



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL REVISION CASE NO. 5 OF 2017

RODAH ZAINAH KWAMBAL.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. This file was placed before me following a letter written by **Kinyua Mwaniki & Wainaina Advcoates** seeking review of a conviction and sentence of the Senior Principal Magistrate, Mwingi, **Hon. K. Sambu**.
2. The basis of the application was that: **Rodah Zainabu Kwambai**, the Applicant was a first offender; the conviction and sentence was unconstitutional; charges illegal; the plea was unequivocal as the Petitioner sought to be granted an opportunity to explain what happened in her mitigation; and that the trial Magistrate failed to appreciate that the Applicant was unrepresented and her husband and the police were keen in ensuring that she was placed in custody.
3. The Applicant was charged with the offence of **Assault Causing Actual Bodily Harm** contrary to **Section 251** of the **Penal Code**. Particulars of the offence being that on the **10th** day of **April, 2017** at around **9.00 a.m.** at **Mwingi Police Quarters** within **Mwingi Central District of Kitui County**, unlawfully assaulted **Faith Kaleche Matulai** thereby occasioning her actual bodily harm.
4. On being arraigned before Court the Applicant admitted the charge. She was convicted and sentenced to serve **six (6) months imprisonment**.
5. My duty is therefore to reconsider what transpired before the trial Court.
6. This is a case where the Applicant was sentenced after she admitted facts presented by the Prosecution as being correct. The plea *inter alia* was not unequivocal. In the case of **Ombena vs. Republic (1981) KLR 450** the Court stated that when a Court records a plea it should ensure that the plea of guilty is unequivocal. A plea being unequivocal extends to whether the Accused admitted the charge and prior to being convicted there was nothing he/she stated that amounted to a qualification to the admission of the charge.
7. This is a case where the Applicant who was the Accused was unrepresented. The Court was duty bound to explain to her the ingredients of the charge and to ensure that she understood the meaning of admitting the charge. Having admitted the charge the Court entered a plea of guilty and convicted her. When she was given the opportunity to address the Court pursuant to **Section 216** of the **Criminal Procedure Code** she mitigated thus:

“I used to live peacefully with the complainant. I had no chance to explain the circumstances under which I committed the offence.”

8. The statement made by the Accused prompted the learned trial Magistrate to seek a Social Report from the Probation Officer. Following the report filed he had this to state:

“Court – Sentence –

I have carefully perused and considered the probation officer’s report dated 12th April instant enquiring into the accused’s social profile and I do find for a fact that the accused, given her unremorsefulness and conduct is not suitable for a non custodial sentence and considering the circumstances which the offence was committed and the fact that the accused without any provocation or at all had unlawfully assaulted the complainant, a police officer in disregard of any respect to the police officer whose mandate and call of duty is to maintain law and order do hereby proceed to sentence the accused person to serve six (6) months imprisonment. 14 days right of appeal explained.”

9. The Applicant was not granted the opportunity of explaining what transpired. If she had been allowed to do so probably the learned Magistrate would have discerned that she was not actually admitting the charge.

10. A Court can only be satisfied that the Accused has indeed admitted a charge if there is no qualification to the admission. **(See Lusiti vs. Republic (1977) KLR 143.** From the foregoing the plea taken cannot be said to have been unequivocal.

11. In the premises I hereby quash the conviction entered and set aside the sentence. The Applicant shall be produced before Mwingi Senior Principal Magistrate’s Court for a retrial on the **28th August, 2017** before a Magistrate of competent jurisdiction other than **Hon. K. Sambu.**

12. It is so ordered.

Dated, Signed and Delivered at Kitui this 23rd day of August, 2017.

L. N. MUTENDE

JUDGE