



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HCCR NO. 172 OF 2010**

**CALROLYNE NKATHA MURUNGI .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***LESIIT J.***

**JUDGEMENT**

The appellant in this case was charged before the SPM'S court at Nkubu with one count of grievous harm contrary to section 234 of the Penal Code. The particulars of the charge were that on the 5<sup>th</sup> day of September 2010 at Mikumbune Location in Imenti South District unlawfully did grievous harm to Beth Nkatha Muriungi. The appellant who was unrepresented before the lower court, pleaded guilty to the charge and was convicted and sentenced to five years imprisonment.

The appellant was aggrieved by the conviction and sentence initially she filed an application seeking to be granted bail pending appeal. The court directed the advocate to argue the substantive appeal as it had already been filed as per the petition of appeal dated 24<sup>th</sup> September 2010.

The appellant raised two grounds of appeal the 1<sup>st</sup> ground was that the learned trial magistrate erred in law and facts in convicting the appellant on a plea which was not equivocal. The second ground was that the learned trial magistrate erred in law and facts in sentencing the appellant excessively in the circumstances of the case.

Mr. K. Kiara argued this appeal on behalf of the appellant. His first argument was that when the charge and the facts were read to the accused she stated "It is true" counsel urged that ***it is true is not the same as saying yes*** counsel urged that what the appellant said in court places doubt whether the appellant understood the charge.

The second argument by counsel was that without medical evidence it was difficult to determine whether the offence charged was proved. Counsel submitted that the P3 form was not adduced as an exhibit and that in the circumstances the prosecution could only prove assault.

Mr. Musau represented the state in this appeal. The learned state counsel submitted that he was in agreement that since the P3 form was not produced in court, the degree of injury could not be established. Counsel submitted that in the circumstances court should order a retrial. The learned state counsel submitted that being a 2010 matter the witnesses could easily be availed.

I have carefully considered the appeal by the appellant. Regarding the argument by the appellant's advocate that the plea of guilty was not unequivocal I noted that the actual words spoken by the appellant at the time of plea were recorded. When the charge was read to the appellant in the Kimeru language which she understood she responded "**It is true**" when the particulars of the charge were read the accused responded the facts are correct and true.

The charge facing the appellant was grievous harm contrary to section 234 of the Penal Code. Grievous harm is a felony and a person convicted for that offence is liable to imprisonment for life. It is therefore a very serious offence. Under Section 4 of the Penal Code a grievous harm is defined "Means any harm which amounts to a maim or dangerous harm or seriously of permanently injures health, or which is likely so to injure health or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.

In order for the prosecution to satisfy that the appellant had committed grievous harm it was imperative for the prosecution either to produce medical evidence to establish the nature and extent the appellant caused the appellant and whether it was classified as grievous harm.

In the facts led by the prosecution the prosecutor made reference to a document that was filled by a doctor that is a P3 form without producing it.

It was impossible for the prosecution to prove that the injury if any caused on the complainant was grievous or a mere assault causing actual bodily harm under Section 251 of the Penal Code without the medical evidence the learned trial magistrate did not have the means to satisfy himself that the facts of the case and the particulars of the charge established the offence with which the appellant was charged with. The learned trial magistrate took a wrong view of the facts when he convicted the appellant for the offence. I agree with appellant's counsel that in the circumstances the plea of guilty entered against the appellant was equivocal and should not be allowed to stand.

I also agree with the learned state counsel that a retrial should be considered. The offence allegedly committed on the 5<sup>th</sup> September 2010 it is less than a half a year ago. The learned state counsel has promised that if a retrial were ordered witnesses will be available for the case.

Considering the view I have of this appeal I set aside the conviction and the sentence imposed against the appellant and order for a retrial of the case. I direct that the appellant should be presented before the SPM court at Nkubu for a retrial of the case before any other magistrate except Mr. S.M. Githinji S.P.M. The appellant should be held in custody until the 21<sup>st</sup> March 2011 when she should be presented before the SPM Nkubu for plea taking in the self same criminal case No. 1852 of 2010.

Those are my orders.

DATED AND DELIVERED AT MERU THIS 17<sup>TH</sup> DAY OF MARCH 2011

**J. LESIIT  
JUDGE.**