



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**CRIMINAL APPEAL NO. 47 OF 2015**

**BERNARD KIPKORIR KIKWAI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original Conviction and Sentence in Criminal Case No.3917 of 2015, Chief Magistrates Court Kericho – Hon. Limo - RM)*

**JUDGMENT**

The Appellant above mentioned was convicted and sentenced to life imprisonment for the offence of grievous harm contrary to Section 234 of the Penal Code.

The particulars being that on the 21<sup>st</sup> day of October, 2015 at Momoni Village, Kipkelion–Kericho County, unlawfully did grievous harm to No.217793 Inspector Phillip Kirui.

He pleaded guilty to the charges and he was convicted and sentenced on his own plea. This was after the facts were read to him and he stated that they were correct.

It stated that the charge was read over to the accused in Swahili language to which he replied “*Kweli*” true. When the facts were read over to him it is indicated that he stated “*facts are correct*”. This is in English. Mitigation it is simply indicated Nil.

The prosecution informed the court that the accused was a first offender. The court proceeded to sentence the accused to life imprisonment. This is the maximum sentence provided for the offence of grievous harm.

The grounds for the appeal are that the appeal was unequivocal.

It is instructive to note that the offence with which the accused was charged with was a serious one. More so, when the complainant is shown to have been a police officer of the rank of an inspector of police.

The learned trial Magistrate ought to have answered that. Accused person did not plead guilty out of presumed fear and or duress.

Bearing in mind that stated background, the words “*kweli*” “*facts are correct*” only, without further providing an explanation cannot safely be said to have been unequivocal. Secondly, mitigation is simply shown as “*nil*”, often times during mitigation an accused person does offer and give a brief review and insight as to what actually took place. Where there is no mitigation that window of opportunity is lost.

In the present case the plea was not un-equivocal. There was no mitigation. The accused was a first offender and was sentenced to life imprisonment. Which is the maximum sentence provided for in cases of grievous harm. Its trite law that a first offender cannot be given the maximum sentence. This case is appropriate for a retrial. The conviction and sentence are hereby set aside.

Case to be mentioned before the plea magistrate on 5<sup>th</sup> December, 2016 for fresh plea taking and further orders. The appellant to remain in custody pending orders of a court of competent jurisdiction.

**DELIVERED, SIGNED AND DATED THIS 30TH DAY OF NOVEMBER, 2016.**

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**M. MUYA**

**JUDGE**

In the presence of:

1. Learned Counsel for the Prosecution – Mwitia holding brief for Mutai
2. Learned Counsel for the Defence- Miss Mwangi
3. Wambany - court assistant