous harm.**
- v) That the trial magistrate erred in law and facts without considering overstay in police custody.**

7. When the appeal came for hearing the appellant presented written submissions which he relied on. My understanding of these submissions is that the appellant wants to be released from prison. He states that the real picture of what is happening in their family was not brought out by the alleged mother who came to court. He says she is the step mother and would want to see them suffering. He requested the court to have the village elder appear to tell the court the truth.

8. The state through Mr Kakoi opposed the appeal against conviction as the plea was properly taken. He however submitted that the appellant having been insane at the time of committing the offence should have been dealt with under Section 166 Criminal Procedure Code. He therefore urged the court to correct that error on sentence only.

9. I have considered the record herein, together with the grounds of appeal and the submissions. The grounds of appeal were prepared on the assumption that the case had proceeded to hearing. The record shows that there was no hearing, as the appellant was convicted on his own plea of guilty. I therefore find the grounds not to be relevant to the appeal.

10. From the record it is clear that the appellant was not in his rightful mind when he committed the offence. All these preliminaries were handled by a court other than the one which convicted him. It was the duty of the state (DPP) to bring out in the facts that were read out to the appellant the fact of his state of mind at the time of commission of the offence. The trial court could not sentence the appellant under the provisions of section 166 Criminal Procedure Code when no such conditions requiring its application were brought out. I will not do so either.

11. It is always the duty of the State to avail full facts to the court and the accused for a proper plea to be taken. I find that the facts presented to the court on 12th June 2014 were not sufficient enough for the court to make the special finding envisaged under Section 166 Criminal Procedure Code. The process was therefore a mistrial and I so find.

12. The result is that the appeal is allowed. The conviction is quashed and the sentence set aside.

The appellant to be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed and dated this 24th day of August 2017 at Kitale.

H. ONG'UDI
JUDGE

In the presence of:

Ms Kakoi for the Respondent present

Appellant - present

Kirong/Silvia – Court Assistants

Court: Judgment delivered in open court.

H. ONG'UDI

JUDGE

24/8/2017